

Mr Mark Huber  
Re: Justice Miscellaneous (Increasing Judicial Retirement Age) Bill 2021  
Strategic Legislation and Policy  
Department of Justice  
GPO Box 825  
HOBART Tas 7001  
By email: [legislation.development@justice.tas.gov.au](mailto:legislation.development@justice.tas.gov.au)

Bill Rowlings OAM

19 February 2021

Comment on the Justice Miscellaneous (Increasing Judicial Retirement Age) Bill 2021

Thank you for inviting a submission to the Department of Justice on such important issues. Please note that this is a submission by a private individual who is a 20-year researcher in the field.

Age of judges

I support a number of submissions two years ago to a similar inquiry in the Northern Territory: the full set of submissions would help inform the Department of Justice and the Tasmanian Parliament's decisions on this Bill. The submissions, and the report, are available at:

<https://parliament.nt.gov.au/committees/previous/EPSC/73-2018>

In particular, in the NT inquiry into raising the upper limit for judges to 72, a submission by the Criminal Lawyers Association of the NT, was apposite. In their submission, they described a major problem simply:

*Changes to judicial tenure risks the appearance of interference with judicial independence if they apply to sitting judges.*

*The Bill in its current form does just that. The community has not been provided with any justification for the increase in retirement age which is concerning. If the change has been endorsed or prompted by sitting members of the bench (or other affected incumbents) that reveals an inelegant blurring of the doctrine of separation of powers and responsible government.<sup>1</sup>*

*If the purpose, or the underlying reason of the increase in age of retirement is to 'save money' by deferring costs associated with paying Supreme Court Justices their pension upon retirement, then such thinking is fundamentally flawed. A deferment of payment is not a saving, nor is there a guarantee those entitled to their pension will sit to the age of retirement. Nor does such thinking seek to address workloads or pressure of Court. The real solution is increasing the number of judges rather than the age to which they can sit.*

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<sup>1</sup> Indeed, it is concerning that the kind of endorsement and prompting highlighted in the NT seems to be happening in Tasmania – see comments attributed to Chief Justice Blow in *The Mercury* of 3 February 2021.

*To avoid this perception of bias any increase in the retirement age should only apply to future appointments and not to any current sitting judge. The same consideration must apply to independent statutory office holders such as the DPP and Solicitor General.*

### **Problems of refreshing-diversifying the bench**

If the new law raising the age limit was to apply to current judges, it would effectively stagnate the current composition for the equivalent of 21 years (7 judges x 3 years each). While there would be change, there would be none for three years from now; effectively there would be a two-decade delay in total turnover.

Adopting such an approach would be a clear signal from the government that it chooses the status quo to apply on the bench of the Tasmanian Supreme Court. I believe that approach is sub-optimal. I believe no major political party would see that as a desired outcome.

It would be far preferable to make the new law apply to appointments of any new judges from the date of enactment, so that a round of “refreshing” the gender diversity, age and multicultural background of Tasmania’s senior judges could occur as soon as possible.

The reason is that there’s an urgent need Australia-wide to redress historic imbalances in the composition of Supreme Court benches and of other judicial appointments, for reasons which include imbalance and misogyny.

*“... there are very few judges from minority backgrounds in all courts across Australia. Out of the 927 judges around the country, only two are of an Indigenous background, two are openly gay, none have a disability and 17 are Muslim, Buddhist or Hindu. The majority grew up speaking English. Seventy-two per cent of judges in the Federal Court, 73 per cent in the Supreme Court of Victoria and 76 per cent in the Supreme Court of New South Wales are male.”<sup>2</sup>*

To which the retired, noted Australian and honoured international jurist, Michael Kirby, replied:

*I agree that there is a need to increase diversity among judges in Australia. In my law school classes back in the 1950s only about 4% were women and non-white (Caucasian) students were roughly the same percentage.*

*...the issue does not only concern the judiciary but also magistrates, senior counsel, law firm partners and summer clerkships. ...your views....should be sent on to Federal, State and Territory Attorneys-General for their consideration when making judicial appointments, at every level.<sup>3</sup>*

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<sup>2</sup> Alexander Logan of Forrest ACT, in a letter to the editor of the *Canberra Times* 9 December 2020.

<https://www.cla.asn.au/News/to-alex-from-michael-about-the-sameness-of-judges/>

<sup>3</sup> *ibid*

The current photos of the judges on the website of the Supreme Court of Tasmania indicate that the female percentage may have risen to 14%.<sup>4</sup> However, the names do not indicate multicultural diversity. To delay each new appointment by three years, for a cumulative total of 20-plus years, does not meet the sense of urgency with which the anomaly(ies) should be corrected, in my opinion. It certainly does not meet the need for and expectation of more rapid change by young lawyers.

**RECOMMENDATION: For the reasons stated above, that any legislated change in the mandatory retiring age for judges does not (repeat, not) apply to the current sitting judges of the Supreme Court of Tasmania, but applies to future appointments.**

**Potential problems of dementia, cognitive impairment, etc:**

Civil Liberties Australia (CLA), in its submission to the NT inquiry, addressed the problem of possible decline as judges age, sometimes called senility and sometimes associated with dementia. There is no direct correlation between age and these issues: however, CLA believed it was prudent for jurisdictions to introduce better assessment mechanisms now that more is known about these issues. There is potential for a judicial officer to be making in-trial decisions as well as deciding judgements and handing down sentences while in early stages of dementia or cognitive impairment, particularly as they sit until age 75.

It would be tragic – and there is currently no correction mechanism – if such impairment were discovered 1-10 years later to have been likely to have affected the judge's ability to fully and fairly carry out their role...and hence their lack of full capacity to have had a major effect on a criminal's conviction and sentencing and/or on civil cases decided.

This area is undoubtedly a “sleeper” in the Australian legal system currently. Dementia is forecast by the Australian Institute of Health and Welfare (AIHW) to rise substantially throughout Australia by 2030. (Dementia Australia – DA – has a slightly lower projected increase).

*How common is dementia?*

*The exact number of people with dementia in Australia is currently not known. It is estimated that in 2020 there are between 400,000 and 459,000 Australians with dementia (AIHW 2018; DA 2020), with Alzheimer's disease accounting for up to 70% of diagnosed cases (DA 2018).*

*It is expected that the continued growth and ageing of Australia's population will lead to an increase in the number of people with dementia over time, as the condition is increasingly common with advancing age and primarily affects older people. The number of people with dementia is expected to increase to between 550,000 (AIHW 2018) and 590,000 by 2030 (DA 2020).*

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<sup>4</sup> It is noticeable that the photo of the only female judge among the seven is shown in black and white in the series of individual photos. 20210209 1515 hours <https://www.supremecourt.tas.gov.au/the-court/judges/current-judges/>  
See Appendix.

*Mild cognitive impairment (MCI) is a condition that causes a slight but noticeable decline in memory or other thinking skills, also known as cognitive abilities.<sup>5</sup>*

I believe it is time for those responsible for the legal and judicial systems in Australia to introduce appropriate tests for the benefit of people appearing before judicial officers, and for the judges themselves, to ensure there are no health-related miscarriages. I note that there are tests for motor vehicle drivers as they age, and constant testing for people like pilots who carry the responsibility of the lives of others in their hands.

There is a research entity, the Wicking Centre, *in Tasmania* equipped to undertake the research:

***“What is the average lifespan of a person with dementia from onset?”***

*This is a difficult question to answer.*

*Firstly, evidence suggests that **the pathology related to dementia begins an average of 20 years prior to any clinical symptoms** (e.g. changes in memory, attention etc.).*

*We are not at the stage yet where we are able to determine who might have the very earliest stages. Life expectancy also depends on the disease that is causing dementia. Alzheimer’s disease, the most common cause, can result in a lifespan anywhere from 2-20 years following diagnosis of dementia, with an average of around 8 years. Life expectancy also depends on the person’s overall health, as well as the age and stage at which they were diagnosed. Other forms of dementia, and those that affect younger people, tend to be more aggressive, meaning that people with these may have a shorter life expectancy. There is no simple answer to life expectancy, every person with dementia is different.*

– from the inaugural Wicking Dementia Research and Education Centre (UTAS) Seminar  
Tuesday 22 September 2020. <https://www.utas.edu.au/wicking>

## **RECOMMENDATIONS:**

**That the Tasmanian Parliament takes the opportunity of the ‘Judges-Ages’  
Bill to commission world-leading research from its own institute, Wicking at UTAS.**

**That the Parliament includes in the current Bill a requirement on judges of the Supreme Court of Tasmania that they cooperate in a formal study into the effects of cognitive impairment, dementia, senility and the like on judges aged from 60 through retirement to death.**

### **Need for a judicial commission**

Immediately after raising the age of retirement of judges in 2019, the NT government began the processes to introduce a Judicial Commission for the first time as a robust mechanism to tackle issues associated with judging after it raised the age limit on its judges. The NT Judicial Commission began operating in 2020 after a parliamentary inquiry process.

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<sup>5</sup> <https://www.aihw.gov.au/reports/australias-health/australias-health-2020-data-insights/contents/summary>  
DA Helpsheet-Other Information 01-Mild Cognitive Impairment <https://www.dementia.org.au>

Australian Attorney-General Christian Porter has signalled recently he is planning a federal judicial commission.<sup>6</sup> As quoted in the February 2021 article in *The Australian*, he said: “I think the NSW judicial commission is a relatively sound model and a body that’s operated in practice in a way that appears efficient and sensible”.<sup>7</sup>

Without the options a commission can provide, a judge can be removed only on the support of both Houses of Parliament, and recommendation to the Governor to terminate the person’s services. This process takes too long, is clumsy and would almost certainly be unnecessarily embarrassing for all concerned.

**RECOMMENDATION: I strongly recommend the Tasmanian government introduces, as soon as possible, a Judicial Commission for Tasmania.**

*Illustration: Excerpt from The Mercury, Hobart, 2021-02-03:*

**Comments during the lead-up to the parliamentary vote:**

It is unusual for a chief judge to make comments on proposed legislation (see screengrab from *The Mercury*).



It is inexplicable that a chief judge would comment that it seemed “inevitable that the recruitment and retention of talented judges would become more and more difficult”. There is no evidence that the recruitment and retention of judges throughout Australia has become any more difficult over the past 50 years.

On the contrary, there is now a much more diverse field to draw on, and more females in particular. Usually each generation is better educated than the previous one: that’s the nature

**06 NEWS**

# Push to extend judges' age limit

**AMBER WILSON**

LEGISLATION may soon be introduced to increase the mandatory retirement age for judges and magistrates, from 72 to 75.

Chief Justice Alan Blow, who recently turned 71, raised concerns late last year about an “inevitable” judicial talent drain in Tasmania.

On Tuesday, Attorney-General Elise Archer announced the state government was seeking public comment on the planned legislation, which would increase the judicial retirement age in line with some other jurisdictions.

Ms Archer said doing so would help retain “continuity and valuable institutional knowledge”, aid in tackling COVID-19-caused backlogs, and recognise Tasmanians were now living and working longer.

Chief Justice Blow previously said that Tasmania’s judges faced a number of problems including heavy workloads caused by case backlogs and a spike in the need to process bail applications, as well as issues surrounding superannuation.

He said it seemed “inevi-



**Chief Justice Alan Blow**

table that recruitment and retention of talented judges would become more and more difficult”, suggesting the state government raise the retirement age to 75 in a bid to “alleviate recruitment problems” as well as enable current judges to make better provision for their retirements.

The proposed legislation follows recent news that three acting judges – David Porter, Shane Marshall and Brian Martin – had been reappointed to the Supreme Court for a further two years in a bid to reduce court backlogs.

The state government also plans to appoint a seventh judge this year.

A public consultation period for the Increasing Judicial Retirement Age Bill is open until February 19.

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**Chemist** at Rosny.

**CAMERON**

**TWO new Warehouse launch in next week increases region to**

**A store on Monday formerly (retailers) Bunnings.**

**The fol Hobart on 350 Elizabeth Fitness gym be home!**

<sup>6</sup> ‘Law closing in on judges over conduct’, *The Australian*, Nicola Bercovic, 12 Feb 2021

<sup>7</sup> The NT Judicial Commission was based on the NSW model.

of human progress. Tasmania has all of Australia to draw on if it wishes: chief judge Alan Blow himself came originally from NSW. In the current rapid transition to a technological and social media economy, it is highly likely that a younger generation of judges would be more well-equipped to lead the law in Tasmania into a new electronic age.

### **‘Talented’:**

“Talented” is not a word customarily used with judges: there is no way of proving a judge is “talented” or indeed “un-talented”, simply because there are no public measures of judging or judgeship. “Talented” is a self-endowed description without any scientific rigour.

In terms of rigour, it should be noted that the only reason – apart from self-selected “talent” – given to the Parliament for increasing the retirement age of judges is because “75 is the new 70”. Nowhere has this been scientifically argued and proven in relation to the judges of the Supreme Court of Tasmania. There is a distinct danger this Bill could be passed on the basis of a slogan.

### **‘Enable current judges to make better provision for their retirement’:**

I hope that the Parliament’s proposal to raise the age of retirement to 75 is not for the purpose of “enabl(ing) current judges to make better provision for their retirement”, a comment contained in the article, in quotes.

Current judges have had ample time to make provision for their retirement. Most of them have had decades, either since becoming barristers 30 or more years earlier, or when in public service.

I comment on the chief judge’s public comments and public relations activities because traditionally judicial reticence in commenting publicly has been balanced against the impermissibility of people being able to criticise judges.

### **Critique:**

Judges might be made to appear “talented” for a number of reasons, which all involve the effective silencing of those who could/would critique judicial behaviour. They include:

1. People with knowledge of the subject area, usually barristers and solicitors, are frequently too fearful of making any comment that could possibly in the slightest way be seen to be critical of a judge, or judges (or magistrates), before whom they may have to appear. Hence bad judging is likely going unremarked and uncorrected. This syndrome is usually pronounced in smaller jurisdictions, as Tasmania is.
2. No established mechanism or group external (to the legal profession) of commentators who are able to seriously, studiously and regularly critique the work of the judges/magistrates of Tasmania (or the DPP, or the police). That statement is probably true across Australia. There used to be a Courts Reporter on the daily newspaper(s) who would report cases and also



comment astutely on them and how they were handled by the judiciary, including alerting the public to trends. There is now no such experienced person solely to cover the courts, the judiciary, the barristers and solicitors, the DPP and police, and the criminal doings.

3. Excessive powers of an individual judge to decide, for him or herself, that something – public comment, for example – is in contempt of court acts to restrict legitimate comment about judges and judging. Anything written broadly about the court system or groupings of judicial decisions also risks the ire of the court, for "scandalising" the court in general.
4. The very slowness of the legal/judicial process severely restricts the practical and timely ability to comment on the quality of judges, among other state actors. For example, the work of the chief judge before Alan Blow, judge Crawford, is still unable to be critiqued because matters are still before the courts 11 years after an appeal on which he sat.
5. It has been said that lawyers are publicly perceived as being "greedy, untrustworthy and self-interested"<sup>8</sup>. It is to be hoped that the recent judicial foray into the media hasn't harmed the reputation of Tasmania's judges.

If judges of the Supreme Court of Tasmania are to engage in debate and public relations activities in the media and publicly over their tenure, pay and retirement provisions, then the rights of the public to criticise judges fairly and sensibly – without judicial recourse to instant punishment – should be expanded considerably in law, so that citizens can comment equally with judges about important aspects of legal matters in Tasmania...and about justice in general.

## **Appendix A: Sexism and misogyny**

Sexism in the legal profession in Tasmania is notorious, and has been for years. A Law Society of Tasmania committee in 2019 produced a submission on the "Nature and prevalence of sexual harassment in the Tasmanian Legal Profession", made to the Australian Human Rights Commission:

[https://humanrights.gov.au/sites/default/files/2019-07/submission\\_358\\_-\\_eeo\\_committee\\_law\\_society\\_tasmania.pdf](https://humanrights.gov.au/sites/default/files/2019-07/submission_358_-_eeo_committee_law_society_tasmania.pdf)

The Law Council of Australia's National Attrition and Re-engagement Survey report in 2014 found:

*"Whether conscious or unconscious, the role of favouritism, personal relationships and alliances in the promotion process was seen to potentially favour male candidates in workplaces led by fellow men."*

Cultural barriers and favoritism are not usually easily demonstrated. But the Supreme Court of Tasmania's website has for a long time downplayed the importance of the sole female judge. Not

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<sup>8</sup> "The first thing that comes to mind when addressing the topic of lawyers and reputation is the plethora of acerbic lawyer jokes which paint us as greedy, untrustworthy and self-interested." Lecture to USQ Law School 17 March 2017 *Reputation, Who Cares?* President Fleur Kingham of the Land Court of Queensland.

only has she alone been shown in black and white, but her face occupies about one-third less space than the faces of other judges, as if she is somehow diminished, and not an equally prominent person. Here are the photos on the court's website in February 2021 – they have been shown this way for many, many months.



*Individual judges shown as a group: Screenshot 10 Feb 2021*

In just a few minutes the Supreme Court could have converted all the full-colour judge photos in the individual photos to black and white for display on the website, so that everyone would be portrayed equally...until an equally-sized, colour photograph of the female judge became available. But the court did not do that, and has left the inequality to languish for a long time (it was still the same at time of writing, on 19 February 2021).

In passing, it is noted that the current extension of age proposed for judges would benefit six men, and just one woman.

#### **RECOMMENDATION:**

**That the Supreme Court of Tasmania website be kept equally up to date, and that it avoids obvious bias in its presentation.**

ENDS