The Parliament of the Commonwealth of Australia

FIRST REPORT OF THE JOINT SELECT COMMITTEE ON CERTAIN ASPECTS OF THE OPERATION AND INTERPRETATION OF THE FAMILY LAW ACT

THE RETIRING AGE OF JUDGES OF THE FAMILY COURT OF AUSTRALIA

SEPTEMBER 1991

Printed in Australia by P. J. GRILLS, Commonwealth Government Printer, Canberra

TERMS OF REFERENCE

That a joint select committee to be known as the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act, be appointed to inquire into and report on the provisions and operation of the Family Law Act 1975 and, where the committee thinks appropriate and necessary, make such recommendations for amendments to the Family Law Act and other action in respect of:

(a) the role, funding, effectiveness and availability of the services of:

   (i) the Family Court Counselling Service, and

   (ii) approved organisations providing marriage counselling and family mediation services;

(b) the proper resolution of custody, guardianship, welfare and access disputes;

(c) the proper resolution of family law property disputes, including the question whether it is desirable that the Family Law Act be extended to property disputes arising out of de facto relationships;

(d) the effective enforcement of rights and duties under the Family Law Act;

(e) the exercise of discretion by the courts, including the question whether it is desirable to better structure the exercise of the discretion of the courts in making orders determining disputes in relation to children or property;

(f) the adversarial nature of proceedings under the Family Law Act and their associated legal costs, including the question whether amendments to the Act or other action are desirable to require or encourage greater use of arbitration, mediation or other forms of alternative dispute resolution;

(g) the prohibition in the Family Law Act on the publication of accounts of proceedings which identify parties, witnesses or other persons associated with the proceedings; and

(h) the retiring age for judges of the Family Court of Australia.

MEMBERSHIP OF THE COMMITTEE

36th Parliament

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Deputy Chairman: Hon. A.S. Peacock, MP

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Mrs L. Cowan

The Committee

1 The Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act (the Committee) was established on 13 March 1991 by a resolution of both Houses of the Parliament. The Terms of Reference for the inquiry are included at page iii. The membership of the Committee is included at page iv. The Chairman, Senator Jim McKiernan and the Deputy Chairman, the Hon Andrew Peacock MP, were elected on 18 April 1991.

The first report

2 The Committee has resolved to address item (h) of its Terms of Reference, the retiring age of judges of the Family Court of Australia, in this first report. This follows a request from the Attorney-General of Western Australia to review this aspect of the *Family Law Act 1975* (the Act) at the beginning of the inquiry. The information before the Committee on this item, is sufficient at this stage, for comment to be made. The other items in the Terms of Reference are such that the Committee believes much more extensive consultation will be required, and investigation undertaken, before the Committee is in a position to report on these issues to the Parliament.

3 Issues relating to the conduct of judges, their suitability for the bench, and their performance, unless directly related to a specific issue, will not be included in this report.

Background

4 In a report by the Senate Standing Committee on Constitutional and Legal Affairs in October 1976 it was recommended that steps be taken to amend section 72 of the Australian Constitution to provide that all justices of the High Court and other federal courts have a maximum retiring age of 70 years. This proposal was endorsed by the Constitutional Convention and approved by the Australian voters at a referendum. The *Constitution Alteration (Retirement of Judges) Act 1977* came

into effect from 29 July 1977.[1] Section 72 of the Constitution was amended to provide a maximum age of 70 years for justices of the High Court and to empower the Parliament to make laws to set a retiring age of less than 70 for justices of any court created by the Parliament.[2]

5 The Senate Committee also recommended that a retiring age of 65 years should apply in relation to all federal courts other than the High Court.[3] The other federal courts existing at that time were the Family Court of Australia, the Australian Industrial Court and the Federal Court of Bankruptcy. The jurisdiction of the Australian Industrial Court and the Federal Court of Bankruptcy were taken over by the Federal Court.[4] There was no subsequent amendment to the Federal Court Act to set the retiring age for these courts at 65 years.[5]

6 The only federal court to have a fixed maximum retiring age of less than 70 years was the Family Court of Australia. Section 23A, which established 65 as the maximum retiring age, was inserted into the Act in 1977 following the constitutional amendment.[6] Until this amendment to the Act judges of the Family Court of Australia were appointed for life. The Family Court of Western Australia, which is the only State to have established a State Family Court, also has a maximum retiring age of 65 years. The State of Western Australia entered into an agreement with the Commonwealth for the establishment of a State Family Court pursuant to section 41 of the Act. Under the conditions set out in section 41(4)(b) of the Act the maximum retiring age for a State Family Court Judge is set at 65 years.[7]

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[1] *Report on Retiring Ages for Commonwealth Judges* in Submission 413, p1
[2] Submission 387, p4
[3] *Report on Retiring Ages for Commonwealth Judges*, loc.cit.
[4] *Federal Court of Australia (Consequential Provisions) Act 1976*, Section 3 and Schedule, in Submission 387 p5
[5] ibid, p5
[6] *Family Law Amendment Act 1977*, section 4 in Submission 387, p5
[7] Submission 409, p1

7 According to a witness at the Committee's first public hearing, "the circumstances that led to the insertion of the 65 retiring age were quite deliberate". At the time of the referendum, to amend section 72 of the Constitution, it was made known that the Government planned to legislate for an age limit of 65 years for the Family Court due to the nature of the work of this Court.[8] It was further felt at the time that the provision of the 65 retiring age was a reflection of community concern.[9]

8 In the second reading speech on 7 September 1977 on the *Family Law Amendment Bill 1977* the Hon John Howard,MP said:

> ...it is generally conceded that in family law, more than in most other areas of law, judges adjudicating over disputes should be aware of and keep abreast of current social values and attitudes. For this reason, and also because of the demanding and arduous nature of at least some of the disputes - notably, defended custody disputes - there seems to be good reason for requiring judges of the Family Court to retire at least by the age recognised as the maximum retiring age for most other occupations in the community.[10]

The Family Court in 1991

9 There are currently seventeen Family Court Judges with life tenure and thirty four with tenure to 65 years.[11] Of those with tenure to 65 ten are due to retire within the next five years. Of these judges one has indicated that he would be willing to remain past the age of 65 and two have indicated that they intend to retire before reaching 65 years.[12]

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[8] Evidence, p4
[9] ibid, p10
[10] Hansard, House of Representatives, 7 September 1977, page 818, in Submission 387, pp5-6 and Submission 413, p2
[11] *Submission 387, p6 and Attachment A*
[12] ibid, p7

The issues

10 Except for the Supreme Court of New South Wales all judges appointed to superior courts in Australia, apart from the Family Court, are eligible to serve in office until the age of 70 years. In 1990 the relevant New South Wales legislation was amended to increase the maximum retiring age from 70 to 72 years.[13] The Committee has been informed that a number of judges hold dual commissions with the Federal Court and the Family Court.[14]

11 In the view of the Hon H C Emery, QC, a retired Family Court Judge and the current chairperson of the Family Law Council, it is an unusual situation to have a retiring age of 65 years for Family Court Judges and 70 years for Federal Court Judges, particularly as some judges hold commissions with both courts. [15]

12 The Committee, in considering whether the retiring age of judges of the Family Court of Australia should be amended, has sought to ascertain what changes have occurred within the Family Court, the judicature generally and the community since the maximum retiring age was set at 65 years. The Committee considers it is now appropriate, in respect of the expanded role of the Family Court, to review this provision to determine whether it adequately reflects society's expectations as well as being in the best interests of the efficient management of the Court.

13 The major arguments advanced both for and against retaining the present retirement age of 65 years have been considered by the Committee. Of those submissions that included a comment on item (h) of the Terms of Reference, there were a number (from individuals who had experience of the Family Court) suggesting that the retiring age should be no different to that of other people in the

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[13] Submission 414, p2
[14] Submission 413, p2
[15] Evidence, p159

workforce, some who believed the retiring age should be lowered and others that believed it was dependent on the individual judge's capacity to continue.

14 It was suggested in one submission that the present retiring age for Family Court Judges should be retained but that an option be available to extend the appointment for another 5 years providing the judge concerned continued to be able to fulfil his or her duties under the criteria contained in section 22(2) of the Act.[16]

15 The Committee does not believe, in the light of the evidence available to it, that there would be any valid reason to consider lowering the maximum retiring age to less than 65 years. In fact no cogent argument has been advanced for so doing. The Committee agrees with the view expressed in one submission that:

> [t]o institute a compulsory retiring age less than the existing retiring age would be to risk losing the valuable input of the most experienced members of the judiciary.[17]

16 Concern has been expressed that judges over the age of 65 may have difficulty in relating to much younger people who appear before them. Conversely the obvious point has been made to the Committee that most judges maintain active family or community lives and that there are a number of senior judges who have young families of their own or whose contact with grandchildren ensures that they are in touch with community attitudes and the problems faced by families. The "day to day contact" that Family Court Judges have with families can only increase their understanding of such problems.[18]

17 Justice Tolcon of the Western Australian Family Court uses the example of the Chief Justice of the Western Australian Family Court, who will turn 65 late in 1991, to illustrate this point. Tolcon J argues that amongst the qualifications that

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[16] Submission 403, p15
[17] Submission 299, p4
[18] Submission 414, p4

the Chief Justice possesses, that point to his ability to continue in the Court, is his "relatively young family and awareness of current social problems".[19]

18 As one Committee member observed responsibility for being in tune with the community does not rest with judges alone. It was stated that:

> I think the discussion is proceeding as though in any disputed situation there is merely a judge and the parties involved. This overlooks the fact that there would be solicitors present, the thrust of whose arguments to the judge would, to a significant extent, concern the social values that ought to be taken into account. The judge is hearing evidence, as well, from other witnesses. It overlooks the fact that there are counsellors and registrars in the court who make reports on how property should be divided up and who make recommendations about the children in any custody dispute. The counsellors in the Family Court are very much at the coalface of social values and know what people are thinking and what is happening. There are conferences, meetings and social gatherings between judges and counsellors ... His experience is then brought to bear in bringing all these threads together and making a conclusion. It is not just mum, dad, the children in the middle being fought over and a judge, with no other influences at all, providing input on a matter that is before the court.[20]

19 The Committee concurs with the view expressed by the Family Law Council that an important qualification for judges of the court is their awareness of social values. The Council believes that there would not be a substantial difference, in this area, between judges who are 65 years and those who are 70 years of age. The Council considers the main danger in having a retiring age of 70 would be the possibility that people appointed to the Bench could be losing touch with community views. The Council would not, for example, be in favour of the appointment of judges to the Family Court at 59 years of age.[21]

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[19] Submission 408, p2
[20] Evidence, pp20-21
[21] Submission 413, p3

20 The Committee acknowledges that adjudicating in Family Law matters may cause a significant level of stress as a result of the often highly emotional issues involved, for example, in adjudicating over access and custody disputes and the distribution of the assets of a marriage, but questions whether it is more stressful than the matters dealt with in some of those courts with a retiring age of 70 years.

21 The view that the role of the Family Court Judge is more stressful is not agreed to by the Chief Justice of the Family Court, the Hon Justice A B Nicholson. Nicholson CJ believes that:

> The work of Judges in all such Courts is stressful. There is little to choose between the emotional strain of conducting a criminal trial and arriving at an appropriate sentence, for example, than there is in conducting a trial of a custody or access issue. Matrimonial property disputes frequently require Judges to display the same skills and learning as is required of a Court of Equity.[22]

22 It is further noted that if a judge does find the work too stressful there is no reason why he or she cannot exercise the right to retire at 60 years.[23]

23 The issue of judicial burnout has been raised. One judge, in opposition to an increase in the current retirement age pointed out that he had been appointed at a relatively young age. He believed that very few judges could be expected to operate effectively as a full time judge in the Family Court after twenty years. If the retiring age were to be extended it has been suggested it should be subject to the provision that no judge should continue beyond 65 if he or she had more than 20 years service at that time. One other judge favoured a time limit of twenty five years but did not oppose an extension to 70.[24] At present the age of 60 is the minimum at which judges of this court can obtain a judicial pension. They must also have served for 10

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[22] Submission 414, p3
[23] ibid, p4
[24] ibid, p10

years.[25] The Committee believes that the issue of judicial burnout may warrant further consideration.

24 The Committee has not formed an opinion on a minimum age for appointment of Family Court Judges but strongly believes that the criteria set out in section 22(2)(b) of the Act would preclude the appointment of people lacking in experience or aptitude for this area of the law.

25 It has been put to the Committee that there exists "an element of risk" in increasing the retirement age of judges of the Family Court. The longer people are able to remain, the greater the chance that they "may have passed their prime".[26] The Committee believes that there is no reason to assume that judges of the Family Court have a diminished capacity to make sound decisions after age 65 when all other federal court judges are considered competent to adjudicate up to age 70.

26 Information received from the Attorney-General's Department, on the age of retirement or resignation of former Family Court Judges is included in the following table. To date no judge has remained in the Family Court until turning 70. As can be seen from the table three judges with life appointments continued after 65 and two with tenure until 65 remained until this age.

[25] ibid, p5
[26] Evidence, p16

FORMER JUDGES OF THE FAMILY COURT

Name	Date appointed	Tenure	Age appointed	Age resigned,retired	Years on Courts
A Demack	21.2.76	Life	41	43	2
J Goldstein	15.10.76	Life	41	44	3
J Marshall	5.1.76	Life	54	61	7
K Pawley	5.1.76	Life	59	69	10
K Asche	5.1.76	Life	50	60	10
E Evatt	5.1.76	Life	42	54	12
M Lusink	27.2.76	Life	53	65	12
B Hogan	27.2.76	Life	57	69	12
W Dovey	27.2.76	Life	51	65	14
G Yuill*	13.4.77	Life	55	68	13
A Cook	21.2.77	Life	47	60	13
D Opas*	31.10.77	65	41	43	3
W Nobbs	18.11.77	65	52	55	3
D Haese	4.9.81	65	46	50	4
J Gibson	10.7.78	65	57	65	8
D Tonge	28.10.77	65	43	54	11
G Lambert	10.11.77	65	49	62	13
H Emery	3.2.76	65	52	65	13
D Connor*	2.4.87	65	56	59	4
J Elliot	19.12.79	65	48	60	12

* Died in Office
Source: Attorney General's Department

27 Since the early days of the Family Court the processes of the Court have been refined. Routine and uncontested matters are now determined by court officials leaving the judges to preside and adjudicate in the more complex contested cases.[27]

[27] Submission 409, pp4-5

28 Despite this refinement to the operation of the court the Committee has received many complaints relating to the length of time taken for particular cases to be heard. It was stated in one submission to the inquiry that:

> The insufficient number of judges is a major problem. There are simply not enough for the cases to be heard. Until more judges are appointed and the older judges are not forced to retire at age 65, the problem will simply increase. Older judges are the best to deal with the Family Law area simply because it is the type of area in which experience is at a premium.[28]

Jurisdiction of the Family Court

29 In its early years the Family Court had a specialised jurisdiction, but this role has been considerably expanded to include not only property cases and issues relating to children but also matters previously dealt with by the Federal Court of Australia.

30 Disputes about property in the Family Court can raise complex questions relating to such areas of the law as property, equity, taxation, contract, company, constitutional and conflict law. Similar questions may be raised in other superior courts where the retiring age is 70 years.[29]

31 Prior to the reference of powers by four States of the Commonwealth, cases involving children born outside of marriage were often heard by State Supreme Courts. In some States the Supreme Courts still exercise jurisdiction in adoption matters.[30]

32 It would appear to the Committee that if a judge of a Supreme Court, up to the age of 70, is able to preside over a matter relating to children, there is no logical reason that a Family Court Judge would be any less able to do so beyond the age of

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[28] Submission 237, p2
[29] Jackson Committee in Submission 409, pp5-6
[30] ibid, pp6-7

65 years. The same can be said of the appeal process in the Family Court. An appeal from the Family Court is first heard by the Full Court of the Family Court. Any subsequent appeal is heard by the High Court whose judges have a maximum retiring age of 70 years.

33 An example of the increased jurisdiction of the Family Court can be seen in the provisions relating to cross-vesting. This legislation, introduced in 1977, has meant that the Family Court can exercise the jurisdiction of the Federal Court and the State Supreme Courts in a number of matters.[31] The legislation allows disputes involving a third party to be determined by the Family Court. In exercising this jurisdiction the Family Court is exercising jurisdiction that would otherwise come under State Supreme Courts.[32]

34 In the second reading speech relating to the *Family Court of Australia (Additional Jurisdiction and Exercise of Powers Bill 1987* the Hon L.F. Bowen said:

> The Bill will extend the Family Court jurisdiction to proceedings in bankruptcy, income tax appeals, consumer protection provisions of the Trade Practices Act and proceedings under the Administrative Decisions (Judicial Review) Act. It does not permit proceedings in these matters to be filed directly in the Family Court. Instead, it provides for proceedings which have been filed in the Federal Court of Australia to be transferred to the Family Court.[33]

35 The subsequent Act of the Parliament, to allow for the transfer of powers between the Family Court of Australia and the Federal Court, has widened the role of the Court and its judges. It was noted, however, that the volume of transfers to date have not been great.[34]

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[31] *Jurisdiction of Courts (Cross Vesting) Act 1977* in Submission 409, p8, also referred to in Submission 414, p5
[32] Submission 409, p8
[33] Extract from the Historic House Hansard - 28 October 1987, Speech in the context of a Bill (Second Reading)
[34] Evidence, p25

Conclusion and recommendation

36 The Family Court has often been treated as a "poor relation" compared to the Federal Court of Australia. It has generally lacked resources and the conditions of service for judges have been deemed to be unequal to the other federal courts.[35] There have been difficulties in the past in attracting the most suitable candidates to the Family Court.[36] Many senior legal people, who would be acceptable as judges of the Family Court may be deterred from accepting appointments due to the retirement age limit of 65. A prospective judge who was over 55 years at the time of appointment, would be forced to retire before being eligible for a full pension.

37 The Committee agrees with points made by the Law Council in relation to extending the retiring ages for Family Court Judges to 70. An increase in the maximum age would:

- be consistent with other superior courts;
- make optimum use of the skills and abilities of current judges;
- prevent loss of human capital;
- have the potential to save tax payers' funds; and
- encourage the development of consistent principles and guidelines through precedents.[37]

38 The Committee believes that the reasons for fixing a 65 retiring age for the Family Court are no longer valid. The original basis for the decision on retiring age for Family Court Judges, due to the narrow jurisdiction of Family Law, has been considerably eroded. The role of the Family Court Judge is no longer one that deals exclusively with Family Law but may now involve similar matters to those heard in the Federal Court of Australia.

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[35] Submission 414, p5
[36] ibid, p7
[37] Submission 415, p168

39 A recognition of the equal status of the Family Court to other superior courts would be gained by increasing the maximum retiring age for Family Court Judges to age 70. By allowing Family Court Judges who are willing and able to remain at the bench, there could be a considerable cost saving to the Government and the community. Not only is the knowledge and ability of an experienced judge invaluable to newer appointees but it would represent a considerable saving in terms of costs associated with new judicial appointments.

40 Some Committee members are of the opinion that a compulsory retiring age of any sort should be abolished. This is in line with a growing community view. These members are, however, not prepared to oppose the lifting of the retiring age of Family Court Judges to 70 which they believe is justified, at the very least as an improvement on the present situation.

41 In making the following recommendation the Committee does not believe that it should be compulsory for a judge of the Family Court to remain until 70 or that existing pension and superannuation benefits should be changed.

42 Accordingly the Committee recommends that:

as a matter of priority the Family Law Act be amended to fix a maximum retiring age of 70 years for Family Court Judges.

HON ANDREW PEACOCK, MP
Acting Chairman

September 1991