

The Senate

Legal and Constitutional Affairs
Legislation Committee

Judges and Governors-General Legislation
Amendment (Family Law) Bill 2012
[Provisions]

May 2012

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Ms Julie Dennett Committee Secretary

Ms Monika Sheppard Acting Principal Research Officer

Ms Hannah Dibley Administrative Officer

Suite S1.61 Telephone: (02) 6277 3560

Parliament House Fax: (02) 6277 5794

CANBERRA ACT 2600 Email: legcon.sen@aph.gov.au

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RECOMMENDATION

Recommendation 1

2.20 The committee recommends that the Senate pass the Bill.

CHAPTER 1

Introduction

1.1 On 15 March 2012, the Judges and Governors-General Legislation Amendment (Family Law) Bill 2012 (Bill) was introduced into the House of Representatives by the Hon. Gary Gray MP, Special Minister of State and Minister for the Public Service and Integrity (Minister).¹ On 22 March 2012, the Senate referred the provisions of the Bill to the Legal and Constitutional Affairs Legislation Committee (committee) for inquiry and report by 8 May 2012.²

Purpose of the Bill

1.2 The *Family Law Act 1975* allows superannuation interests to be treated as property which can be split by married and de facto couples at the time of a family breakdown and property settlement. According to the Explanatory Memorandum (EM) to the Bill, superannuation splitting assists in providing separating couples with a 'clean break' from the relationship and also provides both parties with control over their respective individual interests.³

1.3 However:

[T]he current family law arrangements for judges and Governors-General are inconsistent with family law policy of a clean break. The arrangements are also out of step with the other Commonwealth defined benefit superannuation schemes, which have since 2004 provided separate interest benefits to former spouses of scheme members in a family law split.⁴

1.4 For judges, the current 'percentage-only' splitting arrangements provided for in the *Judges' Pensions Act 1968* (Judges' Act) mean that a judge's pension is split only when payments are made to a retired judge. A former spouse does not receive any payment until that time and the payments cease upon the judge's death.⁵

1.5 For Governors-General, the *Governor-General Act 1974* (Governor-General Act) does not provide for the splitting of a superannuation interest at the time of a family law property settlement.⁶

1 *House of Representatives Hansard*, 15 March 2012, p. 1.

2 Journals of the Senate, No. 87-22 March 2012, p. 2351.

3 Explanatory Memorandum, p. 1.

4 The Hon. Gary Gray MP, Special Minister of State and Minister for the Public Service and Integrity, *House Hansard*, 15 March 2012, p. 1.

5 Explanatory Memorandum, p. 2. A further feature of the current arrangements is that there is no certainty as to the overall quantum of benefit that a former spouse is entitled to receive.

6 Explanatory Memorandum, p. 2.

1.6 The Bill addresses these issues, by amending the Judges' Act and the Governor-General Act to provide for an amount to be calculated and transferred to the former spouse of a judge or Governor-General as a separate superannuation benefit at the time of a family law split, based on the percentage split or specified amount in a splitting agreement or splitting order.⁷

1.7 The EM notes that the family law courts or the separating parties determine whether a judge's or Governor-General's superannuation benefit is to be split and, if so, the amount or the percentage of the split between the parties. The amendments proposed in the Bill do not mean that the Commonwealth will be determining family law property settlements: the Bill's provisions only come into effect when the Secretary of the Department of Finance and Deregulation (Department) receives a splitting order or splitting agreement in respect of a superannuation interest under the Judges' Act or Governor-General Act.⁸

Conduct of the inquiry

1.8 Details of the inquiry, the Bill and associated documents were placed on the committee's website. The committee also wrote to 19 organisations and individuals, inviting submissions by 13 April 2012.

1.9 The committee received one submission from the Department, which is available on the committee's website at http://www.aph.gov.au/senate_legalcon. No public hearings were held for the inquiry.

7 Explanatory Memorandum, pp 5 and 17; Department of Finance and Deregulation, *Submission 1*, p. 1.

8 Explanatory Memorandum, p. 3.

CHAPTER 2

Key amendments and issues

2.1 The key provisions of the Bill:

- insert proposed new sections 17AA to 17AJ into the Judges' Act (item 39 of Part 1 of Schedule 1 of the Bill);
- insert proposed new sections 4AB to 4AI into the Governor-General Act (item 26 of Schedule 2 of the Bill); and
- create a separate interest for the former spouse of a judge as from commencement of the Bill, where judges' pensions are already being paid (item 47 of Part 2 of Schedule 1 of the Bill).

Separate superannuation interests for former spouses

2.2 As stated in the Explanatory Memorandum, the Bill will create scheme specific, separate superannuation interests for the former spouses of judges and Governors-General, consistent with the family law policy of a clean break for separating couples.¹ Therefore, the amendments proposed in the Bill to the Judges' Act and the Governor-General Act are almost identical, and only the key amendments proposed with respect to judges' pensions will be discussed in this chapter.

2.3 In general, the key amendments create a separate interest benefit and establish payment rules for a former spouse; provide for the consequential reduction of a judge or Governor-General's benefit; and set out the methodology and supporting actuarial factors for calculating benefits under a family law split.

Separate interest benefit and payment rules

2.4 Proposed new section 17AA of the Judges' Act provides for the former spouse of a judge to be entitled to either an 'associate immediate pension' or an 'associate deferred pension'. If a judge already receives a pension, the former spouse is entitled to the immediate pension, otherwise the former spouse is entitled to the deferred pension, both as from the time of the family law split.²

2.5 Proposed new section 17AB provides for the calculation of, and payment rules for, an 'associate deferred pension'.³ The deferred pension will be calculated in

1 Explanatory Memorandum, p. 2.

2 Proposed new subsections 17AA(2) and (3) of the Judges' Act. Also see proposed new subsections 4AB(2) and (3) of the Governor-General Act.

3 Also see proposed new section 4AC of the Governor-General Act.

accordance with 'Pension Orders' made pursuant to proposed new section 17AI, and will become payable when the former spouse reaches age 65 (retirement age); when the former spouse reaches 60 years of age and requests payment from the Secretary of the Department; or after the former spouse becomes permanently incapacitated, whichever is the earliest.⁴

2.6 If the former spouse dies before the 'associate deferred pension' becomes payable, a lump sum benefit will be paid to his or her legal personal representative or, if none can be found, any individual(s) determined by the Secretary of the Department. The Bill provides a standing appropriation from the Consolidated Revenue Fund in this regard.⁵

2.7 Proposed new section 17AC sets out prerequisites for payment of the 'associate deferred pension': the former spouse must apply to the Secretary of the Department for payment of the pension and supply all necessary information in support of the claim.⁶

2.8 The Explanatory Memorandum states that the proposed payment rules are broadly consistent with the payment rules for most other superannuation benefits, and the standing appropriation is similar to the arrangements in the Judges' Act for the payment of other lump sum benefits.⁷

Consequential reduction of a judge's benefit

2.9 Proposed new section 17AD provides for the reduction of a judge's pension, if the judge is not receiving a pension at the time of the family law split.⁸ The method of reduction is explained in the Explanatory Memorandum:

The reduced pension is calculated by firstly working out the annual rate of the pension that is payable under section 6A, 6B or 6C of the Judges' Act and then reducing that rate by the amount worked out using the formula set out in [proposed new] subsection (5).⁹

2.10 Proposed new section 17AE modifies the formula proposed in new subsection 17AD(5) when the superannuation benefit has been split more than once before it becomes payable (for example, where the Secretary of the Department

4 Proposed new subsections 17AB(1) and (3). Also see proposed new subsections 4AC(1) and (3) of the Governor-General Act.

5 Proposed new subsections 17AB(6) and (7) of the Judges' Act. Also see proposed new subsections 4AC(6) and (7) of the Governor-General Act.

6 Proposed new subsection 17AC(1) of the Judges' Act. Also see proposed new subsection 4AD(1) of the Governor-General Act.

7 Explanatory Memorandum, pp 10 and 21.

8 Also see proposed new section 4AE of the Governor-General Act.

9 Explanatory Memorandum, p. 11. Also see proposed new subsection 4AE(2) of the Governor-General Act.

receives a second splitting agreement or splitting order arising from another family law property settlement). The Explanatory Memorandum states:

New subsection 17AE(2) allows the formula used in subsection 17AD(5) to be used on more than one occasion by replacing the reduction factor with an interim factor, or a series of interim factors, which represent the reductions applied in relation to reductions before the most recent family law split.¹⁰

2.11 Proposed new section 17AF provides for the reduction of the lump sum benefit payable under section 12A of the Judges' Act,¹¹ if a judge has not received that benefit at the time of the family law split. This could occur, for example, if a judge does not serve for the minimum period (ten years) to qualify for a pension under the Judges' Act.¹²

2.12 Proposed new section 17AG provides for the reduction of an 'associate deferred pension', where the former spouse of a judge has a family law split with a subsequent spouse. The deferred pension will be reduced in accordance with the 'Pension Orders'.¹³

2.13 If a judge already receives a standard pension, proposed new subsection 17AH(1) provides for the reduction of that pension at the time of a family law split. The method of reduction is set out in the Bill and relies on an amount specified in the 'Pension Orders'.¹⁴

'Immediate transitional pension' in the Judges' Act

2.14 Item 39 of Part 1 of Schedule 1 of the Bill and item 26 of Schedule 2 of the Bill (the proposed provisions outlined above) primarily deal with cases in which a judge is not yet in receipt of a pension.

2.15 Item 47 of Part 2 of Schedule 1 of the Bill – one of the transitional provisions – deals with those cases in which a judge is receiving a pension and a splitting agreement or splitting order was made prior to commencement of the Bill.

2.16 The amendment creates a separate interest for the former spouse of a judge from the time the Bill comes into operation, where pensions are being paid. The former spouse will be entitled to an 'immediate transitional pension', payable from the commencement of the Bill at the rate calculated in item 48 of Part 2 of Schedule 1.

10 Explanatory Memorandum, p. 13.

11 Section 12A of the Judges' Act provides for the payment of a benefit where a judge ceases to hold office, or dies, on or after 1 July 2006.

12 Explanatory Memorandum, p. 13.

13 Also see proposed new subsection 4AF of the Governor-General Act.

14 Also see proposed new subsection 4AG of the Governor-General Act.

That item provides for the Minister to make orders for the purposes of the transitional provisions in the Bill.

2.17 Sub-item 47(4) provides for 'immediate transitional pensions' to be paid out of the Consolidated Revenue Fund, which is to be appropriated accordingly.

2.18 The Explanatory Memorandum states that the standing appropriation is consistent with the payment of other pensions under the Judges' Act.¹⁵

Committee view

2.19 The committee notes that the reforms proposed in the Bill align the family law arrangements for judges and Governors-General's superannuation interests with the family law policy of a 'clean break' for separating couples, as well as bringing consistency to Commonwealth defined benefit superannuation schemes. The committee supports these reforms.

Recommendation 1

2.20 The committee recommends that the Senate pass the Bill.

Senator Trish Crossin

Chair

15 Explanatory Memorandum, p. 16.

APPENDIX 1

SUBMISSIONS RECEIVED

**Submission
Number**

Submitter

1

Department of Finance and Deregulation