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Constitution Alteration (Retirement of Judges) 1977

Date Introduced: 16 February 1977
House : House of Representatives.
Presented by : Mr. Ellicott.

Short Digest of Proposed Law

Purpose

The purpose of the proposed law is to amend s.72 of the Constitution so as to provide a maximum retiring age for Justices of the High Court and of other Federal Courts.

Background

Section 72 provides for Justices of the High Court and of other courts created by the Parliament to be appointed by the Governor-General in Council. It further provides that they are not to be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity. As a result of interpretation by the High Court in Alexander's Case,¹ the section has been seen as requiring that every Justice of the High Court and of any other court created by the Parliament be appointed for life subject only to the power of removal for proved misbehaviour or incapacity as laid down in the section.

There has been a growing acceptance of the view that federal judges, like their counterparts in the States, should be subject to maximum retiring age. This view was endorsed by the Senate Standing Committee on Constitutional and Legal Affairs in a report in October last year, and by the Hobart meeting of the Australian Constitutional Convention. The provisions of the proposed law accord with the recommendations of both these bodies.

1. (1918) 25 C.L.R. 434.

Summary

The first paragraph to be added to s.72 provides for the term of appointment of a High Court Justice to expire upon his reaching the age of 70. There is a prohibition upon appointment of a person who has attained that age.

Paragraph 3 sets a maximum age of 70 for Justices of other federal courts. However, paragraph 4 gives the Parliament power to legislate for a retiring age below 70 for Justices of federal courts other than the High Court. The Parliament may amend or repeal such a law at any time but such repeal or amendment will not affect the term of office of a Justice appointed before the repeal or amendment.

Paragraph 2 spells out that the term of a Justice of a federal court other than the High Court is to expire upon his attaining the age that is the maximum age for that court at the time of his appointment. It also prohibits appointment of anyone who has already attained the maximum age.

Paragraph 5 of the proposed law makes it clear that Justices of the High Court or other federal courts may resign, a point not previously clear on the face of the Constitution.

Paragraph 6 provides that the changes made by the Constitution Alteration (Retirement of Judges) 1977 are not to affect Justices already appointed; that is, present Justices are to continue as life appointees. However, it is clear from paragraph 7 that a present Justice who accepts appointment to another office of the same court having a different status or designation (e.g. a Judge who accepts appointment as Chief Justice) will thereupon become subject to the new retirement provisions.

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