

Entry on Tenure, prepared for Tony Blackshield, Michael Coper and George Williams (eds) (2001) *The Oxford Companion to the High Court of Australia*, Oxford University Press, Sydney

Security of tenure is an important aspect of judicial **independence**. Under the Constitution, judges can only be removed in particular circumstances, and their **remuneration** cannot be diminished. This is vital, given their function of determining the limits of power under the Constitution of the other branches of government.

For most of the High Court's history, its judges have been appointed for life. However, in 1977, the Constitution was amended to provide for the **retirement** of all High Court judges when they reach the age of 70.

It was once thought that it might be possible for Parliament to introduce a compulsory retiring age for High Court judges without amending the Constitution. In its original form, section 72, which deals with the **appointment** of judges, provided simply that judges of the High Court (and other courts created by federal Parliament) could not be removed except if both Houses of Parliament voted for their removal on the ground of proved misbehaviour or incapacity (see **Removal of Justices**). The section did not explicitly preclude the possibility that judges might be appointed only until they reached a certain age; but in *Alexander's Case* (1918) the Court (by a majority of five to two) construed it as requiring that all federal judges be appointed for life.

Although some continued to argue that a compulsory retiring age for High Court judges could be provided for by legislation, it was generally accepted after 1918 that it would require a constitutional **amendment**. Such an amendment was proposed in 1929, by the Royal Commission on the Constitution. The Commission recommended a compulsory retiring age of 72. However, the suggestion was not taken further, and the matter then seems to have then lain dormant for nearly half a century.

It came into public prominence again during the deliberations of the Australian Constitutional Convention in the 1970s. The issue was raised in 1975, and in October 1976, the Convention proposed a constitutional amendment making retirement at age 70 compulsory for High Court judges. In the same month, the Senate Standing Committee on Legal and Constitutional Affairs handed down a report with the same recommendation. The Committee gave four reasons for introducing a compulsory retiring age for federal judges. *First*, it would help to maintain vigorous and dynamic courts, which require the input of new and younger judges who could be expected to bring to the bench new ideas and fresh social attitudes. *Secondly*, the relatively high average age of federal judges limited the opportunity for able legal practitioners to serve on the Bench while at the peak of their professional abilities and before their health began to decline. *Thirdly*, there was an acceptance by the community of the need for a compulsory retiring age for judges. *Fourthly*, it would avoid the unfortunate necessity of having to remove a judge who ought not to continue in office because of declining health, but who was unwilling to resign.

In its report, the Committee also considered two alternative ways to encourage judges to retire early—allowing them to retire on full pay, or more controversially, instituting a system that reduced their annual pensions for every year after age 70 that they stayed on the bench. Both of these options were rejected.

In February 1977, all major political parties voted in favour of a provision instituting a compulsory retiring age of 70 for High Court judges (and allowing Parliament to set a retirement age of 70 or lower for judges of other federal courts). In May, it was put to the electorate as part of a package of four constitutional amendments—three of which were successfully adopted. The proposal received a majority in all States, and was supported by 80% of voters, making it the third most popular referendum proposal in Australia's history.

The argument favoured by some that a similar amendment in the US would have deprived the **United States Supreme Court** of much of the wisdom and many of the enduring insights of Oliver Wendell Holmes Jr, who retired from the Court at the age of 92, was evidently unpersuasive in the Australian context.

The 1977 amendment affected all judges appointed to the High Court or elevated to the position of chief justice after that date. Following the death of **Murphy** in 1986, all members of the Bench were subject to the compulsory retiring age provision.

Prior to the constitutional amendment, few judges had retired before they turned 70. Of the 31 judges appointed with life tenure, only four retired below this age—**Knox** (at age 67), **Evatt** (at age 46), **Williams** (at age 69) and **Kitto** (at age 67).

Yet the main factor affecting the average tenure of High Court judges has not been the introduction of a compulsory retiring age. Rather, it has been the steady increase in the average age of appointees. With the exception of the period 1903-20, when the appointment of several former politicians pushed the average age up to 55, the average age of appointees has risen from 45 (1921–40), to 46 (1941–60), to 52 (1961–80), to 54 (1981–2000).

Thus, whilst the average tenure of a High Court judge has fluctuated somewhat, the general trend has been downwards. The average tenure for judges appointed between 1903 and 1920 was 19 years (though this is skewed somewhat by the appointment of **Piddington** for just 30 days). Since then it has gone from 25 years (1921–40) to 15 years (1941–60) to 11 years (1961–80) to 14 years (1981–2000, not including the current Bench).

In all this, one thing is clear. Never again will we see a judge like **McTiernan**, who served for 46 years, longer than any other judge of a final appellate court in the common law world.

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