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Australian Government
Attorney-General's Department

Senate Legal and Constitutional Affairs Committee

Judges' Pensions Amendment
(Pension Not Payable for Misconduct) Bill 2020

SUBMISSION

Attorney-General's Department

Judges' Pensions Amendment (Pension Not Payable for Misconduct) Bill 2020

1 The Australian Government Attorney-General's Department (AGD) provides to the Senate Legal and Constitutional Affairs Legislation Committee the following submission for consideration in relation to the Committee's inquiry into the Judges' Pensions Amendment (Pension Not Payable for Misconduct) Bill 2020 (the Bill).

2 Pursuant to the *Judges' Pensions Act 1968* (JP Act), a judge of a federal court¹ is ordinarily entitled to receive a retirement pension of 60% of the appropriate current judicial salary of a serving judge, if at the time of their retirement, the judge has accrued 10 years of judicial service and is 60 years of age or older.² A partial pension is available in circumstances where a judge has between 6 and 10 years of judicial service.³

3 The Bill, if enacted, would amend the JP Act to enable both Houses of Parliament to resolve to cease pension payments in respect of any former judge whom the Parliament finds had engaged in 'serious misconduct' while in office.

4 This submission addresses those policy aspects of the Bill relevant to the responsibilities of the Attorney-General's Portfolio. These include courts and tribunals, and constitutional law.

Purpose

5 AGD understands that the Bill seeks to address a perceived deficit in the JP Act insofar as its operation applies only to current judges. The Explanatory Memorandum to the Bill notes that 'the Bill is intended to impose on a retired judge the same consequences for misconduct in office they would experience had they still been sitting'.⁴ Section 17 of the JP Act currently provides the following:

Unless the Governor-General otherwise directs, a pension under this Act is not payable by reason of the service of a Judge who has been removed under section 72 of the Constitution or under any similar provision in an Act.

6 To address the 'inequality'⁵ that exists between the outcomes for behaviour between a current serving judge and a retired judge where their behaviour only comes to light after their retirement, the Bill would empower the Parliament to resolve to cease pension payments to a former judge on the basis that the former judge engaged in 'serious misconduct' while in office.

7 The Bill proposes to confer power that could be exercised by reference to events that occurred in the past to enable the Parliament to impact former judges for 'any serious misconduct done while they held their position and that only becomes apparent after their retirement or departure from the Bench.'⁶

8 In considering this Bill, AGD wishes to draw the Committee's attention to 2 key issues.

'Serious misconduct'

9 First, the Bill does not define the meaning of the phrase 'serious misconduct'. As a result, interpretation of the phrase would appear to remain within the sole remit of the Parliament which would have discretion to decide what evidence, if any, would be required to be presented and what

¹ Excluding the Federal Circuit Court of Australia.

² *Judges' Pensions Act 1968* ss 6 and 6A.

³ *Ibid.*

⁴ Explanatory Memorandum, Judges' Pensions Amendment (Pension Not Payable for Misconduct) Bill 2020, 'Overview'.

⁵ *Ibid.*

⁶ *Ibid.*

standard or threshold ought to be met before passing a resolution that a former judge had engaged in 'serious misconduct' while in office.

10 Although the Explanatory Memorandum to the Bill indicates the phrase 'serious misconduct' has been adopted from the Governor-General Amendment (Cessation of Allowances in the Public Interest) Bill 2019 and the *Fair Work Act 2009*,⁷ and that it is intended for the Bill to 'provide the Parliament with maximum discretion to determine the scope, pervasiveness and impact' of a retired judge's behaviour,⁸ the use of the phrase 'serious misconduct' departs from the existing test for removing judges from office under s 72(ii) of the Constitution. The existing test contemplates the Governor-General in Council, on an address from both Houses of Parliament, removing a judge on the ground of 'proved misbehaviour or incapacity'. Section 72(ii) is an important constitutional protection of judicial independence. It is at least arguable that less culpable behaviour may amount to 'serious misconduct' than would amount to 'proved misbehaviour or incapacity'. Existing s 17 of the JP Act would only apply to deny the pension of a judge who has been removed if the test under s 72(ii) of the Constitution is established.

11 Given that the purpose of the Bill is to address the 'inequality'⁹ that exists between the treatment of a current serving judge and a retired judge, the application of different tests for the removal of a serving judge (on the basis of 'proved misbehaviour or incapacity' under the Constitution) and the cessation of pensions for a former judge (on the basis of 'serious misconduct' under the Bill), may limit the Bill's effectiveness in achieving that purpose.

Constitutional issues

12 Second, section 72(iii) of the Constitution provides that a judge's remuneration shall not be diminished during their continuance in office. While the Department is not able to give legal advice to the Committee and does not express a view on the legal question, there is a question whether the cessation of judges' pensions in certain circumstances as proposed by the Bill would be consistent with s 72(iii). Further, there may also be a question whether the Bill is contrary to s 51(xxxi) of the Constitution which requires any acquisition of property by the Commonwealth to be on just terms.

13 AGD again notes that the proposed amendments provide that a cessation event occurs in the event of 'serious misconduct'. This differs from the test for removal in s 72(ii) of the Constitution, which is on the basis of 'proved misbehaviour or incapacity'. This may have implications for the constitutional validity of the proposed amendments.

⁷ *Ibid*, [12].

⁸ *Ibid*, [11].

⁹ *Ibid*, 'Overview'.