Judges and Governors-General Legislation Amendment (Family Law) Bill 2012

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Judges and Governors-General Legislation Amendment (Family Law) Bill 2012

Date introduced: 15 March 2012

House: House of Representatives

Portfolio: Finance and Deregulation

Commencement: Sections 1 to 3 commence on the day the Act receives Royal Assent. Schedules 1 and 2 commence on a day to be fixed by Proclamation, or six months after the day of Royal Assent, whichever is first.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

The Bill amends the Judges’ Pensions Act 1968 and the Governor-General Act 1974 to provide for retirement income splitting arrangements that are generally consistent with family law arrangements to be applied to the pension benefit that is being paid to a separated retired judge or Governor-General or, in the event that the judge or Governor-General remains in office, would be paid on retirement.

Background

Family Law superannuation splitting arrangements

Under amendments in 2002 to the Family Law Act 1975, superannuation became part of the definition of ‘property’ and the Family Court was enabled to make orders that split a superannuation benefit or flag a benefit for future distribution to an ex-spouse of a superannuation fund member.

The detail of the superannuation splitting arrangements, which commenced from 28 December 2002, is largely contained in the Family Law (Superannuation) Regulations 2001. These Regulations provide the details of the process for flagging or splitting superannuation interests by the Family Court and arrangements for calculating each parties’ interest in the case of different types of superannuation schemes, including both accumulation schemes, defined benefit schemes and funds that are in payment phase. The essence of the arrangements is that the superannuation entitlement is split at the time of the property settlement, even though it may not become payable until some time in the future.

The Family Law Act superannuation splitting arrangements do not extend to certain superannuation and pension schemes, most notably those applying to Commonwealth civilian and defence force...

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superannuation schemes, parliamentary pension schemes and also those applying to federal judges and Governors-General.

The Explanatory Memorandum explains the situation that currently applies to Judges and Governors-General as follows:

For Judges, the current ‘percentage-only’ splitting arrangements mean that any split in a family law settlement of the pension of a Judge occurs only when payments are made to a retired Judge. Payments to a former spouse do not commence until the Judge retires and cease upon the death of the Judge. There is no certainty as to the overall quantum of benefit that the former spouse is entitled to receive.

For Governors-General, there are currently no specific family law arrangements in place to cover the splitting of superannuation pensions.¹

Amendments to legislation covering superannuation and pension arrangements incorporating the Family Law Act superannuation splitting arrangements were made in 2004 to Commonwealth and military and civilian superannuation schemes and to federal parliamentary pensions.²

### Defining retirement savings terms—superannuation, pensions and annuities

Retirement savings terminology includes terms such as ‘superannuation, ‘pension’ and ‘annuity’. Each of these terms is used in a generic sense to cover different types of retirement savings or retirement payment arrangements. These terms sometimes having a specific meaning in relation to features of retirement income savings schemes or products and sometimes also have a specific meaning under the legislation regulating different retirement savings schemes.

When comparing the provisions of this Bill with those that apply to other retirement schemes or payments, it is important to consider the different uses of each term. For example, the term ‘pension’ is used on a number occasions in different contexts:

- payments to members of superannuation funds upon meeting the typical ‘retirement’ age of 55 are generally described as ‘superannuation pensions’, which may need to meet a number of minimum requirements including the amount of the payment(s) and frequency of payment(s)
- payments made to certain public officials (including Members of Parliament and judges amongst others) which are typically made on leaving the relevant office rather than achieving a specific ‘retirement’ age and may be viewed as forming part of the employment conditions attributed to the office rather than being viewed strictly as retirement benefit and
- it can also be used in the context of the Age pension, which is Australia’s safety net of income and other benefits in retirement funded from taxpayer government revenues, paid to men aged 65 or

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above and women aged 60 or above (depending on the year of birth) that is subject to both an income test and assets test.³

Judges and Governors-General pension schemes

Judges

Under section 72 of the Constitution, judges acting under federal appointment have a compulsory retirement age of 70 years except for those appointed to Fair Work Australia, where the compulsory retirement age is 65 years.⁴ In states and territories, compulsory retirement age varies from 65 for magistrates and 70 to 75 for judges.⁵

Pensions for federal judges are established by the Judges’ Pensions Act 1968, which covers judges in a number of Commonwealth jurisdictions including:

- Justices of the High Court
- Judges of the Federal Court (other than the Federal Magistrates Court or the Australian Military Court)
- Judges of the Family Court (including the Family Court of Western Australia) and
- persons who, under an Act, have the same status of a Justice, or a Judge, being:
  - presidential members of the Administrative Appeals Tribunal
  - presidential members of Fair Work Australia and
  - Solicitors-General appointed before 31 December 1997.⁶

Under the pension scheme, judges do not make any contribution to the scheme, with payments made directly from consolidated revenue as they become due. Some of the key features of the scheme include:

- the main benefit is a retirement pension of 60 per cent of the salary payable to the equivalent level judge — to qualify for this pension a judge must have served at least ten years and be at least 60 years old

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⁴ Fair Work Act 2009, section 629.

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• judges who have reached the mandatory retirement age and have less than ten, but not less than six years service, are entitled to a pension at the annual rate of 0.5 per cent of the appropriate judicial salary for each completed month of service and
• judges who have less than six years service are entitled to a lump sum benefit at a level sufficient to meet the superannuation guarantee requirements, plus interest.7

The scheme also includes arrangements to cover situations where a judge retires on the grounds of disability or infirmity and provides for death benefits for spouses (including same sex partners) and eligible children of a deceased judge, whether the judge dies in service or after retirement.8

As at 30 June 2008, when the future costs of the pension scheme were last reviewed, there were a total of 152 former judges receiving pension payments and 118 serving judges who may in the future be eligible for such payments.9

Governors-General

There is no mandatory retirement age for Governors-General. Pensions for Governors-General are established by the Governor-General Act 1974. Under the Act, pensions payable to former Governor-General have the following features:

• the scheme is unfunded and no assets are held. Benefits are financed from Consolidated Revenue as they become due for payment. Current and former Governors-General do not contribute to the scheme and the Commonwealth meets the costs of benefits
• the main benefit is a retirement pension of 60 per cent of the salary payable to the Chief Justice of the High Court of Australia and
• a reversionary pension is payable to the surviving partner (including a same sex relationship) following the death of a serving or retired Governor-General.10

Basis of policy commitment

The proposal to provide for family law retirement income splitting arrangements to apply to pensions paid to judges and Governors-General has its origins in a 2008 finding by the then Sex Discrimination Commissioner that, in her view, the Judges Pension Act 1968 may be inconsistent with the objects of the Sex Discrimination Act 1984 and may also violate Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women.11 Media reports suggested that the

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10. Governor-General Act 1974, sections 4, 4AA and 5.

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Commissioner had examined the Judges Pension Scheme after being approached for assistance by the former spouse of a judge.\textsuperscript{12}

**Committee consideration**


The Committee’s report, tabled in the Senate on 10 May 2012, included the recommendation that the Senate pass the Bill.\textsuperscript{14}

**Financial implications**

The Explanatory Memorandum notes that the Bill is not expected to have an impact on the Budget but that the transitional provisions could potentially result in a marginal increase in the longer term cost of the Judges’ Pensions Scheme, depending on the lifetime of the respective parties.\textsuperscript{15}

**Main issue—Constitutional provisions relating to judges remuneration**

As noted above this Bill was referred to the Senate Legal and Constitutional Affairs Committee to consider, amongst other things:

> Whether the bills [sic] are consistent with section 3 and 72 of the Constitution, relating to alteration of salaries and entitlements.\textsuperscript{16}

Submissions closed on 13 April 2012, and only one submission was received. The submission was from the Department of Finance and Deregulation and it did not address the constitutional question.


\textsuperscript{15} Explanatory Memorandum, op. cit., p. 4.


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Sections 3 and 72 of the Constitution are provisions which in effect provide that Parliament can set the remuneration (salary) of judges and the Governor-General, but the salary cannot be altered during the time a person fills the particular office. In relation to judges the expression is in particular, ‘but the remuneration shall not be diminished during their continuance in office’.\(^\text{17}\)

The issue was raised in the Federation Chamber of the House of Representatives by Bronwyn Bishop. In response, the Minister did not directly address the questions raised but did explain the operation of the provisions as follows:

The arrangements in the bill will operate when a splitting order or an agreement is made in relation to a superannuation interest in the scheme. The interest of a judge or Governor-General in the superannuation scheme will be valued at the time of the family law split and a separate interest for the former spouse will also be created at this time. If a pension is not payable to a judge or Governor-General at the time of the split, the pension of the former spouse will be deferred.\(^\text{18}\)

In an article in *The Australian*, one commentator made the following observation about the link between the treatment of judge’s pensions at the time of divorce and the constitutional provision:

The link between the two is odd. A judge’s pay is not being cut upon settlement of matrimonial property, due to divorce. That’s like saying if a judge’s share portfolio went sour this would be a reduction in his pay.\(^\text{19}\)

On an unrelated constitutional point, Federal magistrates are proceeding against the Australian Government in relation to their exclusion from the Judge’s Pension Scheme. In *Altobelli & Ors v The Commonwealth of Australia* in the Federal Court the essence of the argument put by the applicants is outlined in a letter from the Australian Government Solicitor to the lawyers of the applicants in the following terms:

This alternative ground of relief proceeds on the basis that Parliament is (and always has been) constitutionally required to provide Federal Magistrates with a life-long guaranteed pension, but Parliament has failed to provide such a pension to Federal magistrates. On the applicant’s pleaded case, the absence of a life-long guaranteed pension gives rise to ‘financial insecurity’ which is an ‘actual or perceived threat to judicial independence’.\(^\text{20}\)

The Commonwealth argues otherwise, and the matter is next before Judge Buchanan in the Federal Court for directions on 1 June 2012.

17. Constitution, subsection 72(iii).

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Key provisions

Schedule 1—Amendment of the Judges’ Pensions Act 1968

Items 1 to 29 of Schedule 1 of the Bill insert new definitions into existing subsection 4(1) of the Judges’ Pensions Act 1968, which are necessary to facilitate the splitting of a judge’s pension and give meaning to later sections.

Several definitions relating to eligibility and procedural arrangements refer to terms defined in the Family Law Act 1975. This includes the definition of ‘superannuation interest’, inserted by item 27 of Schedule 1 of the Bill, which forms the basis for considering the pension payable under the Judges’ Pensions Act as being subject to the splitting arrangements proposed by the Bill (see Box 1, below).21

<table>
<thead>
<tr>
<th>Box 1</th>
<th>Defining ‘superannuation’ in different retirement payment schemes</th>
</tr>
</thead>
<tbody>
<tr>
<td>•</td>
<td>the Family Law Act provides for a ‘superannuation interest’ to be treated as property in a split in assets between the parties to a relationship (‘matrimonial cause’ or ‘defacto financial cause’) 22</td>
</tr>
<tr>
<td>•</td>
<td>the definition of superannuation interest further relies on a definition of ‘eligible superannuation plan’, which specifies the types of superannuation and retirement income arrangements that are covered 23 and</td>
</tr>
<tr>
<td>•</td>
<td>one of these types of eligible superannuation plans, is a ‘superannuation fund within the meaning of the [Superannuation Industry (Supervision) Act 1993]’, which covers public sector superannuation schemes established under Commonwealth and state/territory government laws that provide for the payment of superannuation, retirement or death benefits 24</td>
</tr>
</tbody>
</table>

Several terms, such as ‘associate deferred pension 25’ and ‘associate immediate pension 26’ are defined according to the existing terminology of the Judges’ Pensions Act, which defines payments to retired judges as ‘pensions’.

Item 30 of Schedule 1 of the Bill inserts proposed section 4AD into the Judges’ Pensions Act to provide the basis for calculating the qualifying service days of a person who has served as a judge. This calculation is required to determine the ‘accrued pension factor’—the amount of pension benefit that has accrued to the Judge at the time of the family law split.

Item 39 of Schedule 1 of the Bill inserts the substantive provisions of the amendments proposed by the Bill to provide the arrangements for applications to be made to the Secretary of the Department

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21. Under the Family Law Act 1975, the term ‘superannuation interest’ is defined as ‘an interest that a person has as a member of an eligible superannuation plan, but does not include a reversionary interest’ (section 90MD).
22. Family Law Act 1975, sections 90MH and 90MHA.
23. Family Law Act 1975, section 90MD.
25. Inserted by item 3 of Schedule 1 of the Bill.
26. Inserted by item 4 of Schedule 1 of the Bill.

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of Finance and Deregulation for the splitting of a judge or retired judge’s pension. The Secretary does not decide whether a pension is to be split – this decision is made by the separating parties or the relevant court. The Secretary is merely required to implement the arrangements set out in a splitting agreement or court order. The amendments inserted by item 39 include arrangements relating to the calculation of the value of the split pension where a judge has retired and is yet to retire, and cover the approach to be taken in a number of possible circumstances, including when more than one former spouse of a judge is permanently incapacitated.

Under proposed sections 17AA and 17AB of the Judges’ Pension Act, a pension is payable to the former spouse(s) from the time of the split and the earliest of the following dates:

- when the Secretary of the Department of Finance and Deregulation is satisfied that the former spouse has become permanently incapacitated
- on request to the Secretary when the former spouse is aged 60 or over and
- when the former spouse reaches age 65.

These payment conditions are broadly similar to the general ‘conditions of release’ that apply to superannuation.

Proposed section 17AJ of Judges’ Pension Act provides that the Commonwealth is liable to pay compensation to a person if the operation of proposed sections 17AA to 17AH, or the Pension Orders that the Minister may make under proposed section 17AI, would result in an acquisition of property otherwise than on just terms. Proposed subsection 17AJ(2) provides that, if the Commonwealth and the person do not agree on the amount of compensation, the person may institute proceedings in the Federal Court of Australia. This is a standard type of provision that is designed to preserve the law from a challenge based on section 51(xxxi) of the Constitution, which provides that Parliament has power to make laws with respect to ‘the acquisition of property on just terms from any state or person for any purpose in respect of which the Parliament has power to make laws’.

Schedule 2—Amendment of the Governor-General Act 1974

Items 1 to 23 of Schedule 2 of the Bill insert new definitions into existing subsection 2A(2) of the Governor-General Act 1974 that are necessarily to facilitate the splitting of a Governor-General’s pension. Several definitions relating to eligibility and procedural arrangements refer to terms defined in the Family Law Act. Several other terms, such as ‘associate deferred allowance’ and ‘associate immediate allowance’ are defined according to the existing terminology of the

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27. For example, equivalent provisions are: section 300 of the Carbon Credits (Carbon Farming Initiative) Act 2011; subsections 68(2) and (3) of the Tertiary Education Quality and Standards Agency Act 2011; and section 152ELD of the Competition and Consumer Act 2010.
28. Inserted by item 3 of Schedule 2 of the Bill.
29. Inserted by item 4 of Schedule 2 of the Bill.

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Governor-General Act, which define payments to retired Governors-General or their spouses as ‘allowances’.

Item 26 of Schedule 2 of the Bill inserts the substantive provisions of the amendments proposed by the Bill to provide the arrangements for applications to be made to the Secretary of the Department of Finance and Deregulation for the splitting of a Governor-General’s, or former Governor-General’s, pension. The Secretary does not decide whether a pension is to be split – this decision is made by the separating parties or the relevant court. The Secretary is merely required to implement the arrangements set out in a splitting agreement or court order. The amendments inserted by item 26 include arrangements relating to the calculation of the value of the split pension where the Governor-General has retired and is yet to retire, and cover the approach to be taken in a number of possible circumstances, including when more than one former spouse is permanently incapacitated.

Under proposed sections 4AB and 4AC of the Governor-General Act, a pension is payable to the former spouse(s) from the time of the split and the earliest of the following dates:

- when the Secretary of the Department of Finance and Deregulation is satisfied that the former spouse has become permanently incapacitated
- on request to the Secretary when the former spouse is aged 60 or over and
- when the former spouse reaches age 65.

As noted above, these payment conditions are broadly similar to the general ‘conditions of release’ that apply to superannuation.

Proposed section 4AI of Governor-General Act provides that the Commonwealth is liable to pay compensation to a person if the operation of proposed sections 4AB to 4AG, or the Allowance Orders that the Minister may make under proposed section 4AH, would result in an acquisition of property otherwise than on just terms. Proposed subsection 4AI(2) provides that, if the Commonwealth and the person do not agree on the amount of compensation, the person may institute proceedings in the Federal Court of Australia. This is a standard type of provision that is designed to preserve the law from a challenge based on section 51(xxxi) of the Constitution, which provides that Parliament has power to make laws with respect to ‘the acquisition of property on just terms from any state or person for any purpose in respect of which the Parliament has power to make laws’.

Concluding comments

Under current arrangements, the spouse of a current or former federal judge or Governor-General can be disadvantaged in the event of a relationship breakdown because retirement payments for the judge/Governor-General are not recognised as ‘property’ in family law. The Bill seeks to address this

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30. For example, equivalent provisions are: section 300 of the Carbon Credits (Carbon Farming Initiative) Act 2011; subsections 68(2) and (3) of the Tertiary Education Quality and Standards Agency Act 2011; and section 152ELD of the Competition and Consumer Act 2010.

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disadvantage to make such payments part of any property settlement in the same manner as occurs under family law and sets out the processes under which a retirement income interest can be split between the parties.

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