



## Federal Magistrates Amendment (Disability and Death Benefits) Bill 2006

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## Federal Magistrates Amendment (Disability and Death Benefits) Bill 2006

**Date introduced:** 29 March 2006

**House:** House of Representatives

**Portfolio:** Attorney-General

**Commencement:** The Act commences on the day after it receives the Royal Assent.

### Purpose

The purpose of the Bill is to amend the *Federal Magistrates Act 1999* (FMA) to provide statutory disability cover and death benefits for Federal Magistrates. Current arrangements for Federal Magistrates provide no specific entitlements in the event of retirement on the grounds of disability or death.<sup>1</sup>

### Background

The Federal Magistrates Court of Australia (FMC) was established by the Commonwealth Parliament at the end of 1999. It conducted its first sittings on 3 July 2000. The FMC currently consists of a Chief Federal Magistrate and 34 other Federal Magistrates. In the 2006-07 budget, the Attorney-General announced the appointment of another five Federal Magistrates in response to increases in the general federal and family law jurisdiction and workload of the Federal Magistrates Court.<sup>2</sup>

The FMA established the Federal Magistrates Court and its jurisdiction is found in the *Federal Magistrates (Consequential Amendments) Act 1999*. The jurisdiction of the Federal Magistrates Court includes family law and child support, administrative law, bankruptcy, unlawful discrimination, consumer protection law, privacy law, migration, copyright and workplace relations. The court shares those jurisdictions with the Family Court of Australia and the Federal Court of Australia. Some work in those jurisdictions continues to be done in state courts also.

The Government's intention in the creation of the FMC was that it would be a low cost court. As a result of this intention, Federal Magistrates were not covered by the *Judges' Pensions Act 1968*. The Judges Pensions Act applies to Federal, Family and High Court judges.

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On 30 March 2006 the Bill was referred to the Senate Legal and Constitutional Legislation Committee for inquiry and report by 2 May 2006. The Committee released its [report](#) on 2 May 2006. While welcoming the changes introduced by the bill, the recommendation of the Committee was to make two amendments to the bill which would provide greater consistency to benefits payable to Federal Magistrates.

#### Current Benefits and Entitlements for Federal Magistrates

Schedule 1 of the FMA covers personnel matters such as the appointment and removal of Federal Magistrates. A Federal Magistrate is appointed by the Governor-General and must be a legal practitioner of at least five years standing. A Federal Magistrate's term expires when he or she turns 70 unless they resign or are removed by the Parliament on the ground of proved misbehaviour or incapacity. Federal Magistrates may be appointed on a full-time or part-time basis except for the Chief Federal Magistrate who is a full-time appointee.

Schedule 1 of the FMA provides that the Remuneration Tribunal is to determine the remuneration for Federal Magistrates. A Federal Magistrate's remuneration cannot be diminished while he or she is in office.

Terms and conditions for Federal Magistrates are determined by the Governor-General. These conditions currently include an entitlement to a superannuation contribution by the Commonwealth. This contribution is limited to 13.1% of salary and is paid to the Magistrate's choice of either a complying superannuation fund or a retirement savings account.

There are currently no provisions which provide adequate income protection for Federal Magistrates in the event of serious disability. A Federal Magistrate whose performance is significantly impaired for medical reasons may thus be unwilling to resign. There is also no lump-sum death benefit currently payable to a Magistrate's family if they die in office or are in receipt of a disability pension.

In comparison, the Judges Pensions Act provides for a pension of 62.5% of salary to a spouse or dependants on the death of a judge or the death of a retired judge. When a judge retires due to permanent disability or infirmity, they are entitled to a pension of 60% of their salary.

#### Basis of policy commitment

In the Second Reading Speech the Attorney-General stated that:

The Bill provides federal magistrates, their spouses and dependants with income protection and death benefits that have until now been lacking. The Government acknowledges the significant contribution federal magistrates make to an efficient

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federal civil justice system, and is committed to ensuring that they are provided with fair and adequate remuneration and conditions.<sup>3</sup>

### Position of significant interest groups/press commentary

There has been limited press commentary in relation to this bill.

Justice Kenneth Raphael, currently Australia's oldest Federal Magistrate has been highly critical of the proposed amendments, calling them 'ageist, homophobic and mean'.<sup>4</sup> His [submission](#) to the Senate Committee provides further detail to these comments.

Justice Ronald Sackville, as chair of the Judicial Conference of Australia has also commented on the bill and is generally supportive of the changes which will provide adequate retirement benefits for Federal Magistrates.<sup>5</sup> Justice Sackville has commented on the procedure required for a Federal Magistrate to retire on the grounds of permanent disability or infirmity. The procedure [**new clause 9A**] may cause uncertainty and a medically unfit magistrate may be reluctant to retire first and then face the uncertainty of applying for certification to the minister or the AAT. He suggests that it would be better for the decision to be made by an independent body and for that to be done before retirement.<sup>6</sup>

The Federal Magistrates Court of Australia made a submission to the Senate Committee which was generally supportive of the changes to improve the remuneration and entitlements of Federal Magistrates.

It is the view of the Court that all judicial officers should be treated equally in respect of disability and death entitlements. The Court submits that the simplest way to achieve equality in this matter is to include Federal Magistrates in the operation of *the Judges' Pensions Act 1968 (Cth)*. However, in the absence of this, other improvements to achieve better entitlements for Federal Magistrates are welcome. The Federal Magistrates Amendment (Disability and Death Benefits) Bill 2006 ("Bill") seeks to make a number of improvements in the entitlements of Federal Magistrates.<sup>7</sup>

### ALP/Australian Democrat/Greens/Family First policy position/commitments

The Australian Democrats (AD) support the recommendations of the Senate Committee report. They made some additional comments and points of dissent in the Senate Committee report. The AD noted that the definitions in the bill discriminate against same sex couples and recommended the definitions in this bill and other legislation establishing Commonwealth superannuation and pensions should be expanded to expressly provide for the provision of benefits where a same sex relationship exists.

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## Financial implications

### Special appropriation

The Australian Government Actuary has costed the proposed disability cover and death benefits at 3% of salaries on average. For the existing 35 Magistrates, the total cost would currently be on average some \$250 000 per annum.

It is proposed that the new benefits be funded through a special appropriation authorised by the Act, as it would not be possible to predict when such benefits would need to be paid.<sup>8</sup>

## Main provisions

### Schedule 1 – Amendment of the Federal Magistrates Act 1999

**Items 1 – 9** insert new terms into the section 5 (definitions) of the FMA. Some of these terms are defined in greater detail in the following clauses.

**Item 10** inserts **new section 5A** into the FMA. It defines **prior judicial service**. It makes it clear that where a person held office as a Federal Magistrate on more than one occasion any service before the person's most recent appointment falls within the definition.<sup>9</sup>

**Items 11 and 12** insert new headings and divisions into Schedule 1. This provides a structural framework to the Schedule. The current heading is 'Personnel provisions relating to Federal Magistrates.' **Item 11** inserts the new heading **Appointment of Federal Magistrates** which creates Part 1 of Schedule 1 and covers existing clauses 1-3.

**Item 12** inserts new headings after clause 3 of Schedule 1. The heading **Terms and Conditions of Federal Magistrates** creates a new **Part 2** of Schedule 1. It also inserts a new Division into that Part dealing with the terms and conditions of serving Magistrates.

**Item 13** inserts a **new Division 2** into Part 2 of Schedule 1 to the FMA. The **new division** provides for disability and death benefits for Federal Magistrates. The following new clauses provide the details for the new entitlements.

**New clause 9A** allows the Minister to certify that a Federal Magistrate who retires before reaching age 65 is a retired disabled Federal Magistrate. The Minister can only make the certification following a request and must be satisfied that the retirement was due to permanent disability or infirmity [clause 9A (2)]. Where the Minister refuses the certification, the decision may be reviewed by the Administrative Appeals Tribunal (AAT).

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**New clause 9B** provides for pensions for retired disabled Federal Magistrates. Pensions are payable until the retired disabled Federal Magistrate reaches the age of 65 years or dies, whichever happens first. The annual rate of pension is 60% of the salary the Magistrate would have received if he or she had not retired.

**New clause 9C** provides that a retired disabled Federal Magistrate is only entitled to a Commonwealth superannuation contribution until he or she reaches the age of 65 years or dies, whichever occurs first.

**New clause 9D** provides death benefits where a Federal Magistrate or a retired disabled Federal Magistrate who has not reached the age of 65 dies. The death benefits are payable to an eligible spouse or eligible children. The amount of death benefits payable is equivalent to the amount of Commonwealth superannuation contributions the Federal Magistrate would have been entitled to if the Federal Magistrate had neither died or retired before the age of 65. Under existing arrangements the Commonwealth makes a superannuation contribution payment to Federal Magistrates of an amount equal to 13.1% of salary.

**New clause 9E** provides relationship definitions for 'eligible spouse' and 'marital relationship'. These definitions are used to establish if a person is an eligible beneficiary for a death benefit payment. The Explanatory Memorandum states:

These definitions, and that included by clause 9F, are generally consistent with the definitions used in legislation establishing Commonwealth superannuation and pensions schemes, including those contained in the *Judges' Pensions Act 1968*.<sup>10</sup>

An 'eligible spouse' includes only those people which have or have previously had a 'marital relationship' with a Federal Magistrate or retired disabled Federal Magistrate. A 'marital relationship' is defined to only include heterosexual married and de facto couples. Same sex relationships are not provided for in the current definitions.

**New clause 9F** provides a definition for 'eligible child'. This definition is used to establish if a person is an eligible beneficiary for a death benefit payment. The criteria used to establish if a child is eligible are based on age and dependency.

**New clause 9G** establishes a special appropriation for pensions and superannuation contributions payable to retired disabled Federal Magistrates and death benefits payable to eligible spouses and children. The establishment of a special appropriation is necessary as it is not possible to predict when such benefits will need to be paid.<sup>11</sup>

Item 13 also introduces new division of Part 2 of Schedule 1 **Remuneration of a Federal Magistrate not to be diminished**. **Clause 9H** replicates existing clause 11 of Schedule 1 and prohibits a Federal Magistrate's remuneration being reduced while in office.

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**Item 14** introduces a new heading **Acting Chief Federal Magistrate** establishing Part 3 of Schedule 1. The heading will appear before existing clause 10 of Schedule 1 which allows the Minister to appoint an acting Chief Federal Magistrate in certain circumstances.

**Item 15** inserts a technical item which relates to the reorganisation of existing provisions within the new structural framework of Schedule 1. The item repeals clause 11 of Schedule 1 which is replicated in new clause 9H.

**Item 16** provides that the amendments only apply to persons who are Federal Magistrates at the time the amendments commence or who are appointed after that time.<sup>12</sup>

## Concluding comments

The amendments in the Bill go some way to providing improved conditions for Federal Magistrates. The new conditions may make appointments to the position of Federal Magistrates more attractive. However, there has been some criticism that the amendments are discriminatory and financially inequitable when compared to judicial officers who are covered by the Judges' Pensions Act.

The appointment of a Federal Magistrate is until 70 years of age. The age limitations for entitlements provided for in new sections 9A, 9B, 9C and 9D appear to discriminate against Federal Magistrates and retired disabled Federal Magistrates between the ages of 65 and 70. This point was noted in some of the submissions to the Senate Committee and in the Senate report. The Senate Committee recommended that the age limits specified in the Bill limiting eligibility for disability cover and death benefits be amended from 65 to 70 years.

The amount of death benefits payable to an eligible spouse and children are not as generous as those payable under the Judges' Pensions Act. The Senate Committee recommended that the amount of death benefits payable under the Bill be reviewed to provide more adequate compensation payments.

Some of the submissions<sup>13</sup> to the Senate Committee were of the view that it would be far simpler and equitable to allow the Judges Pensions Act to apply to the Federal Magistrates. However, there are no costings available on this alternative proposal.

## Endnotes

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- 1 Hon. Phillip Ruddock MP, Attorney-General, 'Second reading speech: Federal Magistrates Amendment (Disability and Death Benefits) Bill 2006' House of Representatives, *Debates*, 29 March 2006, p. 7.

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- 2 Hon. Phillip Ruddock MP, [Attorney-General increased access to justice](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(1E34438A184496CEA370A0C8D75B1710)~15+Increased+access+to+justice.PDF/$file/15+Increased+access+to+justice.PDF) *News Release* 9 May 2006  
[http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(1E34438A184496CEA370A0C8D75B1710\)~15+Increased+access+to+justice.PDF/\\$file/15+Increased+access+to+justice.PDF](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(1E34438A184496CEA370A0C8D75B1710)~15+Increased+access+to+justice.PDF/$file/15+Increased+access+to+justice.PDF), accessed 1/6/06
- 3 Ruddock, Second Reading Speech op. cit. p. 8.
- 4 Cath Hart [‘Magistrates’ pension scheme ‘ageist, homophobic and mean’](#), *The Australian* 28/04/06 p. 23.
- 5 Justice Ronald Sackville [‘Fair pensions ensure judicial independence’](#), *The Australian* 21/04/06 p. 22.
- 6 *ibid.*
- 7 Federal Magistrates Court of Australia. [Submission](#) to the Senate Legal and Constitutional Legislation Committee. Inquiry into the provisions of the Federal Magistrates Amendment (Disability and Death Benefits) Bill 2006. 19 April 2006.
- 8 Explanatory Memorandum p. 2.
- 9 *ibid.*, p. 4.
- 10 *ibid.*, p. 6.
- 11 *ibid.*, p. 8.
- 12 *ibid.*, p. 8.
- 13 Victorian Bar [submission](#); Federal Magistrates Court of Australia [submission](#) to the Senate Legal and Constitutional Legislation Committee. Inquiry into the provisions of the Federal Magistrates Amendment (Disability and Death Benefits) Bill 2006.

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