



19 February 2021

Department of Justice
GPO 825
Hobart TAS 7001
attn: Brooke Craven

via email: HaveYourSay@justice.tas.gov.au

To Brooke Craven,

Re: *Justice Miscellaneous (Increasing Judicial Retirement Age) Bill 2020*

The Tasmanian Aboriginal Legal Service (TALS) welcomes the opportunity to provide comment on the *Justice Miscellaneous (Increasing Judicial Retirement Age) Bill 2020*.¹

TALS is a community legal centre that specialises in criminal, civil and family law matters for Aboriginal people in Tasmania. We are a member-based, independent, not-for-profit and incorporated organisation that advocates for law reform. Our goal is to halve Aboriginal Tasmanians' rate of negative contact with the justice system in a decade.

We agree with his Honour Chief Justice Blow in the *Supreme Court of Tasmania Annual Report 2019-20* that superannuation arrangements for judicial officers should be improved. However, we strongly believe that an appropriate pension on retirement should not be limited to judicial officers but should be guaranteed for all Australians. In the event that there is no political appetite to enshrine appropriate pensions for all, including judicial officers, then we support increasing the mandatory retirement age of judges and Magistrates from 72 to 75 in Tasmania on the basis that it will ensure relative age equality, retain valuable institutional knowledge for a longer period of time and increase the courts ability to operate effectively.

- ***Jurisdictional Differences***

Under section 72 of the Australian Constitution, High Court judges must retire upon turning 70 years of age. The Commonwealth Parliament has also legislated a mandatory retirement age of 70 for other federal courts.² However, the mandatory retirement age of 70 set out in the Australian Constitution does not apply to State and territory courts, providing legislative flexibility in the setting of judicial retirement ages. Currently, Tasmania imposes a retirement age of 72 on both judges and Magistrates,³ whilst Victoria, Western Australia, South Australia,

¹ We would like to acknowledge Benedict Bartl and Katherine Sproule who assisted in the preparation of this response.

² See, for example, Schedule 1, clause 1(4) of the *Federal Circuit Court of Australia Act 1999* (Cth).

³ Section 6A(1) of the *Supreme Court Act 1887* (Tas); section 8(2) of the *Magistrates Court Act 1987* (Tas).

Queensland, the Australian Capital Territory and the Northern Territory have 70 as the mandatory retirement age.⁴ In 2018, NSW increased the mandatory retirement age from 72 to 75 years of age.⁵

- ***Advantages of increasing retirement age***

The main advantages of increasing the retirement age are to retain experience and skills on the bench, reflect broader societal trends of living and working longer and ensuring age equality. Increasing the mandatory retirement age for the judiciary may also assist in the breaking down of the stereotype that older workers are not suitable employees.

- ***Age Discrimination?***

Both the Commonwealth *Age Discrimination Act 2004* and the Tasmanian *Anti-Discrimination Act 1998* prohibit discrimination on the basis of age.⁶ The Commonwealth Act maintains an exemption where the person “is unable to carry out the inherent requirements of the particular employment because of his or her age”⁷ whereas in Tasmania the exemption is based on “voluntary or compulsory retirement”.⁸ A review of the research suggests that the mandatory retirement age for judicial officers was in part enacted “to prevent the process of ageing and mental decline from inhibiting the judicial function”.⁹ However, in the article *Judges and Retirement Ages*, the author reviews the medical evidence on cognitive-decline in older age concluding:¹⁰

Age-related cognitive decline is a complex area of study, and it is risky to draw any assumptions on the link between age and declining capacity. Indeed, based on a study of cognitive information processing capacities in older adults, Ramskar et al have concluded that cognitive decline is no more than a myth: while older adults may take longer to complete certain tasks, this is because they have more information to process, and is not due to any issues of declining ability. These findings increasingly challenge our stereotypical preconceptions of old age, and the assumed correlation between old age and mental capacity. [footnotes removed]

Whilst we strongly support employment based on an employee’s capacity to carry out the inherent requirements of their job rather than their age, this has to be weighed against the Australian Constitution’s requirement that Chapter III courts maintain independence and impartiality. Whilst it is arguable that judges and magistrates are able to be reappointed as acting judges after their retirement, and that this may provide some protection against appointment where there is clear cognitive decline, it is also recognised that this may impinge on the appearance of judicial independence and impartiality as Justice Kirby observed in *Forge v Australian Securities and Investment Commission*.¹¹

⁴ See, section 77 of the *Constitution Act 1975* (Vic); section 12(a) of the *Magistrates’ Court Act 1989* (Vic); section 3(1) of the *Judges’ Retirement Act 1937* (WA); Schedule 1, clause 11(1) of the *Magistrates Court Act 2004* (WA); section 13A(1) of the *Supreme Court Act 1935* (SA); section 9(1)(c) of the *Magistrates Act 1983* (SA); section 21 of the *Supreme Court of Queensland Act 1991* (Qld); section 42(d) of the *Magistrates Act 1991* (Qld); section 4(3) of the *Supreme Court Act 1933* (ACT); section 7D of the *Magistrates Court Act 1930* (ACT); section 38 of the *Supreme Court Act 1979* (NT); section 7 of the *Magistrates Act 1977* (NT).

⁵ Sections 44(1) and (3) of the *Judicial Officers Act 1986* (NSW).

⁶ Section 18 of the *Age Discrimination Act 2004* (Cth).

⁷ Section 18(4) of the *Age Discrimination Act 2004* (Cth).

⁸ Section 35 of the *Anti-Discrimination Act 1998* (Tas).

⁹ Alysia Blackham, *Judges and Retirement Ages* (2016) 39(3) *Melbourne University Law Review* 738 at 759.

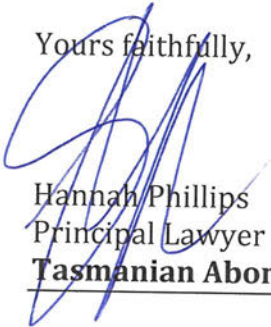
¹⁰ Alysia Blackham, *Judges and Retirement Ages* (2016) 39(3) *Melbourne University Law Review* 738 at 759-760.

¹¹ [2006] HCA 44 at para. 221.

In summary, we support increasing the mandatory retirement age of judges and magistrates from 72 to 75 in Tasmania. Whilst mandating retirement at 75 years of age is relatively arbitrary in our opinion it strikes the right balance between a judicial officers capacity to carry out the inherent requirements of the job and the currently available medical literature.

If you have any queries, or would like to discuss our submission in greater detail, please do not hesitate to contact us.

Yours faithfully,

A handwritten signature in blue ink, appearing to read 'Hannah Phillips', is written over the typed name and title.

Hannah Phillips
Principal Lawyer
Tasmanian Aboriginal Legal Service
