

6 May 2021

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Senate Legal and Constitutional Affairs Legislation Committee  
PO Box 6100, Parliament House  
CANBERRA ACT 2600

Dear Committee Secretary,

UNSW LAW SOCIETY ANSWERS TO QUESTIONS ON NOTICE FROM PUBLIC  
HEARING INTO JUDGES' PENSIONS AMENDMENT (PENSION NOT PAYABLE FOR  
MISCONDUCT) BILL 2020

The University of New South Wales Law Society Inc. thanks the Committee for the opportunity to appear at the public hearing conducted on 23 April 2021, concerning the Committee's inquiry into the Judges' Pensions Amendment (Pension Not Payable for Misconduct) Bill 2020.

This document contains the answers to questions taken on notice at the aforementioned hearing on 23 April 2020.

The UNSW Law Society Inc. is the representative body for all students in the UNSW Faculty of Law. These answers reflect the opinions of the four named directors below (who appeared as witnesses and authored the original submission), with the UNSW Law Society proud to facilitate these answers. UNSW Law Society Inc. is not affiliated with any political party.

We thank you for considering these answers. Please do not hesitate to contact us should you require any further assistance.

Yours sincerely,

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**ANSWERS TO QUESTIONS TAKEN ON NOTICE:**

1. **Question from Senator Patrick:** *Perhaps on notice, could [The UNSW Law Society] provide a suggested definition [for ‘serious misconduct’] to assist in a potential amendment?*

**ANSWER:** Drawing from related legislation about judicial misconduct, UNSW Law Society proposes that a definition for ‘serious misconduct’ should be:

‘conduct that is:

- a. deliberate and harmful to
  - i. the administration of justice; or
  - ii. the ethical standards of the court/ The Australasian Institute of Judicial Administration Incorporated, ‘Guide to Judicial Conduct’<sup>1</sup>
- b. liable to lead to serious loss of faith in the judiciary; or
- c. unlawful under the *Commonwealth Criminal Code 1995 (Cth)*’

The proposed definition draws on similar legislation from the United Kingdom including reg 151(4) of the *Judicial Pensions Regulations 2015* (UK) SI 2015/182 (definition of ‘forfeiture certificate’). Further the ‘/’ in part (a)(ii) is to indicate where the Senate Committee can infer what ethical standards for judicial conduct are; deriving from a book published by well-experienced barristers for the Council of Chief Justices of Australia. Also, the proposed definition also brings into consideration an issue outlined UNSW Law Society’s Submission that there is no burden of proof the accused is held accountable to; hence the incorporation of part (b), to set a criminal standard for a judge’s pension to be discontinued.

2. **Question from Senator Carr:** *Let me talk about a case that’s in the Guardian this morning. An Australian judge and barrister involved in the same case failed to declare a relationship. It’s a matter before the High Court at the moment, and the newspaper report goes to it so I won’t go to the particular nature of it. According to this report, there’s an*

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<sup>1</sup> The Australasian Institute of Judicial Administration Incorporated, *Guide to Judicial Conduct* (Australasian Institute of Judicial Administration Incorporated, 3rd ed, 2020).

*allegation that a judge and a barrister failed to declare a relationship involving a trial. Is that the sort of misconduct you'd think would warrant a loss of pension?*

**ANSWER:** The UNSW Law Society generally would refrain from commenting on the specifics of matters currently before the courts. However, more generally, this question highlights the problematic ambiguity that currently exists with respect to the misconduct covered by this amendment.

The explanatory memorandum itself suggests the application of it is only for cases of highly problematic behaviour. So, without further detail on the alleged misconduct mentioned above, it is hard to comment whether a loss of pension is warranted. This highlights, however, the importance of setting a clear standard of what 'serious misconduct' is, to ensure that the judiciary and the public can be confident in the consistency of the decisions the Parliament is making with respect to potentially terminating a judge's pension. Namely, it makes it more likely that the serious step of cutting a judge's pension is undertaken only in the most serious matters.

It will ultimately be for Parliament to decide if removing a judge's pension is warranted based on the misconduct that may have occurred.

3. ***Question from Senator Henderson (Chair):*** *Can you take that on notice in relation to the system in the US? Obviously, it may vary from state to state— so the committee can be properly informed about these other countries?*

**ANSWER:**

*Federal Judges*

A. *Effects of felony conviction*

As noted in our written submission, federal judges in the United States do not lose their pensions in the case of misconduct.<sup>2</sup> However, as also noted in the original submission,

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<sup>2</sup> UNSW Law Society, Submission No 3 to Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Judges' Pensions Amendment (Pension Not Payable for Misconduct Bill 2020* 9. Note specifically the definition of 'judge' under the provision, outlined in 28 USC § 351(d) (2002).

felony conviction, an offence attracting a maximum penalty of at least one year of imprisonment,<sup>3</sup> affects the service requirements necessary to receive the pension.<sup>4</sup>

‘Service requirements’ refer to the minimum years of service required to be completed for that judge to receive their pension<sup>5</sup> (an annuity equal to their salary at retirement).<sup>6</sup> The analogous provision for Australian judges in the federal system is in the *Judges’ Pension Act 1968* (Cth) s 4(3).

There are two points to highlight. Firstly, the impact of a conviction upon a judge’s service requirements, and their ability to receive their pension, only occurs once that conviction is final, ie all appeals are unsuccessful or the time for appeal has expired.<sup>7</sup> Secondly, the criminal conviction alone does not disqualify a judge from receiving his/her pension. This means that a judge who has already met their service requirements prior to the conviction being finalised seemingly retains their pension, irrespective of the conviction. Once that judge is retired, there seems no avenue to cut the pension off at that point even if convicted.

#### *B. Effect of investigations under the Judicial Conduct and Disability Act of 1980*

In 1980, Congress created a system for investigating and resolving complaints of misconduct against federal judges.<sup>8</sup> Federal judges appointed under Article 3 of the United States Constitution can only be removed by the action of Congress.<sup>9</sup> However, the investigating judicial council can take other action short of removal against a federal judge to remedy the (proven) misconduct.<sup>10</sup> Among other possible actions,<sup>11</sup> the council may request a judge to voluntarily retire ‘with the provision that the length of service requirements under section 371 of this title shall not apply’.<sup>12</sup> This suggests that even if a judicial council investigation finds a judge has committed misconduct,<sup>13</sup> they still receive their pension if eligible. Being the

<sup>3</sup> 18 USC §§ 3559(a)(1)-(5) (1987).

<sup>4</sup> UNSW Law Society (n 2) 9.

<sup>5</sup> 28 USC § 371(c) (2000).

<sup>6</sup> 28 USC § 371(a) (2000).

<sup>7</sup> 28 USC § 364 (2002).

<sup>8</sup> *Judicial Conduct and Disability Act of 1980*, 28 USC §§ 351-354 (2002).

<sup>9</sup> *United States Constitution* art III § 1, providing that appointed judges retain their position ‘during good behavior’. Only impeachment under *United States Constitution* art II § 4 can be used to remove a judge.

<sup>10</sup> *Judicial Conduct and Disability Act of 1980*, 28 USC § 354(a)(1)(C).

<sup>11</sup> See *Judicial Conduct and Disability Act of 1980*, 28 USC § 354(a)(2).

<sup>12</sup> *Judicial Conduct and Disability Act of 1980*, 28 USC § 354(a)(2)(B)(ii).

<sup>13</sup> As defined in *Judicial Conduct and Disability Act of 1980*, 28 USC § 351(a).

subject of a misconduct investigation does not bar a federal judge receiving their pension.<sup>14</sup> Former/already retired judges cannot be investigated through these means because the provisions governing judicial misconduct investigations by judicial councils only apply to those *currently* on the bench.<sup>15</sup> This has led to some judges who are under investigation retiring to force that investigation to close.<sup>16</sup> The judge then faces little-to-no material consequence and retains their pension.

Therefore, where pensions are concerned, the statutorily available means of investigating judicial misconduct will have little if any practical impact. Already retired judges are completely immune from these investigations, and so their pensions are certainly untouchable.

### C. *Impeachment*

Article II of the US Constitution provides for the removal of judges through the process of impeachment.<sup>17</sup> One consequence of a conviction on an article of impeachment, among others, is the loss of future benefits including pensions.<sup>18</sup>

However, a successful impeachment is rare – only 8 judges in the history of the United States have ever been the subject of impeachments leading to conviction, with only one occurring in the last 30 years.<sup>19</sup> The earlier mentioned ‘judicial council investigations’, conducted by other judges, can result in impeachment eventually. Furthermore, the investigation needs to be referred to the Judicial Conference of the United States (a statutory body of the most senior judges in the country),<sup>20</sup> who need to make their own subsequent referral to the US House of Representative to commence impeachment proceedings.<sup>21</sup> The conduct of Judge Kent, the only other judge impeached this century, prior to his resignation before his impeachment trial,

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<sup>14</sup> Victoria Root Martinez, ‘Avoiding Judicial Discipline’ (2020) 115 Northwestern University Law Review 953, 981.

<sup>15</sup> *In re Charge of Judicial Misconduct*, 782 F.2d 181, 181 (9<sup>th</sup> Cir. 1986).

<sup>16</sup> Martinez (n 14) 961-2, 963-5.

<sup>17</sup> *United States Constitution* art II § 4.

<sup>18</sup> Martinez (n 14) 960, citing Alexa J. Smith, ‘Federal Judicial Impeachment: Defining Process Due’ (1995) 46 *Hastings Law Journal* 639, 657 n 121.

<sup>19</sup> ‘List of Individuals Impeached by the House of Representatives’, *US House of Representatives: History, Art and Archives* (Web Page) <<https://history.house.gov/Institution/Impeachment/Impeachment-List/>>.

<sup>20</sup> 28 USC § 331 (2008).

<sup>21</sup> *Judicial Conduct and Disability Act of 1980*, 28 USC §§ 354(b)(2), 355(b).

demonstrates the practical reality that judges can simply retire to avoid the consequences of their serious misconduct, including avoiding the loss of pension.<sup>22</sup>

Thus, though impeachment can stop a judge receiving their pension, it is very rare that this avenue is taken. It is unresolved whether former judges can be the subject of impeachment proceedings,<sup>23</sup> meaning at least currently, their pensions remain intact even if misconduct otherwise worthy of impeachment and conviction was discovered.

### *State Judges*

Because of the varied systems that the 50 state court systems all run under, undertaking a detailed analysis would be beyond the helpful scope of this answer. However, recent journalistic reporting on judicial misconduct in the US at the state level suggests that judges' pensions there are similarly unimpacted by findings of misconduct.<sup>24</sup>

### *Conclusions*

The important take-away about the system for judges' pensions in the United States, at least insofar as the effect of misconduct is concerned, is that pensions are largely unaffected by misconduct. The cutting off of a pension of a federal judge is only possible through an impeachment and Senate conviction. Misconduct not leading to impeachment does not prevent the receipt of a judicial pension. If the judge has fulfilled his/her service requirements and retires during an investigation, or is already retired once the misconduct is discovered, their pension cannot be taken away. Given the mechanisms for investigating judicial misconduct cannot touch those off the bench and the great weight placed by Congress on findings of the Judicial Conference (based on investigations utilising those mechanisms) when it comes to starting impeachment proceedings against judges,<sup>25</sup> impeachment as the

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<sup>22</sup> Lise Olsen and Harvey Rice, 'Judge Disciplined for Sexual Harassment' *Houston Chronicle*, (online, 28 September 2007)

<<https://www.chron.com/news/houston-texas/article/Judge-disciplined-for-sexual-harassment-1672514.php>>  
archived at <<https://perma.cc/34X9-ZUQM>>.

<sup>23</sup> Martinez (n 14) 960.

<sup>24</sup> See eg, Michael Berens and John Shiffman, 'With 'judges judging judges,' rogues on the bench have little to fear', *Reuters* (online, 9 July 2020) <<https://www.reuters.com/investigates/special-report/usa-judges-deals/>>, and 'Joseph C. Polito, Will County Associate Judge', *Injustice Watch* (online, 22 November 2015) <<https://www.injusticewatch.org/news/2015/joseph-c-polito-will-county-associate-judge/>>

<sup>25</sup> Smith 648

avenue for dealing with the pensions of retired, former judges who have committed misconduct is practically unlikely (setting aside potential issues of constitutionality).

Thus, at least for former judges, their pension is largely unaffected even if they have likely committed misconduct.

4. **Question from Senator Carr:** *If we look at Australia, is there any state that, when it comes to the question of dealing with retired judges, has a process for dealing with misconduct or even for sitting judges that you think was worthy of using as any model?*

**ANSWER:** In addition to the Judicial Commission of NSW discussed in our earlier submission, the UNSW Law Society notes the role of the Judicial Commission of Victoria as an independent body designed to investigate complaints about judicial officers and Victorian Civil and Administrative Tribunal (VCAT) members. Both commissions are restricted to investigating complaints about the conduct or capacity of sitting judicial officers.<sup>26</sup> Any member of the public or legal profession can make a complaint to the Commission through the form available online, or by contacting the Commission by telephone.<sup>27</sup> After a complaint is received, a preliminary investigation will be conducted by the Commission to determine whether to dismiss the complaint, refer it to the relevant head of jurisdiction, or (if it warrants removal from office) to refer to an investigating panel.<sup>28</sup>

It must be noted that the recent report, ‘Sexual Harassment in Victorian Courts’, initiated by Victoria’s Attorney General, the Hon. Jill Hennessy and the Chief Justice of the Supreme Court of Victoria, reviewed the current processes of responding to sexual harassment in courts and offered recommendations to improve these processes.<sup>29</sup> These recommendations

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<sup>26</sup> Judicial Commission of Victoria, *How to Make a Complaint About a Judicial Officer or VCAT Member* (Web Page)

<<https://files.judicialcommission.vic.gov.au/2021-03/Judicial%20Commission%20of%20Victoria%20Brochure.pdf>> and Judicial Commission of New South Wales, *Guide for Complaints* (Web Page)

<<https://www.judcom.nsw.gov.au/complaints/guide-for-complainants/>>.

<sup>27</sup> Judicial Commission of Victoria, *How to Make a Complaint About a Judicial Officer or VCAT Member* (Web Page)

<<https://files.judicialcommission.vic.gov.au/2021-03/Judicial%20Commission%20of%20Victoria%20Brochure.pdf>>.

<sup>28</sup> Judicial Commission of Victoria, *Complaint Process Explained*

<<https://www.judicialcommission.vic.gov.au/complaints/complaint-process-explained>>.

<sup>29</sup> ‘About the review’, *Review of Sexual Harassment in Victorian Courts* (Web Page)

<<https://www.shreview.courts.vic.gov.au/about-the-review/#section-2>>

emphasised a focus on victim-survivor-centred support, reporting and responding.<sup>30</sup> At present, the complaint form requires that complainants disclose their identity.<sup>31</sup> The report prompted the Judicial Commission of Victoria to consider and, where appropriate, make recommendations to the Attorney-General to amend the *Judicial Commission of Victoria Act 2016*.<sup>32</sup> This includes an amendment to give the Commission powers to issue confidentiality notices in the appropriate circumstance to prevent disclosure of the fact of a complaint, referral or investigation.<sup>33</sup> The report further recommended conferring the Judicial Commission of Victoria with an own motioning power to establish an investigating panel to investigate sexual harassment and other forms of discrimination without the need for a formal complaint or referral.<sup>34</sup> Rather, it would be satisfactory to investigate forms of misconduct where there is a reasonable basis to suspect a judicial officer has committed conduct that would warrant dismissal from office, if proven.<sup>35</sup>

These recommendations respond to concerns raised by female legal professionals who attended Review Roundtables, and seek to ensure that the process of reporting is psychologically safe, compassionate and fair.<sup>36</sup> While the Judicial Commission of Victoria is useful as a model to consider in relation to dealing with judicial misconduct, the above recommendations should also be noted when considering the design of an independent federal body that investigates complaints against judicial officers.

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<sup>30</sup> Helen Szoke, *Preventing and Addressing Sexual Harassment in Victorian Courts and VCAT* (Report, March 2021) 17.

<sup>31</sup> Judicial Commission of Victoria (n 26).

<sup>32</sup> Helen Szoke (n 30) 71.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.* 70.