

CHAPTER 2

CONSIDERATION OF THE BILL

Introduction and overview

2.1 The purpose of the Bill is to amend the *Federal Magistrates Act 1999* (the Act) to provide statutory disability cover and death benefits for Federal Magistrates. The current arrangements provide no specific entitlements covering retirement on disability grounds or in the event of death.

2.2 When the Federal Magistrates Court was established in 2000 it was the Government's intention to create a low cost court. In keeping with this intention, Federal Magistrates were not covered by the *Judges' Pensions Act 1968*. Instead, Federal Magistrates are currently entitled, by a determination by the Governor-General under the Act, to a superannuation contribution by the Commonwealth of an amount equal to 13.1 per cent of salary to a complying superannuation fund or a retirement savings account.

2.3 The Explanatory Memorandum explained the rationale for the Bill:

The lack of insurance against disability for Magistrates is potentially problematic. Magistrates hold office until age 70 unless they resign, die in office or are removed by the Parliament on the ground of proven misbehaviour or incapacity before this age. In the absence of adequate protection in the event of serious disability, a magistrate whose performance is significantly impaired for medical reasons may nonetheless be unwilling to resign.¹

2.4 In the Second Reading Speech it was noted 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 federal civil justice system, and is committed to ensuring that they are provided with fair and adequate remuneration and conditions.²

Disability cover

2.5 The Bill would amend the Act to provide that where the Attorney-General certifies that the resignation of a magistrate is due to permanent disability or infirmity,

1 *Explanatory Memorandum*, Federal Magistrates Amendment (Disability and Death Benefits) Bill 2006, p. 1.

2 *Second Reading Speech*, Federal Magistrates Amendment (Disability and Death Benefits) Bill 2006.

a pension of sixty per cent of salary would be payable to the Magistrate until he or she attains the age of 65 or dies, whichever comes first.

2.6 The Commonwealth would also make contributions to the Magistrate's superannuation while the disability pension was being paid. This would ensure that Commonwealth provided superannuation support for an incapacitated Magistrate would be the same as if the Magistrate had continued to work to age 65 or, if the former Magistrate dies before this age, to the date of death.

Death benefits

2.7 The Bill would also provide death benefits for Federal Magistrates. The Bill would amend the Act to provide that, where a Magistrate dies in office or a former Magistrate in receipt of a disability pension dies before reaching age 65, a lump sum, covering the period between the date of death and age 65, is payable to the Magistrate's spouse and dependent children.

2.8 The lump sum would be equal to the superannuation contributions the Magistrate would have received during the period between the Magistrate's death and the Magistrate's 65th birthday, based on the salary payable to a Magistrate at the time of the Magistrate's death or, where the former magistrate was in receipt of a disability pension prior to death, the salary of a serving Magistrate at the time of death.

Major Issues

2.9 Submissions generally supported the intent of the Bill to provide statutory disability cover and death benefits for Federal Magistrates as a considerable improvement on the current situation. Submissions, however, generally took the view that all judicial officers should be treated equally in respect to entitlements and that the most appropriate way of achieving this would be to include Federal Magistrates in the operation of the Judges' Pensions Act.³

2.10 A number of issues were raised in submissions concerning the Bill, including age limitations on entitlements, amount of death benefits and same sex relationships. These issues are discussed below.

Age limitations on entitlements

2.11 Submissions argued that while Federal Magistrates hold office until the age of 70 years, the proposed provisions relating to disability cover and death benefits are expressed to operate in respect of Federal Magistrates and retired Federal Magistrates who are 65 years or younger.

3 The Victorian Bar, *Submission 2*, p. 1; Federal Magistrates Court, *Submission 3*, p. 2; Law Council of Australia, *Submission 4*, p. 1; Mr Raphael, *Submission 1*, p. 3.

2.12 Specifically:

- section 9A provides that the Minister may only certify a Federal Magistrate as a retired disabled Federal Magistrate if the Federal Magistrate has not attained the age of 65 years;
- section 9B provides that a retired disabled Federal Magistrate is only entitled to a pension until he or she attains the age of 65 years or dies, whichever occurs first;
- similarly, section 9C provides that a retired disabled Federal Magistrate is only entitled to a Commonwealth superannuation contribution until he or she attains the age of 65 years or he or she dies, whichever occurs first; and
- section 9D only provides death benefits where a Federal Magistrate or a retired disabled Federal Magistrate who has not attained the age of 65 years dies.

2.13 The Federal Magistrates Court of Australia stated that it is difficult to see the reasoning for limiting these entitlements to Federal Magistrates and retired disabled Federal Magistrates who are 65 years or younger. The Court argued that 'this approach appears to be discriminatory against Federal Magistrates and retired disabled Federal Magistrates between the ages of 65 and 70'. It was also argued that the approach contradicts the Government's objective of encouraging participation in employment by persons older than 65 years of age.⁴ Mr Raphael, a Federal Magistrate, also argued that 'there is no logical explanation for the decision to limit the benefit to the age of 65, [and] it is ageist'.⁵

2.14 The Federal Magistrates Court recommended that the age limitations in the Bill (sections 9A, 9B, 9C and 9D) should be amended from 65 years, as currently proposed, to 70 years so that they are aligned with the appointment of Federal Magistrates.

Amount of death benefits

2.15 Submissions raised concerns in relation to the perceived inadequacies in the amount of death benefits payable to eligible spouses and eligible children.⁶

2.16 Section 9D provides for the amount of death benefits payable to an eligible spouse or eligible children to be equivalent to the amount of Commonwealth contributions the Federal Magistrate would have been entitled to if the Federal Magistrate had not died or retired due to disability during the period between the death of the Federal Magistrate or retired disabled Federal Magistrate and the date they

4 Federal Magistrates Court, *Submission 3*, p. 4. See also The Victorian Bar, *Submission 2*, pp 2-3.

5 Mr Raphael, *Submission 1*, p. 2.

6 Federal Magistrates Court, *Submission 3*, p. 5; Mr Raphael, *Submission 1*, p. 2.

would have attained the age of 65 years. Under current arrangements, the Commonwealth makes a superannuation contribution payment to Federal Magistrates of an amount equal to 13.1 per cent of salary. Federal Magistrates are not permitted to be members of public sector superannuation schemes.

2.17 The Federal Magistrates Court argued that the amount of death benefits proposed in the Bill is inadequate and benefits payable should be equivalent to the pension and superannuation entitlements the Federal Magistrate or retired disabled Federal Magistrate would have received up until the age of 70 years.⁷ Mr Raphael, commenting on the low level of these benefits, stated that there should be a floor under the death benefits to ensure that the benefits payable are never less than \$400,000.⁸

Same sex relationships

2.18 Section 9E defines certain relationships for the purpose of establishing status as a beneficiary for a death benefit payment. Submissions noted that these definitions for 'eligible spouse' and 'marital relationship' do not make provision for same sex relationships.⁹ Mr Raphael noted that to 'impose such discrimination' on a court which has the prime responsibility for dealing with cases under the Commonwealth Anti-Discrimination legislation is 'ironic'.¹⁰

2.19 The Explanatory Memorandum explained, however, that these definitions are generally consistent with the definitions used in legislation establishing Commonwealth superannuation and pension schemes, including those contained in the Judges' Pensions Act.¹¹

Committee view

2.20 The Committee welcomes the Bill and acknowledges that it fills an important gap in providing statutory disability cover and death benefits for Federal Magistrates. The Committee believes, however, that there are some aspects of the Bill that require amendment.

2.21 The Committee considers that the age limitations in the Bill that apply to disability cover and death benefits should be increased from 65 years, as currently proposed, to 70 years so as to align the provision of benefits to the terms of appointment of Federal Magistrates, which is 70 years. The Committee sees no clear

7 Federal Magistrates Court, *Submission 3*, p. 5.

8 Mr Raphael, *Submission 1*, p. 3.

9 Mr Raphael, *Submission 1*, p. 3; Federal Magistrates Court, *Submission 3*, p. 5.

10 Mr Raphael, *Submission 1*, p. 3.

11 Explanatory Memorandum, p.6.

reason for why the Government choose the age of 65 years as the cut-off point for the cessation of these benefits.

2.22 The Committee notes that there is considerable inconsistency in the ages at which judges generally are eligible for various benefits and there is a need for more consistency in this area. The Committee notes that Federal Magistrates are the only Chapter III judges not covered by the Judges' Pensions Act – which generally provide more generous benefits than that available to Federal Magistrates. The provision of disability pensions and death benefits provides some measure of 'catch-up' in the provision of benefits already available to other judges. The Committee considers that given the Federal Magistrates Court's role, jurisdiction and increasing workloads, the remuneration and entitlements of Federal Magistrates need to be consistent with more senior judges.

2.23 In relation to the provision of death benefits, the Committee believes that the Government should provide a more generous level of benefits. The Committee believes that lump sum payments based on superannuation contributions alone would generally provide relatively small amounts of death benefits to eligible spouses and children. While the Committee has some concerns that the Bill does not provide provision for same sex relationships in the payment of death benefits, it notes that the definitions used in the Bill are consistent with legislation establishing Commonwealth superannuation and pension schemes, including those contained in the Judges' Pensions Act.

Recommendation 1

2.24 The Committee recommends that the age limits specified in the Bill limiting eligibility for disability cover and death benefits be amended from 65 years to 70 years.

Recommendation 2

2.25 The Committee recommends that the death benefits payable to an eligible spouse or children under the Bill be reviewed to provide more adequate compensation payments.

Recommendation 3

2.26 Subject to the amendments set out above, the Committee recommends that the Bill be passed.

**Senator Marise Payne
Committee Chair**

