18th February 2021

Department of Justice
Office of the Secretary
GPO Box 825
Hobart TAS 7001

Re: **Justice Miscellaneous (Increasing Judicial Retirement Age) Bill 2021**

As a former DPP I do not want my email address published please. Otherwise I agree to the publication of this submission in relation to the abovenamed Bill.

Although the Department has invited submissions, and although it is said the Government "intends" to proceed with this Bill, I am unaware of the motivation for doing so other than from the Chief Justice in the last two of his Annual Reports. I presume therefore that Government has been persuaded by his arguments as there presented. As I believe the Bill is most unwise, I will need to primarily address those arguments.

In doing so it is inevitable that attention is paid to the immediate practical effect of enactment this year which would be of extending Blow CJ's Chief Justiceship for a further three years after this year. It is right that such attention be paid as it seems to be that the shadow of his imminent seventy –second birthday, and presently compulsory retirement, this December has inspired his advocacy of this extension. He would appear to be the most immediate beneficiary of such an extension which would allow his retention of the most prestigious and highly-paid judicial office in this State. It is thus only appropriate that the proposal be examined not only in light of his arguments as raised in the Annual Reports but also in light of his performance as Chief Justice, as it seems inherent in his proposal that he believes there is no-one presently available better suited and that his performance merits extension.

Statistics in Annual Reports 2004 - 2019

Disposal of Criminal Cases

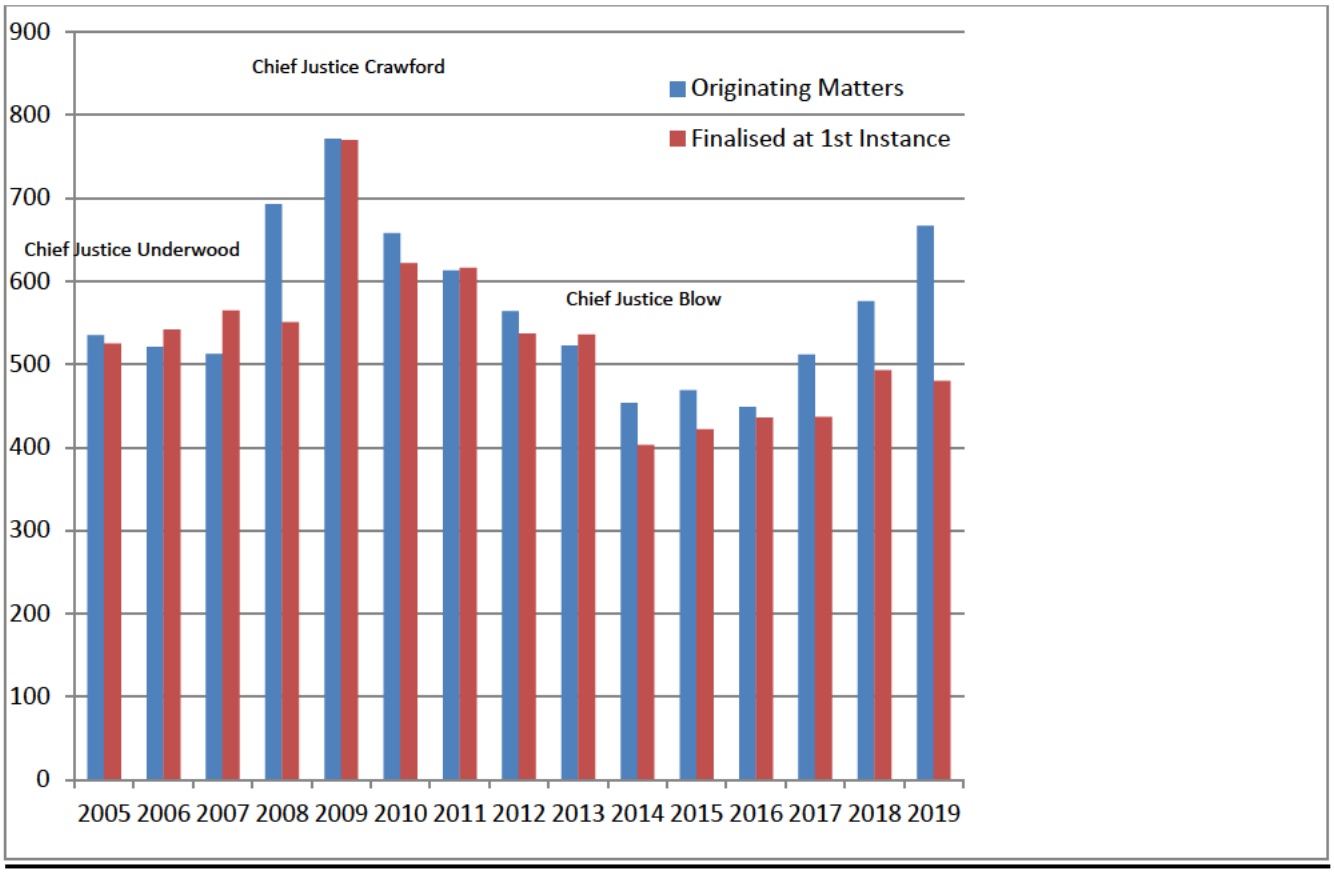
One measure of the Court's effectiveness and productivity under Chief Justice Blow is in the disposal of cases. The Annual Report required of the Chief Justice gives this measure. The reports available on the Court's homepage commence with that of the 2004-2005 year and it, like all subsequent years, reports the number of originating matters and the number of matters finalised at first instance in the Court's criminal jurisdiction.

Those numbers are:

Year	Originating matters	Finalised at first instance
2004-2005	535	525
2005-2006	521	542
2006-2007	513	565
2007-2008	693	551
2008-2009	772	770
2009-2010	658	622
2010-2011	613	616
2011-2012	564	537
2012-2013	523	536

Blow J appointed as Chief Justice 8th April 2013

2013-2014	454	403
2014-2015	469	422
2015-2016	449	436
2016-2017	512	437
2017-2018	576	493
2018-2019	667	480
2019-2020	647	596



Analysis of performance

Although 2019-2020 shows an apparent improvement, it was an unusual year because of the pandemic and, as Blow CJ himself in his Annual Report stated:

> **As a result of the pandemic**, the number of new cases dropped, and the number of finalisations increased. The clearance rate went up from 72.0% in 2018/19 to 92.1% in 2019/20. (Emphasis added.)

It is therefore appropriate to exclude that year from analysis as the apparent improved performance was due to the pandemic, not to better management or improved methods.

The total number of originating matters from 2004-2005 to 2012-2013 was 5392, so the average per year for the nine years was 600[1]. The total of finalisations at first instance was 5264, so the average was 585. The average difference of 15 matters per annum is not significant.

[1] All numbers are rounded up or down to the nearest whole number

Since the retirement of Crawford CJ and the elevation of Blow CJ in 2013, excluding the last year, the total of originating matters was 3127, an average over those six years of 521. The finalisations totalled 2671, an average of 445. The difference of 76 matters per annum *is* significant.

There have not been more originating matters since Blow CJ's appointment; there have been on average significantly fewer. But the finalisations have been starkly fewer, 445 compared to 585 on average per annum

Reasons Offered for the Backlog

The disparity between originating matters and finalisations at first instance inevitably led to a growing backlog of cases. In his Annual Reports Blow CJ has offered various reasons for this:

2013 - 2014 a particularly lengthy double murder in 2013-2014;

2014 - 2015 the same lengthy case;

2015 - 2016 an "increase in length and complexity" of trials (not specified and without supporting data to compare other years), an increase in bail appeals, and a "gradual increase in workload"(in fact the number of initiations had fallen from the previous year); and

2016 - 2017 "it was necessary for the judges to spend more and more of their time dealing with appeals and applications by remand prisoners seeking bail" .

Four part-time acting Judges were sworn in on 27 February 2017 and a fifth followed on 10 April 2017 "with a view to relieving the backlog problem." In the same Report the lack of judicial pension was complained of and His Honour said:

> It seems inevitable that the recruitment and retention of talented judges will become more and more difficult as a result of the judges' increasing workload and nature of the judicial superannuation arrangements.

Exactly how the claimed increasing workload was being measured was unsaid; there had been an increase in bail matters, noted in the 2016 - 2017 Annual Report as up from 110 in

2014/15, to 244 in 2015/16, and to 304 in 2016/17. It was also noted of the bail appeals and applications that "Most take 30 to 60 minutes" of Court time, plus reading time. I do not know the source of the claim that the majority take between 30 to 60 minutes to hear. In common with a range of measurements one would expect a modern institution concerned with productivity to make, if a time measurement has been made it has not been made publicly available. From my experience I seriously, respectfully, doubt most such applications take over thirty minutes.

Nevertheless, bail applications and appeals continue to grow in number each year. It is surprising that there was been, at least publicly stated, no attention given to finding causes and solutions to this growth. It seems at least as worthy of constructive attention as retirement ages and judicial pensions or the lack thereof.

In the same (2016-2017) report it was said the State DPP was not able to get enough trials ready and judicial time was wasted when there had been sufficient judicial resources to deal with all cases the Commonwealth and State DsPP had initiated.

In 2017 - 2018 the Chief Justice said:

> During the reporting year, the Court had sufficient judicial resources to deal with all the criminal trials that the State and Commonwealth Directors of Public Prosecutions were able to prepare for trial. It is fair to say that the Court could have made more use of the acting judges and disposed of more criminal trials if both the Tasmanian Director of Public Prosecutions and the Legal Aid Commission had had greater resources and had therefore been able to bring more matters to trial.

In other words the Court was able to do more, even though a seventh Judge and the retention of part –time Judges would continue to be necessary. The same complaint of lack of a pension was made and it was said:

> It seems inevitable that the recruitment and retention of talented judges will become more and more difficult as a result of the judges' increasing workload and the nature of the judicial superannuation arrangements.

In 2018 - 2019 it was claimed once again that more matters could have been completed but for the DPP's and TLAC's lack of funding which meant trials could not have been put on. Their Reports show the funding of both bodies was at considerably higher levels than it had been pre-2013 when considerably more matters were brought and completed, and their funding has been increased every year in recent years. It was said that the inclusion of dangerous driving and assault charges where there was neck compression had "substantially contributed to the growth in new cases" and they may well have, although such cases are usually pleas of guilty and where not are not greatly complex or lengthy trials.

The prediction of the difficulty of recruiting and retaining "talented judges" was repeated and for the first time an extension of the retiring age was raised not just as a solution to the predicted problem but as an alternative to paying a pension. It was asserted that:

> Such an increase **would** alleviate recruitment problems, prolong the service of experienced judges, and enable those judges, by working longer, to make better provision for their retirements.(emphasis added)

In the 2019 - 2020 the appointment of a seventh Judge was expected but there was no indication of the fate of the part-time Judges. The Government has subsequently announced three part-time judges will continue. The complaint of the absence of judicial pension was repeated but the Chief Justice recognised that it was unlikely more money would be spent in these times:

> However one step that the Government could consider is raising the judicial retirement age from 72, perhaps to 75. Such an increase would alleviate recruitment problems, prolong the service of experienced judges, and enable those judges, by working longer, to make better provision for their retirements.

That is, a repetition of the same three purported benefits (see below) as in the previous year. I will examine each in turn, but first make some further comment about the claim of health-threatening overwork of the Judges which has been made in the last three Annual Reports (usually as a prelude to calling for the appointment of a seventh Judge).

Overwork of Judges and Measures taken by the Chief Justice

There is no doubt the work of Judges can be hard and onerous at times. After hours work is common. There is a high level of responsibility and public scrutiny is present. These however are common features where salaries and benefits are paid at comparable levels to those paid to and conferred on Judges. The majority of lawyers in private practice are self – employed and do not earn anywhere near those levels. Nor do they have the comfort of tenure. Nor do they have a prestige, private plated and fully maintained vehicle provided to them. Only two legal roles in the public sector are paid at the level of puisne Judges and none at the level of the Chief Justice.

The assertion of overwork of the judges appears to be anecdotal and not empirically measured, so far as I am aware. Indeed the empirical measure of matters completed would suggest an opposite conclusion, although of course effort does not always result in productivity.

These are the measures the Chief Justice refers to in Annual Reports as having been taken:

1. "Concentrated" criminal sittings (meaning occasionally criminal sittings will be of longer duration, including holding trials in appeal terms) and, on one day , having seven Judges sitting in crime.
2. Increased usage of s.308 of the *Criminal Code* to remit matters to the Magistrates Court, and
3. More directions hearings.

Measure 1 – "concentrated" criminal sittings:

Cleary these occasional sittings have not had any significant effect on the backlog.

Not until very recently except in the occasional "concentrated" sittings has there been any attention to the practice of requiring all Judges to be in Hobart in Appeal term and performing (or being available for) no other work but appeals. It was announced on the 15th of February 2021 that there will be some trials in appeal term in Launceston and Hobart, but not Burnie. Unless these trials will be with the Judges who were sitting in that very Court immediately preceding that week, this will not affect the current situation whereby Judges

will not allow any trial to be commenced if it cannot be guaranteed to end before Appeal term starts. Frequently, times and days which are allocated for sitting are abandoned because that guarantee cannot be made. Every prosecutor who has appeared toward the end of sittings, particularly outside Hobart, will be familiar with this.

Measure 2 – s.308 *Criminal Code*

The remission of less serious matters to the Magistrates Court under section 308 of the *Criminal Code* is a minor work-transfer benefit to the Supreme Court (although not to the Magistrates' Court) and how often it has been utilised does not appear in a public report. Additional legislation to increase the workload of the Magistrates Court ought not to be considered until an analysis of the use of s.308 has been undertaken and consideration given to the workload of that Court.

Measure 3 – more directions hearings:

Directions hearings are usually an excellent opportunity for one side to grandstand about the failings of the other side in getting a matter to trial. There is no evidence whatsoever that directions hearing promote any added efficiency in case disposal. It is inarguable that they add to the expense of representation for those represented, and they further tax the resources of the DPP. It is odd that on the one hand the Chief Justice begrudges the time taken to deal with bail matters but wants judicial time devoted to further directions hearings

Alternative solutions to the asserted overwork issue:

1. Revise the handling of bail matters:

The time taken to deal with bail matters and the increasing number of such matters needs to be addressed. At least the spectacle of a large and largely pointless remand day list on the first day of sittings has been improved, although whether at a cost of increased non-attendances of remanded accused at times closer to trial has not at least publicly been measured.

2. Revise sitting arrangements:

Judges adhere to antiquated sitting hours, lunch and morning tea breaks and are usually loathe to depart from them. These might reasonably bear review.

There has been no attention to the Supreme Court calendar, which might as well be written in stone for all the change there has been to it in the last few decades. The only two changes I am aware of in that time are the reduction in time allocated to Burnie sittings by a week or so, and the disappearance from the Calendar of mention of the Mid-Year Vacation, which used to be shown. The Vacation still exists, this year it is from the fifth to the nineteenth of July, it is just no longer shown as such. The Easter break is ten days, this year from the second to the twelfth of April. The Recess at the end of the year (the length is always the same) was this year from Monday, 14 December 2020 until Monday, 1 February 2021 inclusive.

Judges also have access to "recreational leave" and generous Sabbatical leave (2021 Information Package, Department of Justice).

In relation to the claims of overwork, it is well to also consider the leave and vacation allocations.

Purported Benefits of Raising the Retirement Age

In his Annual Reports, the Chief Justice claims that raising the retirement age of Supreme Court Judges will have the following benefits:

1. Alleviate recruitment problems,
2. Prolong the service of experienced judges, and
3. Enable judges to make better provision for their retirements.

1. "Such an increase would alleviate recruitment problems…"

These "recruitment problems" of attracting "talented" Judges as a result of overwork and superannuation arrangements were first predicted by the Chief justice in the 2016-2017

Annual Report, and remained a prediction in the next Report but by the last Report were being referred to as a fact which the extension of the retirement age "would" alleviate. In 2017 a new Judge had in fact been recruited.

There is no evidence that the current retirement age deterred any applicants who might otherwise have applied. [redacted]

It is interesting to note that in a major study which had been supported by the Judicial College of Victoria and the Australasian Institute of Judicial Administration and published in the Journal of Judicial Administration[2] it was found that that judicial officers' rates of "moderate" to "extremely severe" depression, anxiety and stress symptoms were dramatically lower than those reported for Australian lawyers, and lower also than those suggested for the Australian general population.

The report said of the study's findings:

> This is consistent with the limited empirical research on judicial stress from the United States, which has collectively suggested that judicial officers experience elevated occupational stress, but <u>their rates of stress and mental ill-health are generally lower than practising lawyers.</u> (Underlining added.)

Acknowledging that the study focussed on the negative side of judicial wellbeing , it said:

> However, the results from the three questions measuring perceived stress and wellbeing provide an initial indication that personal wellbeing and satisfaction were prominent feelings alongside the stress of the role. It is possible that the sources of fulfilment, accomplishment and purpose within judicial work compensate or offset for the sources of stress, providing for a demanding but meaningful professional life.

It was said further study of those aspects was suggested.

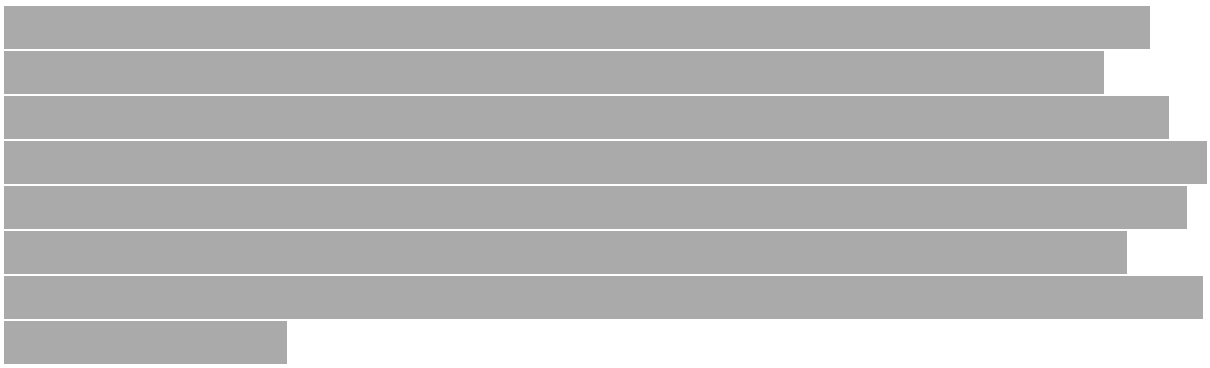
[redacted]

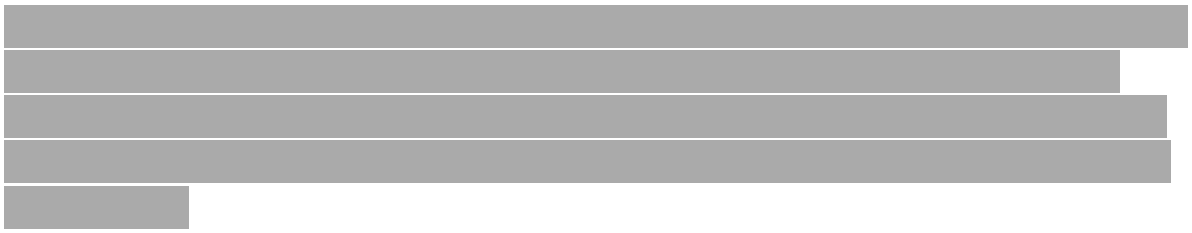
Also likely to be a deterrent is the unsatisfactory nature of the recruitment process. The last such exercise in 2017 is an example. Ever since the calling for expressions of interest has been a feature of the process it has inevitably followed that those locals who applied would have their names become generally known in the legal profession. The lack of security of the

[2] (2019) 28 JJA 141

identities of applicants is itself a disincentive, particularly in light of what then happened in 2017.

However, operatively the Assessment Panel does no more than report as to whether the candidates are suitable for appointment in an "is/is not" way, although its report might contain some comment. It carries out no ranking or comparison of merit, unless there are more than five candidates to consider in which case it reduces the field to five, still not ranking within the five. It strains the meaning of the word to refer to the result, as the Protocol does, as "recommendations".





It is more likely that it is this sort of performance which will create recruitment issues.

2. "(Such an increase would) prolong the service of experienced Judges…"

Self- evidently it might. It might also prolong the service of Judges who have been there already too long, and whose service is of lesser value than would be the refreshment of the Bench by younger Judges. It would prolong the service of those who do not know when to stop or who cannot be persuaded to do so when they ought to. It will almost inevitably

mean that older applicants closer to the end of their usual working lives will be attracted to apply.

Just as with footballers, experience alone should not be sufficient to guarantee a place in the team

3."(Such an increase would) …enable those (experienced) judges, by working longer, to make better provision for their retirements."

One can only wonder how much better provision for retirement "experienced" Judges would need to make. They are appointed after usually very well-renumerated careers. The present Chief Justice is undoubtedly an "experienced" Judge; he was appointed in 2000. With salary, travel allowances and superannuation contributions he would have been paid many millions of dollars while not having to purchase, fuel or maintain a car. Very few people would have been paid so generously in their working lives from which working lives with such generous superannuation provided, nor would they have had that working life with security of tenure and no capital risk.

The Effects of Aging

The physical and mental deterioration which comes to some – not all – people with age and comes to some with greater effect than to others seems to be ignored in the Bill. For instance there is no provision for mental health and acuity examinations for those wishing to go on from 72 years of age - the compulsory retirement age which all current Judges must have expected when appointed - to 75, or for ongoing assessments. The bar for removal for incapacity is very high.

In 2009, a study in Australia by CEPAR found that 8% of those in their 60's had mild cognitive impairment. This increased to 37% for those aged between 70 and 90.[3] Meta-analysis of studies outside Australia found over 60% of dementia cases in high income countries were undetected[4]. Old age is the greatest risk factor for dementia. After the age of 65, the likelihood of being diagnosed with dementia doubles every five years. Dementia prevalence

[3] ARC Centre of Excellence in Population Ageing and Research *Cognitive Ageing and Decline: Insights from Recent Research*, 2018, page 5, Box 2.
[4] Ibid page 7 Box 3.

is relatively low until the age of 70 years, after which prevalence rates increase exponentially. [5]

[5] Deloitte Access Economics 2011, *Dementia across Australia: 2011–2050*, p.14. as cited in *Thinking Ahead Report on the inquiry into dementia: early diagnosis and intervention* House of Representatives Standing Committee on Health and Ageing, June 2013, Canberra

[6]

Civil Proceedings

In his arguments to extend the retirement age, the Chief Justice concentrated on the criminal work of the Court. The Court also has functions in civil law and remains, of course, an important forum to resolve civil disputes. Here an aging judiciary is even more undesirable, as disputes increasingly will concern, and will involve proof by, advanced technology. Some of the Judges now in sight of the present retirement age have kept at least somewhat abreast with advances, but others have not shown the interest or capacity to do so.

The work of the Court on the Civil side has been characterized by staleness and unwillingness to wrestle with change. Other Courts can and do offer a more streamlined and relevant service for litigants [redacted].

A modern, efficient and fair civil litigation regime (including mediation and conciliation) can promote confidence in business to invest in the State. There is no aspect of civil litigation in which the Tasmanian Supreme Court can claim to be a leader in Australia and this points to the desirability of regular refreshment of the Bench by younger people, open to adaptation to modern needs.

Magistrates

I have not overlooked that the Bill, presumably for comity as there has been no call for it publicly, would also extend the retiring age for Magistrates (but not the DPP, Solicitor – General or Heads and Members of Tribunals and other bodies). No reason for this at all has been advanced. No-one who has seen the Magistrates Court in session would believe that those predominately young and frequently unrepresented people who appear in it are going to have an increased respect for the law by being dealt with by someone over 72 years of age. There is a lot more "back and forth" in direct conversation between the dock and the Bench in the Magistrates' Court than in the Supreme Court, it is in fact essential to the work of that Court, and the parties need to be somewhere close to being on the same page for that to happen.

Conclusion:

The same tired conservatism which continues to think of no better way to mark the return to work of the Court after a six week vacation than by trudging along fully robed and bewigged to one of four Hobart Christian Churches to sing hymns and be regaled by a reading and sermon from the Pulpit ought not to be further entrenched by extending the retiring age. The State ought to aspire to present as modern and inclusive, and its law administered in a secular way. Extending the retiring age for Judges is no way to achieve that.

Yours faithfully,

T.J.Ellis S.C.