CHAPTER 4

Terms of appointment

4.1 A transparent and principled appointment process is a critical feature of a strong judicial system with the ability to act independently to uphold and promote the rule of law. It is also a necessary feature of a robust judicial framework that the terms of any judicial appointment include provisions that ensure appropriate tenure, protection and remuneration of judges and that the judiciary receives resources sufficient to discharge its functions properly.

4.2 This chapter explores:

- the desirability of a compulsory retirement age;
- the merit of utilising judicial officers on an acting basis;
- whether part-time judicial appointments are appropriate; and
- other aspects about terms of appointment raised with the committee.

Tenure and the age of retirement

4.3 Currently, all federal judicial appointments are for a term that continues until the judicial officer reaches the age of 70. This is a constitutional requirement under section 72 which states in part that '…the maximum age for Justices of any court created by the Parliament is 70 years.' Retirement as a federal judicial officer occurs at this age unless a judge voluntarily resigns before then or is removed under the 'misconduct or incapacity' provision of The Constitution.[1]

4.4 In the States and Territories compulsory retirement ages vary from 65 for magistrates and 70 to 75 for judges. Judicial resources in some jurisdictions can be retained for longer using statutory provisions that allow for judges to continue undertaking a judicial function for further periods of time.

4.5 Until 1977 judges of the High Court were appointed for life. The Senate Standing Committee on Constitutional and Legal Affairs reported in October 1976 on the retirement age for Commonwealth judges.[2] The report recommended that the maximum retiring age for judges of the High Court be set at 70.[3]

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1 See section 72 of the The Constitution.

2 Standing Committee on Constitutional and Legal Affairs, *Report on retiring age for Commonwealth judges*, Parliamentary Paper No. 414/1976.

3 Standing Committee on Constitutional and Legal Affairs, *Report on retiring age for Commonwealth judges*, Parliamentary Paper No. 414/1976, p. 14.

4.6 This recommendation led to the 1977 referendum that saw the carriage of the introduction of a compulsory retiring age for federal judges in section 72 of the Constitution. It was the third most popular constitutional amendment since federation with some 80% of voters in support. [4]

4.7 In concluding that a compulsory retirement age for judges should be established - a change from the approach at that time of being appointed for life - the committee observed that:

> In the view of the Committee there are a number of [compelling] reasons for introducing a compulsory retiring age for all federal judges:
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> (a) It is necessary to maintain vigorous and dynamic courts, which require the input of new and younger judges who will bring to the bench new ideas and fresh social attitudes…
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> (b) The relatively high average age of federal judges does, to some extent, limit the opportunity for able legal practitioners to serve on the bench while at the peak of their professional abilities and before suffering the limitations of declining health.
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> (c) In Australia and to a growing degree in comparable countries, there is an acceptance of the need for a compulsory retiring age for judges. In most Australian States and the mainland territories this age is 70 years.
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> (d) The introduction of a compulsory retiring age may result in the automatic removal of judges still capable of some years of service, but it will avoid the unfortunate necessity of removing a judge who, by reasons of declining health, ought not to continue in office, but who is unwilling to resign.[5]

4.8 The arguments made in favour of answering the referendum question in the affirmative still have relevance today, and the use of a compulsory retirement age was the subject of discussion with the committee.

Evidence to the committee

4.9 While not specifically arguing against a compulsory retirement age, the Law Council of Australia notes that there are reasons to consider alternative approaches:

> The primary argument opposing a mandatory retirement age for justices is its inflexibility, in addition to the difficulty of setting an appropriate age. A judge's effectiveness and ability to keep abreast of new developments in the

4 Standing Committee on Constitutional and Legal Affairs, *Report on retiring age for Commonwealth judges*, Parliamentary Paper No. 414/1976, p. 3.

5 Senate Standing Committee on Constitutional and Legal Affairs, *Parliamentary Paper No. 414/* 1976, p. 11.

> law is not a function of age. A mandatory retirement age could also potentially be considered a form of age discrimination.[6]

4.10 These are real considerations, but no-one has expressed a view to the committee that they outweigh the arguments in favour of a compulsory retirement age. As Mr Colbran QC, chairman of the National Judicial Issues Working Group, Law Council of Australia observed:

> The Law Council accepts that, on balance, the imposition of a mandatory retirement age serves a number of important public policy objectives. On balance, we support a mandatory retiring age. It prevents the situation of a judge who is unable to continue with his or her duties but unwilling to resign. As Justice Gleeson observed, you will find in our submission that it avoids the unfairness and inappropriateness of a judge being required to decide, in his or her own case, whether or not it is appropriate to continue.[7]

4.11 Indeed, the use of a compulsory retirement age remains the accepted approach in all jurisdictions in Australia to determining the maximum term of all permanent judicial appointments. The ICJ-Victoria is of the opinion that 'the term of a judicial appointment should never be fixed other than requiring a compulsory retirement age.'[8]

4.12 During this inquiry, no major concern was raised about either the existence of a compulsory retirement age in the federal judiciary, nor the age at which retirement is set. The general view put to the committee is that a compulsory retirement age is appropriate.[9] In fact, the Law Council of Australia noted that 'the question of security of tenure until the maximum retirement age appears uncontroversial, as it is a fundamental aspect of the separation of powers doctrine and Australia's constitutional structure, and is an essential underpinning of judicial independence'[10] and that 'anything less than those arrangements has the effect of compromising judicial independence.'[11]

4.13 As to an appropriate retirement age, divergent views were expressed, but the range of difference was small. No submitters argued that the federal retirement age is too high. However, some submitters and witnesses sought to persuade the committee that the retirement age is too low. Mr Alexander W Street SC, argued that:

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6 Law Council of Australia, *Submission 11*, p. 6.

7 *Committee Hansard*, 12 June 2009, p. 17.

8 International Commission of Jurists, Victoria, *Submission J2*, p. 4.

9 For example, see the Gilbert + Tobin Centre of Public Law, *Submission 1*, p. 6, Law Council of Australia, *Submission 11*, pp 5 and 6, and the Human Rights Law Resource Centre, *Submission j1*, p. 31. The committee did receive some evidence to the contrary: see Hon Dr Bob Such MP, *Submission 2*, p. 2.

10 Law Council of Australia, *Submission 11*, p. 5.

11 International Commission of Jurists, Victoria, *Submission J2*, p. 4.

> It is now more than 30 years since [the 1977 retirement age referendum] and it is clear that the age of retirement is too young, creates a significant loss of most valuable judicial resources and was an overreaction to the octogenarians serving out life appointments.[12]

4.14 The Gilbert + Tobin Centre's view of establishing in the Constitution a retirement age of 70 years is that in retrospect the age of 70 seems too young. The Centre proposes that the issue is one of 'raising rather than removing' the 70 year limit.[13] However, despite its view that the retirement age could be increased, the Centre notes that a number of practical considerations apply, including that 'it would be difficult to establish community consensus on what age retirement should be mandated beyond the existing limit' and that even if a referendum to revisit the issue was successful it would only increase the period of judicial service by a few years.[14] The Centre therefore goes on to take a pragmatic approach to the costs and problems associated with implementing this constitutional reform:

> However, we submit that alteration of this rule should not be pursued. A reversion to granting federal judges tenure for life is undesirable…Apart from seeking to minimise problems of infirmity and poor capacity, a compulsory retirement age is valuable for ensuring timely renewal of the ranks of the judiciary. This contributes positively to the law's development and the ability of judges to appreciate changes in social mores and technology. [15]

4.15 While supporting a fixed retirement age the ICJ-Australia argues that an appropriate retiring age is 72 as 'many judges are fully capable of carrying out functions to more advanced years and there is a danger of loss of valuable experience'.[16] Mr Street and others propose that 75 is an appropriate retirement age.[17]

4.16 The Chief Justice of Victoria also supports a compulsory retirement age, and raised practical reasons for considering increasing the retirement age from 70 to a higher limit:

> The existence of a compulsory retirement age has been accepted for a number of years as the means for determining the outer limit of the judicial career. What that outer limit should be has been the subject of further consideration in recent times. This is in part a result of broader social trends of increased life expectancy and later retirement. In Victoria it has also been prompted by the experience in the Supreme Court which is facing the loss

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12 Mr Alexander Street SC, *Submission 14*, p. 1.

13 Gilbert and Tobin Centre of Public Law, *Submission 1*, p. 6.

14 Gilbert and Tobin Centre of Public Law, *Submission 1*, p. 6.

15 Gilbert and Tobin Centre of Public Law, *Submission 1*, p. 6.

16 International Commission of Jurists, Australia, *Submission 5*, pp 5 and 6.

17 Mr Alexander Street SC, *Submission 14*, p. 1. See also the evidence of Chief Federal Magistrate Pascoe, *Committee Hansard*, 11 June 2009, p. 50.

> of a number of experienced judges in a short period of time, posing challenges at an organisational level. When it became clear a number of judges reaching retirement age would happily continue, the Court was prompted to consider whether reinstatement of the 72 age of compulsory retirement would be appropriate given the organisational benefits.[18]

4.17 However, some eminent people have expressed support for retaining the present age of retirement. The Hon Michael Kirby AC CMG said late last year that 'change and turnover, fresh ideas and a reflection of the values of different generations, is a vital aspect of a dynamic and open-minded final national court.'[19] Chief Justice Bryant of the Family Court and Chief Federal Magistrate Pascoe of the Federal Magistrates Court endorse this view for federal courts generally and believe that the compulsory maximum retirement age 'should remain as it presently is' under The Constitution.'[20]

4.18 The ICJ-Victoria agrees that notwithstanding that many judicial officers continue to be capable beyond the age of 70,[21] there is merit in a retirement age of 70 on the basis that 'turnover in judicial office and the introduction of younger judges (albeit at least of the age of 50) is desirable.'[22]

4.19 Relative to other statutory retirement ages, the outer limit for judges is at the high end. This is not to imply that judges therefore lack capacity – the point is that many judges may feel ready to retire and engage with their communities in other ways. Evidence from Professors Roach Anleu and Mack in relation to the compulsory retirement age was that:

> While the plans of some judicial officers might be affected by abolishing or changing compulsory retirement ages, it appears that, for most in the judiciary, decisions about retirement are more strongly driven by factors such as finance, health, and job satisfaction.[23]

4.20 In the project's 2007 survey of the judiciary, apparently only 18% of judges identified statutory age as a factor influencing planned retirement age.[24]

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18 Chief Justice Marilyn Warren of the Supreme Court of Victoria, *Submission j3*, pp 3 and 4.

19 Former Justice Michael Kirby, *Neville Wran – A Lawyer Politician – Reflections on Law Reforms and the High Court of Australia*, Inaugural Neville Wran Lecture, The Parliament of New South Wales, Thursday 13 November 2008, p. 39.

20 Family Court and Federal Magistrates Court, *Submission 8*, p. 7.

21 Justice Lasry, *Committee Hansard*, 12 June 2009, p. 2.

22 International Commission of Jurists Victoria, *Submission J2*, p. 4.

23 Flinders University Judicial Research Project, *Submission J4*, p. 16.

24 Flinders University Judicial Research Project, *Submission J4*, p. 18.

Committee view

4.21 The committee is of the view that there are strong arguments for increasing the compulsory age of retirement to at least 72 and possibly to 75. The concern about losing valuable experienced and effective judicial resources prematurely is an important consideration.

4.22 However, the committee is mindful of the inherent difficulty and cost of achieving constitutional change at a federal level. Evidence from the Judicial Research Project about judges' views on planning their retirement was also very useful, in particular, that the statutory retirement age is only one factor in a judicial officer's decision to retire and often it is not even the most important.[25]

4.23 As Acting Chief Justice Murray says, it seems that '70 is as good an age as any…The point that I think is important is that it provides a convenient mechanism to end an appointment which is of good behaviour or during good behaviour.'[26]

4.24 In light of the cost of seeking to alter the Constitution, this is not an issue that the committee believes currently warrants further action. It is possible that with further increases in life expectancy and advances in technology and support the question will again arise. That will be a matter for parliaments in the future, and possibly the not-too-distant future. In determining an appropriate compulsory retirement age, the committee encourages jurisdictions to consider the merit of achieving national consistency.

4.25 While Professor Williams of the Gilbert + Tobin Centre cautions that this is not an issue that should be at the 'forefront' of constitutional reform,[27] he has made a very useful suggestion that the committee considers should be adopted when the time comes to amend the compulsory retirement age for federal judges set by section 72 of The Constitution:

> I think the flaw in the Constitution is that it fixes 70 as the retirement age. I think a better outcome would have been to say that the retirement age must be fixed by parliament to enable it to change over time. I think there clearly should be a retirement age; it is just that leaving it at 70 will over time become more anomalous. It would be better to have more flexibility there. Of course, any changes to the retirement age should not affect any sitting judges; it should only operate prospectively.[28]

4.26 If the federal compulsory retirement age is changed (either by directly increasing the age referred to in the Constitution or by constitutionally providing an alternative legislative process for establishing the compulsory retirement age for

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25 Flinders University Judicial Research Project, *Submission J4*, p. 18.

26 *Committee Hansard* , 13 July 2009, p. 3.

27 *Committee Hansard*, 11 June 2009, p. 37.

28 *Committee Hansard*, 11 June 2009, p. 37.

judicial officers such as suggested by Professor Williams) the committee agrees that the operation of any amendment should be prospective.

Recommendation 5

4.27 The committee recommends that all jurisdictions set a nationally consistent compulsory retirement age for judicial officers and encourages each jurisdiction to implement it within the next 4 years.

Recommendation 6

4.28 The committee recommends that at the next Commonwealth referendum section 72 of the Constitution should be amended in relation to the compulsory retirement age for judges to provide that federal judicial officers are appointed until an age fixed by Parliament.

Acting appointments

4.29 There may be appropriate ways to use retired or former judges who remain capable and interested in judicial or related work beyond their compulsory retirement age. For example, retired judges can be appointed as royal commissioners, or many states and territories have the ability to appoint acting judges. A question for the committee in relation to federal courts is: are acting appointments inconsistent with the independence of the judiciary, or a practical and appropriate solution to a difficult problem?

4.30 One solution for governments when their courts are faced with resource shortages from time to time is to consider the use of acting appointments. The States and Territories are able to supplement their judicial resources through the use of acting judicial appointments, but the federal courts are currently constrained in this regard. As the Family Court and Federal Magistrates Court explain:

> There cannot be an acting appointment to a federal court due to the prohibition in the *Constitution* against the diminution of judicial remuneration during office. It is further noted that changes to enable acting appointments would require alteration to s 72 of the *Constitution*.[29]

4.31 Most evidence to the committee was that it is inappropriate for judges to be appointed on an acting basis, based primarily on concern that it seriously damages the independence of the judiciary. The ICJ-Victoria has a firm view against the use of acting appointments:

> There is simply no question in our opinion that to appoint a judge in an 'acting' capacity either actually, or in perception, compromises that judge's independence particularly where the State appoints judges and is also a regular litigant in the Courts to which an acting judge might be appointed. Cost is not a justification and, indeed, we suspect that if all the evidence

29 Family Court and Federal Magistrates Court, *Submission 8*, p. 8.

> were assembled it would be discovered that the actual cost of appointment full-time judges, bearing in mind their workload, is highly cost effective.[30]

4.32 Another eminent organisation that is strongly opposed to acting appointments is the Law Council of Australia. As the Council explains:

> A conflict of interest arises where a judge's continued appointment becomes subject to a decision of the Executive Government, which may either influence or appear to influence the exercise of the judge's public duties and functions. Judicial officers need to be able to make decisions without fear of having their ongoing employment prejudiced by that decision, and must have the confidence of the public that they are in a position to apply the law impartially.[31]

4.33 The Law Council also encouraged governments to limit their use of acting judicial appointments:

> The use of acting…judges has traditionally been seen as a measure to temporarily replace permanent judges when they retire or are on extended leave. Relying on short term judicial appointments as a method to overcome chronic court delays is not a viable option...
>
> …Governments should not be tempted to make acting or part-time appointments in order to avoid their responsibility to provide an adequately resourced, permanent, full-time judiciary.[32]

4.34 Others who strongly opposed acting appointments on the basis that they undermine the principle of the independence of the judiciary include the Judicial Conference of Australia, the ICJ-Victoria and the Law Council of Australia.[33]

4.35 As noted above, the States and Territories are able to make acting appointments. However, there are significant variations between the approaches in some jurisdictions. The differences have been described as being both 'in the legislation itself and the practical constraints that affect the way in which the legislation is administered.'[34] An example of a legislative constraint is limiting the maximum term of appointment. Practical constraints include, for example,

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30 International Commission of Jurists, Victoria, *Submission J2*, p. 5.

31 Law Council of Australia, *Submission 11*, p. 7.

32 Law Council of Australia, *Submission 11*, p. 9.

33 For example, see Justice McColl, *Committee Hansard*, 11 June 2009, p. 4, International Commission of Jurists, Victoria, *Submission j2*, p. 5 and Law Council of Australia, *Submission 11*, p. 7.

34 *Additional Information,* Justice Ronald Sackville, letter as chair of the Judicial Conference of Australia to Attorney-General of Victoria dated 1 November 2004, tabled at public hearing by the Judicial Conference of Australia, Thursday 11 June 2009, p. 1.

administering the appropriate legislation cautiously such as utilising only retired judges.[35]

4.36 The Law Council of Australia uses the Victorian model to highlight some of its concerns about the use of acting judicial officers. In Victoria legislation was passed that permits the appointment of legal practitioners as acting judges for 5 years or until attaining the age of 70 years if this is sooner.[36] The Law Council's evidence to the committee is that:

> …if the Victorian model of acting judges is used as an example, it is likely that the acting judge will only receive remuneration for whatever periods of full-time or session work the Attorney-General may subsequently assign to them. It may be the case that the acting judge will hope that if they can win the Attorney-General's favour they may secure more frequent commissions, eventually leading to permanent tenure.[37]

4.37 This problem is said to be potentially exacerbated by the fact that in Victoria an acting judge has no pension entitlements, 'but if he or she is later appointed as a permanent judge their service as an acting judge can count for pension purposes.'[38] The Victorian approach also provides added incentive for an acting judge to seek permanent appointment. As Victorian Justice Ronald Sackville has observed:

> This means that an acting Judge coming to the end of his or her five year term of appointment has a double incentive to be appointed a Judge of the Court. Appointment will not only mean a secure tenured position, but the Judge will receive credit for five years service as an acting Judge for pension purposes. This amounts to a notional sign-on bonus that could be worth hundreds of thousands of dollars. What if an acting Judge is hearing a case in which the government is a party when a permanent vacancy in the Court is about to be filled? If the government wins and the acting Judge is later appointed as a permanent Judge, will the losing party accept that that two events were unrelated?[39]

4.38 The committee can appreciate that this can leave a judge and the legal system in an unhappy position because either the judge is influenced by his or her circumstances of employment and does not decide a case independently, or the judge is not influenced by the prevailing situation but may be open to the criticism that the decision was made under the influence of the vacant judicial position.

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35 See generally *Additional Information*, Justice Ronald Sackville, letter as chair of the Judicial Conference of Australia to Attorney-General of Victoria dated 1 November 2004, tabled at public hearing by the Judicial Conference of Australia, Thursday 11 June 2009.

36 For example, see section 11, *County Court Act 1958* (Vic), *Appointment of acting judges*.

37 Law Council of Australia, *Submission 11*, p. 8.

38 Law Council of Australia, *Submission 11*, p. 8.

39 Justice Ronald Sackville, *Acting Judges and Judicial Independence*, opinion article published by The Age, 28 February 2005, as quoted in Law Council of Australia, *Submission 11*, p. 8.

4.39 There are also arrangements in Western Australia that allow for the appointment of acting judges from the ranks of legal practitioners. Mr John Staude representing the Western Australia Law Society advised that these positions are known as 'commissioners' of the Supreme Court and the District Court in that jurisdiction. He described more fully the process for these appointments:

> We do have in Western Australia a system which permits the appointment of commissioners of the Supreme Court and of the District Court. I have in fact served as a commissioner of the District Court- that is in the nature of a temporary appointment, and it might be for a month or two or three. The appointments are made according to the need of the jurisdiction, so the way in which the appointments would come about would generally be that the head of the jurisdiction would notify the Attorney-General of a need to clear a backlog of cases, to provide extra resources to the court for whatever reason – absence of judges on leave or whatever. Traditionally in Western Australia such positions have been filled in the Supreme Court by barristers of the rank of Queen's Counsel or senior counsel, and in the District Court, either by senior counsel or senior juniors.
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> …The work of the commissioners is limited to civil work. I do not think that restriction is put in place by the legislation but it is a matter of practice. …I do not think there is any sort of formal opposition expressed on behalf of the society to that system. It has worked for many years. It is regarded as a necessary process to support the court on certain occasions but generally I think both my colleagues would agree with what Justice Murray said about the undesirability of people in practice being called upon to meet that need... it is not difficult to then preside in a contest between your colleagues, but it may give rise to perceptions and it may be perceived as a process in which the traditional protections of judicial offices are not as obviously enforced. So it is probably viewed as a necessary evil and not an ideal means of remedying the problem of having an under-resourced court from time to time.[40]

4.40 In evidence to the committee there was only extremely limited support of acting appointments. While noting that 'temporary appointments interfere with the doctrine of the separation of powers',[41] the Public Interest Advocacy Centre could identify limited circumstances in which temporary judges could be appointed:

> …Judges should only be appointed on a temporary or acting basis to deal with particular listing difficulties or a temporary backlog of judicial work. Even then, such appointments should be for a short period, for example six to twelve months. It should be to overcome a temporary difficulty, not to create a large and continuing pool of acting judges from which selections could be made from time to time.[42]

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40 Mr Staude, *Committee Hansard*, 13 July 2009, p. 11.

41 Public Interest Advocacy Group, *Submission 10*, p. 2.

42 Public Interest Advocacy Group, *Submission 10*, p. 3.

Committee view

4.41 The use of acting appointments could raise genuine concerns about the independence and impartiality of the judiciary. In relation to the use of acting appointments a number of submitters referred to the view expressed by Sir Ninian Stephen in 1989 that:

> It is fundamental to judicial independence that Judges enjoy security of tenure until they attain retirement age. The reason is obvious. If Judges are appointed for a fixed term, there is a danger that they will be seen as attempting to curry favour with the Government of the day in order to obtain reappointment for another term.[43]

4.42 The committee is also mindful of the international standards applicable and the Human Rights Law Resource Centre's injunction in this regard. As Mr Lynch explained:

> We consider that any such appointments should be very carefully considered and subject to stringent safeguards which ensure compliance with the obligations and standards required by article 14 of the International Covenant on Civil and Political Rights.[44]

4.43 An outline of the relevant international law obligations is in chapter 2 above. In addition, Article 14 of the *International Covenant on Civil and Political Rights*, an extract from the United National Human Rights Committee, *General Comment No 32* and the United Nations *Basic Principles on the Independence of the Judiciary* at Appendix 3 to this report.

4.44 While noting the practical considerations that play a role in a jurisdiction making acting appointments, the committee is persuaded that acting appointments, by their nature, are inconsistent with the appropriate independence of the judiciary. Consequently, the committee believes that no change should be made to the present constitutional arrangements that prohibit the use of acting federal judicial officers.

4.45 For the purpose of clarity, the committee notes that there is some overlap in the use of terminology in relation to acting appointments – for example in New South Wales judges who would otherwise have had to retire at 72 can be appointed to continue as an 'acting judge' up until the age of 77 and that appointment can be full-time or part-time.[45] Although a person undertaking this type of appointment is referred to as an 'acting judge', in the committee's view the use of a retired judicial officer is very different from the temporary appointment of a legal practitioner who will return to that role at the end of the judicial appointment.

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43 For example, see the Law Council of Australia, *Submission 11*, p. 7.

44 *Committee Hansard*, 12 June 2009, p. 96.

45 Justice McColl, *Committee Hansard*, 11 June 2009, p. 18.

4.46 The committee suggests that to avoid confusion a term other than 'acting judge' be used to refer to additional arrangements for retired or former judges. For example, in Western Australia a retired judge can be appointed as an 'auxiliary judge' for a period of up to a year, with a further option to extend the term if needed and if this is suitable to the court and the judge. As Acting Chief Justice Murray of the Western Australia Supreme Court explained to the committee:

> …it gives you the opportunity to keep on-stream the experience of a judge who is regarded as still having a capacity for service at that point but gives you the ability to end the relationship without embarrassment on either side when the use-by date arrives.[46]

Part-time appointment

4.47 Part-time appointments as understood for the purposes of this discussion are fundamentally different from acting appointments because the tenure of the position is the same as for full-time appointments: that is, to the compulsory age of retirement. The difference between them lies only in the pattern of work for part-time judicial officers compared to full-time appointees.

4.48 Part II of the *High Court of Australia Act 1979* (Cth) is seen by some to prevent part-time appointments to the court because it provides that a Justice of the High Court is not capable of accepting or holding any other office of profit within Australia.

4.49 The ICJ-Victoria agrees with this approach and 'is opposed to part-time appointments on the basis that they have a similar consequence of compromising judicial independence.'[47] The Law Council of Australia also objects to part-time (and acting) appointments and expressed the view that:

> Governments should not be tempted to make acting or part time appointments in order to avoid their responsibility to provide an adequately resourced, permanent, full-time judiciary.[48]

4.50 The assumption (and concern) that appears to underlie these comments is that it is likely that the person undertaking the part-time work would seek to supplement the position with other paid work to fill the person's employment capacity to a full-time equivalent.

4.51 However, this is not necessarily the case, and in fact the committee's understanding accords with submitters who approach this issue primarily on the basis that part-time appointments are likely to be sought by people who only wish to be in paid employment on a part-time basis. This is implicit in the evidence of the Chief Justice of the Supreme Court of Victoria who explained that:

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46 *Committee Hansard*, 13 July 2009, p. 2.

47 International Commission of Jurists, Victoria, *Submission J2*, p. 4.

48 Law Council of Australia, *Submission 11*, p. 9.

> Flexible work arrangements for judicial officers are also a matter of interest to Victorian Courts. In 2004 provisions were introduced to allow Magistrates to work on a part time basis. Other courts have been considering the means by which more flexible working arrangements could be provided with the aim of:
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> - retaining experienced judges for longer;
> - removing provisions which may act as barriers to aspiring to, or accepting, judicial appointment for sections of the community including women; and
> - creating a simple, effective and flexible system of additional judicial resources.
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> The nature of work in the higher courts requires a different approach to traditional part-time work, but is an option which Victorian Courts consider it is important to pursue.[49]

4.52 The Gilbert + Tobin Centre offers qualified support for part-time appointments at a federal level to only the Federal Magistrates Court and only if anyone undertaking part-time work does not also undertake any other work.[50] On this as basis part-time appointments 'may be seen as a means of diversifying the pool of potential judges but there are inevitable limitations to such a move.'[51] In particular:

> …part-time judicial work would seem a possibility only for lower level courts given the speed with which they may deal with many of the matters which come before them. In some Australian states magistrates are able to work part-time, but it would be difficult to see how at any higher level a part-time judiciary would not impede the progress of litigation and inconvenience the parties.[52]

4.53 Acting Chief Justice Murray's view is that it is most desirable that any part-time appointment is made from the ranks of retired judges to avoid the difficulties of being in legal practice and having to go back into the profession. He also noted that he would support these appointments only if they were part-time in the sense 'that they would serve for a particular period of months during a year.' His concerns about part-time working arrangements are practical:

> I find it very difficult to envisage, but perhaps that is because I come from a relatively small court. I find it very difficult to envisage how the court would be well served by a judicial officer who is working, say, two or three days a week…I just do not see how you could possibly manage it. It has to

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49 Chief Justice Warren, Supreme Court of Victoria, *Submission J3*, p. 4.

50 Gilbert and Tobin Centre of Public Law, *Submission 1*, p. 6.

51 Gilbert and Tobin Centre of Public Law, *Submission 1*, p. 6.

52 Gilbert and Tobin Centre of Public Law, *Submission 1*, p. 6.

> be for an extended period. While you are on deck, it seems to me that the appointment should be full-time.[53]

4.54 The Judicial Conference of Australia had a slightly broader view of support for part-time arrangements because it '…is a good option of keeping skilled practitioners unable to undertake full-time judicial duties.'[54]

4.55 This idea is built upon in evidence of Professors Mack and Roach Anleu of the Judicial Research Project, who extend the concept by pointing out that a 'zero tolerance' approach to part-time appointments may undermine the principle of appointment based on merit:

> If we go back to the idea of merit—the judiciary stands to lose meritorious applicants if there is not some accommodation or flexibility or recognition that different people have different kinds of needs, obligations and relationships to the workplace.[55]

4.56 However, as the Judicial Conference recognises, for the use of part-time judges to be effective there are of course practical factors that need to be considered:

> It would be necessary, however, to devise a system of appointing permanent but part-time judicial officers which does not impose excess burdens on the other judicial officers in the relevant court. The Judicial Conference is aware that the system of part-time magistrates in the New South Wales Local Court appears to work well.[56]

4.57 Arrangements for part-time judges are already in place in some courts in New South Wales. Even in the New South Wales Court of Appeal part-time arrangements have been made for a judge working in an 'auxiliary' capacity. Justice McColl of that court observed in relation to these circumstances: '…It is already happening and a judge working part-time in this capacity was noted as being 'a substantial contributor to the court's work.'[57]

4.58 A related, but somewhat different, proposal is being developed by the Family Court. Of considerable interest to the committee was the suggestion brought to its attention by Chief Justice Bryant to introduce the concept of a *Senior Judge*:

> In recent years, the Family Court has proposed that a Judge of the Family Court who has retired after more than ten years of service may be appointed, by means of a new commission, to part-time judicial office in the Family Court as a "Senior Judge" until the age of 70 years. The title

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53 *Committee Hansard*, 13 July 2009, p. 3.

54 Justice McColl, *Committee Hansard*, 11 June 2009, p. 4.

55 Professor Roach Anleu, *Committee Hansard*, 12 June 2009, p. 39.

56 Justice McColl, *Committee Hansard*, 11 June 2009, p. 4.

57 *Committee Hansard*, 11 June 2009, p. 18.

> "Senior Judge" would reflect the senior status and judicial experience of the Judges provided with the new commission.
>
> The Senior Judges would be assigned up to one third of a normal judicial workload and be paid in proportion. Pay could be either by means of a fixed amount for part-time office, or on a sessional rate for work undertaken, depending on legal advice as to the impact of the Constitution.[58]

4.59 This innovative idea is one that could warrant further exploration. There are, as usual, practical matters to consider such as whether this approach could be established in a way that meets the constitutional requirements. As the Family Court explained:

> This proposal has the benefit of enabling suitably qualified Judges to provide flexibility in the management of dockets and be responsive to the needs of the Court in particular registries as those needs arise. The proposal would, however, require examination from a constitutional perspective such as whether or not there is a requirement that judicial office is, by its nature, full-time, and whether or not the proposal would likely offend the constitutional prohibition on diminishing remuneration during office. There is scope for part-time appointments under the Constitution, by virtue of the fact that multiple commissions may be held by a Judge and by the obvious practical reality that each commission cannot be exercised in a full-time capacity.[59]

4.60 In addition to the possible constitutional constraints, it would be unfortunate if implementing this arrangement had the effect of leading to a significant number of judges retiring earlier than they otherwise would have done. However, the evidence of Professors Mack and Roach Anleu (outlined above in relation to the retirement age discussion) that often considerations other than the maximum retirement age prevail in reaching a decision to retire from judicial office indicates that this is an idea that could, overall, result in retaining experienced judicial officers for longer.

4.61 Some jurisdictions already have in place a similar arrangement whereby there is a capacity to renew the appointment of a retired judge, although not necessarily on a part-time basis. For example, as discussed in the 'acting appointments' section above, in Western Australia a retired judge can be appointed for a period of up to a year as an 'auxiliary judge', with a further option to extend the term if needed and if this is suitable to the court and the judge.

4.62 A key difference between these options is that the proposed Family Court model still uses the compulsory retirement age to determine the outer limit of the extra use of a judge. On the other hand, the Western Australian model, though in practice it

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58 Family Court and Federal Magistrates Court, *Submission 8*, p. 7.

59 Family Court and Federal Magistrates Court, *Submission 8*, pp 7 and 8. The submission further noted that there is statutory provision for 'appointments to the FMC [to] be made on a part-time basis where that is specified in the commission' and that 'the office of the Chief Federal Magistrate is held on a full-time basis': *Submission 8*, p. 8.

is no doubt appropriately managed and effective, does impinge on the notion of judicial independence to the extent that there could be the perception that a judge is deciding cases in a particular way in order to have his or her 'auxiliary' term extended.

Committee view

4.63 The committee agrees that part-time appointments where a judicial officer supplemented this position with other employment would be wholly inappropriate.

Recommendation 7

4.64 The committee recommends that the *High Court of Australia Act 1969* (Cth) prohibition on federal judges holding another office of profit be retained.

4.65 However, the committee suggests that it is important for a jurisdiction to understand why the use of part-time judges is being considered and to consider the exact nature of the terms of appointment. For example, if judges are appointed:

- with appropriate tenure (i.e. to the compulsory retirement age);
- but part-time arrangements are in place in order to provide more flexible employment circumstances; and
- the judge is not supplementing this role with additional employment

this does not seem to inherently undermine judicial independence. A consideration of importance for any jurisdiction offering this employment arrangement would be appropriately managing the work of the court. This give rise to matters of internal case management, but it does not trigger an issue of principle.

4.66 The committee agrees with the Human Rights Law Resource Centre's perspective on the use of part-time appointments that they should not be established in such a way as to give rise to impartiality and independence concerns, but could be managed in such a way as benefit the judiciary:

> This is something which we would support, particularly so far as it may diversify the pool of candidates available for appointment, including, particularly, women. But one must also be mindful of ensuring that the principles of independence and impartiality are strictly maintained. In our view, a judge who is a part-time judge and who maintains a part-time role in the legal profession would raise serious issues.[60]

4.67 Another arrangement where part-time judicial officers could be appropriate is the use of retired or former judges ('auxiliary judges'), particularly to relieve excessive workloads or where the judicial officers involved wished to work part-time and could be accommodated to do so. The Gilbert + Tobin Centre has offered qualified support for part-time arrangements in lower level courts, but is concerned about increased reliance on the use of part-time judges. As Dr Lynch explained in evidence:

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60 Mr Lynch, *Committee Hansard*, 12 June 2009, pp 96 and 97.

> I think the initial case for use of part-time judges was really as a supplement than as a mainstay of the system, and I think we now may have moved, unfortunately, to the latter. I do not think that is terribly desirable.[61]

4.68 The use of 'auxiliary judges' over the age of 70 would require constitutional amendment, but the committee did not examine in detail whether other federal options for part-time employment (such as is described above) are currently limited by constitutional constraints. However, the committee notes Chief Justice Bryant's view that, subject to receiving formal advice from constitutional experts, part-time appointments for people under the age of 70 can be made.[62]

4.69 The committee considers that the appropriate use of judicial officers with part-time working arrangements will be an issue of increasing importance in attracting and retaining many talented appointees. Therefore, the committee is of the view that a model protocol to guide arrangements for judicial officers to work part-time should be developed. The process should be led by the Attorney-General in consultation with the federal courts and the Judicial Conference of Australia. It should include appropriate safeguards to protect the independence of the judiciary and should encourage the appropriate use of short and long term part-time working arrangements. The protocol should be implemented in all federal courts and presented to SCAG for consideration.

Recommendation 8

4.70 The committee recommends that by 30 June 2010 the Attorney-General develop and implement a protocol that provides guidelines to federal courts for the appropriate use of short and long term part-time working arrangements for judicial officers.

Recommendation 9

4.71 The committee recommends that the Attorney-General present the protocol to the Standing Committee of Attorneys-General for consideration at the first meeting after 30 June 2010.

Other possible arrangements and issues

Continued judicial involvement for 6 months

4.72 An interesting suggestion was made to facilitate a further efficiency of the federal courts by Mr Alexander Street SC. Mr Street made a recommendation for the committee's consideration 'to permit written participation in the delivery of reasons for judgments and written participation in the making of orders on full courts, heard prior [to] reaching the retirement age, within 6 months after reach retirement age'.[63] This is

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61 *Committee Hansard*, 11 June 2009, p. 36.

62 *Committee Hansard* , 13 June 2009, p. 52.

63 Mr Alexander Street SC, *Submission 14*, p. 1.

somewhat related to suggestions outlined above for the use of 'auxiliary' and 'senior' judges and could be included in any government consideration of the arrangements for appointments. Such an amendment would require constitutional amendment to permit this activity.

Family Law Act 1975 *(Cth)*

4.73 In broadly considering the terms of this inquiry and improvements to Australia's judicial system, the Family Court saw benefit in the *Family Law Act 1975* being streamlined on the basis that 'it is a voluminous statute that is difficult to navigate, particularly for people without legal training.'[64] One suggestion made to achieve this is to place the provisions concerning the establishment of the Family Court and its powers and functions into a separate act.[65]

4.74 Although this matter is somewhat tangential to the main areas of inquiry, the committee commends this suggestion to government for consideration.

A brief comment about remuneration, resources and a national approach

4.75 Other arrangements mentioned in this report that relate to terms of appointment include judicial exchange. This is discussed in more detail in the following chapter relating to the interface between the federal and state judicial systems. However, the committee does note that a move to a national judiciary could provide an opportunity to strengthen the independence of the judiciary in some jurisdictions if the federal model which vests a court's administrative decision making power in the role of its chief judicial officer is adopted nationally,[66] and this has implications for the terms of judicial appointments. In fact, all of the matters discussed in this chapter could be standardised by the development of a national judiciary, or in the interim, by the development of a national approach to these issues. As the Chief Justice of the Supreme Court of Victoria noted:

> A national approach to issues of judicial terms of appointment, retirement and conditions is a matter which the Supreme Court has pursued for some time. The current discrepancies between jurisdictions are unwarranted and inconsistent with the trend towards greater integration of Australia's legal system.[67]

4.76 The importance of remuneration as one aspect of securing the independence of the judiciary was highlighted in this inquiry by the Public Interest Advocacy Centre, which said:

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64 Family Court and Federal Magistrates Court, *Submission 8*, p. 6.

65 Family Court and Federal Magistrates Court, *Submission 8*, p. 6.

66 The issue of concern about models where fiscal responsibility is split between a court and an executive government department was raised by the Chief Justice of the Supreme Court of Victoria, *Submission J3*, p. 2.

67 Chief Justice of the Supreme Court of Victoria, *Submission J3*, p. 3.

> The appointment of judges for life or until a fixed retirement age, and with guarantees of their pay and pension entitlements, is central to the independence of the judiciary and both the reality and appearance of impartiality in adjudication.[68]

4.77 Remuneration for Commonwealth judges is expressly protected from reduction by constitutional or legislative provisions. Although in some cases it would be technically possible that these could be amended or repealed, in the committee's view this is unlikely and not presently a cause for concern. The committee notes that in Australia the federal institutional independence of the judiciary is provided for in Chapter III of The Constitution. As the ICJ-Victoria explains:

> Funding of the High Court and courts established pursuant to Chapter III is provided for in s 81 of the Constitution:
>
> > All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution. (emphasis added)
>
> The federal courts, including the High Court, fall within the words "charges and liabilities imposed by this Constitution" found in s 81 of the Constitution. The federal courts are a charge and a liability imposed by the Constitution.[69]

4.78 The Law Council of Australia has also pointed to anomalies between the remuneration of judges in different jurisdictions as an issue of concern.[70] This can lead to forum shopping for judges to ensure that they retire in a way that maximises their superannuation and pensions. The Law Council endorses the view of Blow J of the Supreme Court of Tasmania that 'Judicial independence will not be promoted if a judge needs to have any eye on his or her next career move.'[71]

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68 Public Interest Advocacy Group, *Submission 10*, p. 2.

69 International Commission of Jurists, Victoria, *Submission J2*, pp 3 and 4.

70 Annexure B to *Submission 11*, p. 9, *Law Council Submission to SCAG Consultation on a Proposed National Judicial Framework*, 20 April 2008, p. 29.

71 Annexure B to *Submission 11*, p. 9, *Law Council Submission to SCAG Consultation on a Proposed National Judicial Framework*, 20 April 2008, p. 29.