

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

1 January 2021

Senate Submission Re: Judges' Pensions Amendment (Pension Not Payable for Misconduct) Bill 2020

Summary of Position

Commonwealth judicial officials hold a privileged position in the community and instances of serious misconduct must be condemned. The Bill fulfils this but in a flawed and unnecessary manner that attacks the separation of powers doctrine, and therefore should not be endorsed by the committee. It is recommended that a reformed Bill be introduced that gives the proposed power to make a pension non payable only on being found guilty or liable, to the judiciary.

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Introduction

My name is Angus Thompson, I am a young person who has an interest in the judiciary and the law. I am making this submission because I believe that the proposed legislation is unjust and attacks the core framework of the Government of the Commonwealth.

Commonwealth judicial officers hold an extremely privileged position of both power and influence over the community and the nation. Being direct representatives of the Crown, they must be held to a high standard of accountability and ethics as to represent their position and ensure continuing community faith in the Judiciary. Recently there has been many allegations of members of judiciary misusing their power and position for their own gratification. Thus, these repugnant actions by some must be condemned by the community.

However, the Bill, while wholesome in its intentions, falls short in its operation. This is because the proposed regime would operate extrajudicially and in defiance of the doctrine of the separation of powers. The regime operates without any of the protections and independence that the current judicial dispute resolution process provides for. Further, the proposed regime as it exists currently, could operate in opposition to the finding of a court with potentially adverse consequences.

There are other mechanisms available, that would be more equitable, independent and less partisan than the current proposed model. This may work to advance the administration of justice and further enforce the notion that no one, especially judicial officers are above the law.

Criticisms of the Bill

There already exists a robust judicial system in both the Commonwealth in addition to the States and Territories where offenders of serious misconduct can be brought to justice, and where victims can receive compensation. This system also contains many centuries old protections such as the standard of proof, the appeals process, a right to silence among many others.

The judicial branch of Government is structurally separated from the legislative and executive branches of Government to preserve the independence of judicial decisions from the interference of the other branches. Presumably to ensure that the judiciary make fair and just decisions, even in the face of public pressure and outrage.

The proposed regime flies directly in the face of this long-established doctrine and hands judicial power to the Parliament. This is done by the Bill requiring that "A cessation event happens ... if each House of the Parliament passes, in the same session, a resolution that the person cease to be paid a pension under this Act."

The proposed regime requires a pseudo impeachment to happen before the Parliament. As one would expect, the outcome could be driven by partisanship and the demands of the public. But not by what the correct, fair and just outcome could be. In the proposed system, it is up to the legislative branch of Government which is inherently partisan body and not the judicial branch to determine the guilt and punishment of an offender. The proposed legislation may also be the subject of a constitutional challenge under section 71 as it appears that the legislature is assuming judicial power.

In the Bill, an accused person before Parliament has none of the rights (standard of proof, right to silence, presumption of innocence, et al) and due process as would be expected if he or she appeared before a court. They would also have no legal recourse against a decision of the Parliament. In other words when Parliament takes away a Judge's pension there is no way to reverse it without another joint resolution.

A critical deficiency of the Bill is where the Parliament may independently revoke a pension even where a finding of guilty has not been made in a court. This is the Bill's foremost flaw because a future Government or Parliament could maliciously use this proposed Act to unduly influence the judiciary and judicial decisions. If for example an adverse judicial decision is made against a Government, the Parliament can punish the Judge by taking away their pension as long as they could point to some vague, unsubstantiated point of serious misconduct. While this is an unlikely outcome, the fact that it is possible re-enforces the significance of the separation of power doctrine that exist in this country.

Another Way

While the Parliament should not be the law makers and the adjudicators, there must be a way for the Parliament to forward the message of the community that while Judge's hold a privileged position in society, they are not above the law and that serious misconduct is deplored and condemned by the community.

One way would be to enable a competent Commonwealth court to make a portion of a judicial pension not payable as a punishment upon being found guilty of serious misconduct. Or through tort law, to make a portion of the pension payable to a victim, if an offender is found liable of serious misconduct while in a judicial office.

These actions send a strong message to the community and members of the judiciary that no one is above the law and that the judiciary is entrusted to function free of undue political influence and that the judiciary operates in a fair and transparent manner. However, this would also fulfil what would be expected to be the benefits of introducing this legislation. That is, act as a deterrent to judicial officers committing serious misconduct and act as a punishment for offender judges.