

31 January 2021

Legal and Constitutional Affairs Legislation Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee Secretary,

UNSW LAW SOCIETY SUBMISSION REGARDING JUDGES' PENSIONS
AMENDMENT (PENSION NOT PAYABLE FOR MISCONDUCT) BILL 2020

The University of New South Wales Law Society Inc. welcomes the opportunity to provide a submission to the Legal and Constitutional Affairs Legislation Committee.

The UNSW Law Society Inc. is the representative body for all students in the UNSW Faculty of Law.

Nationally, we are one of the most respected student-run law organisations, attracting sponsorship from prominent national and international firms. Our primary objective is to develop UNSW Law students academically, professionally and personally.

The enclosed submission reflects the opinions of the contributors, with the UNSW Law Society proud to facilitate these submissions. UNSW Law Society Inc. is not affiliated with any political party.

We thank you for considering our submission. Please do not hesitate to contact us should you require any further assistance.

Yours sincerely,

JANANI BALASUBRAMANIAN
Policy Submissions Director

SHARANYA MURTHY
Policy Submissions Director

KARTHIK PANDE
Policy Submissions Director

MURSAL RAHIMI
Policy Submissions Director

Authors

POLICY SUBMISSION DIRECTORS

Janani Balasubramanian, Sharanya Murthy, Karthik Pande, and Mursal Rahimi

Acknowledgements

We acknowledge the support of the following individuals who made this submission possible.

UNSW LAW SOCIETY CO-PRESIDENTS

Sanjay Alapakkam and Alexandra Zoras

UNSW LAW SOCIETY VICE-PRESIDENT (SOCIAL JUSTICE)

Joshua Sykes

I BACKGROUND

The *Judges' Pension Act 1968* (Cth)¹ (*the Act*) outlines the provision of the judicial pension for retired judges and extends these benefits to a judge's spouse, children, and other family members. Section 6A² provides that an eligible judge will receive a pension amounting to 60% of the appropriate current judicial salary.

In mid-2020, former associates and staff members of former High Court Justice, Dyson Heydon, brought to light an extensive history of the sexual harassment they suffered while working under Justice Heydon. His behaviour had a detrimental, permanent impact upon his former associates, with one abandoning her desire to become a barrister and another leaving the legal industry entirely.³ Following an independent inquiry commissioned by the High Court into the sexual harassment, current High Court Chief Justice, Susan Kiefel, expressed the bench's strong condemnation of former Justice Heydon's conduct. While the High Court's response to the inquiry was commended by legal professionals, it has also been emphasised that the profession's pervasive sexual harassment problem is one that must be taken more seriously.

Currently, the Act fails to hold retired judges accountable for instances of misconduct that occurred during their term but have only gained public attention during their retirement. Against this background, the Judges' Pensions Amendment (Pension Not Payable for Misconduct) Bill 2020 (*the Bill*) seeks to bridge a limitation in the present Act by implementing uniform consequences for both retired and sitting judges⁴ who have engaged in misconduct. If misconduct is substantiated, both retired and sitting judges would face the

¹ *Judges' Pension Act 1968* (Cth).

² *Judges' Pension Act 1968* (Cth) s 6A.

³ Kate McClymont and Jacqueline Maley, 'High Court inquiry finds former justice Dyson Heydon sexually harassed associates', *The Sydney Morning Herald* (online), 22 June 2020 <<https://www.smh.com.au/national/high-court-inquiry-finds-former-justice-dyson-heydon-sexually-harassed-associates-20200622-p5550w.html>>.

⁴ Under section 10 of the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth), a Commission can be established to investigate a current federal judge's misconduct and then report back to Parliament as to whether there is substantial evidence for the Houses to be satisfied that misconduct occurred.

same consequences of removal from the bench under section 72 of the Constitution⁵ and forfeiture of their pension.⁶

While stronger accountability mechanisms are required to ensure judicial integrity, this submission expresses concerns regarding the application of the Bill and whether it adequately addresses the issues it seeks to remedy. Namely, this submission expresses the limitations of the proposed Bill in having a narrow scope solely responsive to the conduct of Justice Heydon. Additionally, this submission notes that additional accountability frameworks are required to fully realise the objectives of the Bill.

II ANALYSIS OF AMENDMENT

Whilst the primary aim of the Bill, as stated in the second reading speech, is to ensure judges who have engaged in misconduct do not receive a pension,⁷ a secondary implicit aim is in stopping gross acts of misconduct by those in high judicial office. Parliament's hasty response to former Justice Heydon's actions, through this Bill, is evidence of this. However, as the Bill appears to directly respond to former Justice Heydon's conduct, the likelihood of broader cultural change in the legal sphere is limited. This Bill does little to address the endemic issues of abuse of power and a culture of silence within the justice system. This Bill might constitute a step in remedying these issues, however this submission strongly recommends that greater action is taken by the Commonwealth Parliament and the judiciary to rectify the culture of the legal industry to prevent instances of sexual harassment and misogyny.

Whilst this submission supports the principles of the Bill and recognises the Bill's remedying of an inadequacy in the law in relation to punitive measures for retired judges, it also highlights issues in its interpretation. This submission will outline the implications of the Bill's, at times, vague wording and potential application, and the minimal emphasis on the need for evidence in order to prove the accused's misconduct.

⁵ *Constitution* s 72.

⁶ *Judges' Pension Act 1968* (Cth) s 17.

⁷ Commonwealth, *Parliamentary Debates*, Senate, 6 October 2020, 5091-2 (Rex Patrick).

A *Responds to inadequacies in the law*

Processes to deal with judicial misconduct already exist within the Australian legal system. These include: custodial sentences for ‘Public Justice Offences’,⁸ or, suspension of judicial office.⁹ The consequences stemming from these processes, whether it is a criminal conviction or civil penalty, may be sufficient penalisation.

However, there is little procedure in regards to misconduct for judicial officers who have retired. The Judicial Commission of NSW was barred from resolving a complaint in 2011-2012 regards to a retired judge, who whilst serving had ‘systematically and wilfully contrived findings’¹⁰ due to the limited jurisdiction of the *Judicial Officers Act 1986* (Cth).¹¹ Therefore, the purpose of the Judges’ Pension Bill is necessary to satisfy the law.

If one was to practically apply the Bill in relation to current findings of sexual assault by former Justice Heydon, the Bill’s effect in stripping pension would offer a form of administrative punishment that is yet to be handed down by the criminal justice system. Former Justice Heydon is yet to face any legal consequences, either civil or criminal. He even retains his official honorifics despite the findings of the investigation. The Bill has the potential to provide greater certainty in delivering a punishment in light of the absence of any guaranteed repercussions for wrongdoing of this nature in the current legal system.

Those who engage in misconduct may not be primarily deterred by the Bill’s impacts as there are more significant consequences such as the immediate reputational damage that comes from the discovery of misconduct. Additionally, the Bill does not pose any detrimental effects towards the wider public if implemented. It may constitute a public condemnation of judicial misconduct and may demonstrate that it will not be tolerated by the Australian public.

⁸ *Crimes Act 1900* (NSW) s 20-140.

⁹ *Judicial Officers Act 1986* (NSW) s 40.

¹⁰ Judicial Commission of New South Wales, ‘Complaint Case Studies’, *Complaints about judicial officers* (Web Page) <<https://www.judcom.nsw.gov.au/complaints/complaint-case-studies/>>.

¹¹ *Judicial Officers Act 1986* (Cth).

The Bill may be viewed as a response to recent findings of judicial misconduct in Australia's highest court. However, stripping one's pension, without more, appears to be an inadequate and secondary response to the greater problem at hand; that being appropriate preventative measures through adequate reporting mechanisms in order for potential future misconduct to not transpire.

Given the importance of preserving judicial independence to Australia's democratic system of government, any proposal seeking to alter the remuneration of judges should be assessed through the lens of its effect on the judiciary. It seems logical to make this analysis, given that the security of the pension is, inter alia, a factor that may attract talented practitioners to pursue a judicial career.¹²

B *Broad Application*

The Bill's lack of specific wording relating to its application is concerning. There are no precise parameters or indicators for what type of events are inclusive of 'serious misconduct' to which retired judges will be held accountable. In the Bill's explanatory memorandum,¹³ 'serious misconduct' was said to be guided by the definitions found in the *Fair Work Act 2009* (Cth)¹⁴ and Governor-General Amendment (Cessation of Allowances in the Public Interest) Bill 2019 (Cth).¹⁵ Both instruments provide vague and broad definitions, noted through the Governor-General Amendment (Cessation of Allowances in the Public Interest) Bill 2019 (Cth),¹⁶ which states that 'serious misconduct includes an omission to act'.¹⁷ This can encourage Parliament a loose interpretation of the term. Such vague definitions bring into question issues of Parliamentary discretion and abidance with the Rule of Law, and as

¹² Senate Select Committee on Superannuation, Parliament of Australia, *The Parliamentary Contributory Superannuation Scheme & The Judges' Pension Scheme* (Final Report, September 1997) 64-66.

¹³ Explanatory Memorandum, Judges' Pensions Amendment (Pension Not Payable for Misconduct) Bill 2020 (Cth), 3-4 [12].

¹⁴ See *Fair Work Regulations 2009* (Cth) reg 1.07

¹⁵ See Explanatory Memorandum, Governor-General Amendment (Cessation of Allowances in the Public Interest) Bill 2019 (Cth), 2 [9].

¹⁶ Explanatory Memorandum, Governor-General Amendment (Cessation of Allowances in the Public Interest) Bill 2019 (Cth), 2 [9].

¹⁷ Governor-General Amendment (Cessation of Allowances in the Public Interest) Bill 2019 s4AGB (5).

Endicott states, may encourage disagreement, doubt and dispute.¹⁸ and the potential misuse of power to strip retired judges of pension for actions that may not warrant such punishment.

In the United Kingdom, the equivalent provision to the one proposed in this Bill requires consideration of whether the offence committed by the judge whose pension is at risk was either ‘injurious to the administration of justice’ or something that would cause a fall in confidence in the judiciary.¹⁹ In the case of a retired judge’s prior sexual harassment coming to light, such conduct may plausibly be shown to reduce confidence in the judiciary particularly given the high moral standards judicial officers are expected to keep. While the exact wording of the conditions of the UK provision are somewhat limited, in this submission’s view, the inclusion wording akin to this, which makes the application of the Bill more specific to issues pertaining to the judiciary, is more preferable than the ill-defined ‘serious misconduct’. As Parliament ultimately decides on the removal of pensions (not dissimilar to the Lord Chancellor, a Minister, making a declaration in the UK provision mentioned above), attaching more specific conditions for serious misconduct will decrease the chance of unwarranted declarations being made under this Bill, while still allowing Parliament to retain discretion in deciding whether a judge’s pension is worth stripping. One remedy for this issue is the provision of a non-exhaustive list of examples in the Bill to illustrate the nature of the wrongdoing that would amount to serious misconduct. This could provide more precise guidance for decision-makers. The use of vague definitions and requirements for serious misconduct could lead to inconsistent outcomes across different matters and judgments as well as resulting in a broader disregard for due process for judges who are at the receiving end of such an accusation.

This submission recommends that the Bill states a clear definition of what actions are to be considered ‘serious misconduct’ so as to avoid confusion and broad discretionary powers bestowed upon Parliament.

C Proof of Misconduct

¹⁸ Timothy Endicott, ‘Law is Necessarily Vague’ [2001] (7) *Legal Theory* 379.

¹⁹ *Judicial Pensions Regulations 2015* (UK) SI 2015/182, reg 151(4) (definition of ‘forfeiture certificate’).

This submission particularly notes the absence of a specified standard of proof of the ‘serious misconduct’ that may trigger a cessation event under the suggested s 17AAA of the Act. As Senator Patrick notes in his second reading speech, s 17 of the Act disqualifies a judge removed from the bench from receiving their pension,²⁰ yet s 72 of the *Australian Constitution* only allows removal for ‘*proved* misbehaviour or incapacity’.²¹ This submission notes the uncertainty regarding the meaning of ‘proved’ as a matter of constitutional law²². However, a specified evidentiary threshold for proof would demonstrate that removing a judge for misconduct is a power not to be used without proper consideration of the facts in question. Though this Bill is targeted at penalising misconduct discovered after retirement,²³ this does not reduce the importance of requiring proof of the alleged misconduct. If it is accepted that removing a judges’ pension is a significant and effective penalty, then it is important to limit potential avenues for abuse of said power. Therefore, this submission recommends the inclusion of a specified standard of proof relating to an allegation of misconduct.

Looking to international examples may be particularly constructive. For the pension schemes for judicial officers from the United States of America, the United Kingdom, and Canada, the removal of judges from those programs is difficult; reflective of a similarly strong respect for judicial independence and an entrenched sense of veneration for the judiciary in their respective legal systems. In Canada, it is explicitly stated in the legislation governing the Canadian judicial pension scheme that, assuming other mandatory statutory conditions are fulfilled, a judge may receive their pension ‘at the time of his or her resignation or *removal*’.²⁴ That removal from the bench is explicitly contemplated as *not* disqualifying one from receiving their pension, in stark contrast to the position in Australia, suggests a great unwillingness to interfere with the judicial pension. This is likely due to a highly cautious approach in interfering with the autonomy of the judiciary generally and the entitlements and

²⁰ Commonwealth, *Parliamentary Debates*, Senate, 6 October 2020, 5091-2 (Rex Patrick).

²¹ *Australian Constitution*, s 72(ii) (emphasis added).

²² Rebecca Ananian-Welsh and George Williams, ‘Judicial Independence from the Executive: A First-Principles Review of the Australian Cases’ (2014) 40(3) *Monash University Law Review* 593, 604. See also, Gavan Griffith, *In the Matter of Section 72 of the Constitution* (Opinion, 24 February 1984) 53-55.

²³ Commonwealth, *Parliamentary Debates*, Senate, 6 October 2020, 5091 (Rex Patrick).

²⁴ *Judges Act*, RSC 1985, c J-1, s 42(1) (emphasis added).

expectations of its judges.²⁵

In the United States, at present, judges do not lose their pensions in the case of misconduct even after the fact.²⁶ However felony convictions will count against the ‘service requirements’ for judicial pension benefits.²⁷ Given that fulfilment of those ‘service requirements’ are necessary to receive the judicial pension, American judges can still, in substance, face the penalty of having their pension not being granted to them for their misconduct. Importantly, there must be a criminal conviction for this to occur. The UK in its judicial pensions legislation also contains a mechanism which removes pensions for misconduct²⁸; the equivalent of the proposed s 17AAA in the Bill. However, there must be a criminal conviction and a judgment made that the relevant offence damaged public confidence in the judiciary or affected the administration of justice.²⁹ That a criminal conviction is needed for a judge’s pension to be affected materially in the USA and the UK is an implicit requirement for proof of misconduct before imposing consequences.

By requiring the relevant misconduct to be proved beyond a reasonable doubt, as required for criminal convictions, these examples demonstrate that a consistently cautious approach should be taken in favour of preserving judicial independence as far as possible. By not requiring proof of misconduct, even impliedly like in the two examples above, Parliament may plausibly be allowed to pass a resolution declaring a cessation event based purely on an allegation without affording the judicial officer due process under the law - something certainly undesirable in any context, but particularly the judicial context. Thus, this submission recommends that the Bill must be amended to require some threshold of proof of the misconduct.

²⁵ See eg, Department of Justice Canada, *Response of the Government of Canada to the Report of the Judicial Compensation and Benefits Commission* (Government Response, February 2020) 4-5, which outlines the lengthy process to remove Canadian judges for misconduct.

²⁶ 28 USC § 362 (2002).

²⁷ 28 USC § 364 (2002).

²⁸ Judicial Pensions Regulations 2015 (UK) SI 2015/182, reg 151.

²⁹ Judicial Pensions Regulations 2015 (UK) SI 2015/182, regs 151(1), 151(4) (definition of ‘relevant offence’).

III ADDITIONAL ACCOUNTABILITY MECHANISMS

The effectiveness of the proposed Bill in responding to and deterring instances of judicial misconduct will be limited where there is insufficient architecture to support the reporting of said misconduct. Following the High Court’s investigation into former Justice Dyson Heydon’s conduct, Her Honour Chief Justice Kiefel released a statement apologising to the six women who raised complaints against him and acknowledged the difficulties they likely faced in coming forward.³⁰ This was particularly in light of the power asymmetry that exists between judicial officers and junior legal professionals, and the ease with which it may be abused if unchecked.

Within New South Wales, complaints of judicial misconduct are investigated and dealt with by the Judicial Commission of New South Wales (JCNSW); an independent statutory body established by the *Judicial Officers Act 1986* which commenced operation in 1987. Though its creation sparked debate over whether the commission would encroach on judicial independence,³¹ the Standing Committee on Legal and Constitutional Affairs has observed that it has ‘established a reputation as one of the leading institutions of its kind’.³² After the High Court’s internal investigation and findings regarding former Justice Dyson Heydon, the NSW Supreme Court further appointed an external consultant to whom complaints may be directed.³³ Until the Judicial Commission of Victoria was established in 2017, the JCNSW was the only permanent body that could deal with concerns raised by the public regarding the behaviour of a judicial officer.³⁴ At present there is no federal equivalent of this independent investigatory body, as complaints are managed internally by the Chief Justice.³⁵

³⁰ Hon Susan Kiefel AC, *Statement by the Hon Susan Kiefel AC, Chief Justice of the High Court of Australia* (23 June 2020) High Court of Australia

<<https://cdn.hcourt.gov.au/assets/news/Statement%20by%20Chief%20Justice%20Susan%20Kiefel%20AC.pdf>>

³¹ Kate Lumley, *From controversy to credibility: 20 years of the Judicial Commission of New South Wales* (2008) Judicial Commission of New South Wales

<<https://www.judcom.nsw.gov.au/wp-content/uploads/2014/07/judcom-20years-web.pdf>>

³² Legal and Constitutional Affairs References Committee, Parliament of Australia, *Australia’s Judicial System and the Role of Judges* (2009) [7.11].

³³ Supreme Court of New South Wales, *Supreme Court Policy on Inappropriate Workplace Conduct* (14 October 2020)

<<https://www.supremecourt.justice.nsw.gov.au/Documents/Practice%20and%20Procedure/Unacceptable%20Workplace%20Conduct%20Policy.%2014%20October%202020.pdf>>.

³⁴ Legal and Constitutional Affairs References Committee, Parliament of Australia, *Australia’s Judicial System and the Role of Judges* (2009) [7.11].

³⁵ Federal Court of Australia, *Judicial Complaints Procedure* (3 May 2013)

<<https://www.fedcourt.gov.au/feedback-and-complaints/judicial-complaints>>.

This submission echoes the call of 500 female legal professionals in their open letter to Commonwealth Attorney-General Christian Porter for the deep cultural shifts required to hold judicial officers to account, particularly in circumstances of workplace misconduct and sexual harassment.³⁶ This submission recognises the value of institutional judicial reform through the creation of an independent complaints body with standing to hear complaints against federal court judges.³⁷ This submission further defers to the recommendations contained in the open-letter in relation to the design and structure of such a body in order to strike a careful balance that respects judicial independence while holding judicial officers to account.³⁸

IV CONCLUSION

The acceptance of judicial decisions relies greatly on the conformity of the public to these decisions.³⁹ Former Chief Justice Murray Gleeson attributes this habit of conformity to the confidence of the public in the judiciary; that is, a satisfaction that the justice system is underpinned by and actively upholds values of independence, impartiality and professionalism.⁴⁰ The improper handling of complaints against judicial misconduct and the endemic culture of silence with regards to abuse of power amongst senior legal professionals risks undermining public confidence in the judiciary. In response to the newly suggested mechanisms to deal with judicial misconduct, this submission has explored key issues within the current framework, in addition to highlighting particular deficiencies in the Judges' Pensions Amendment (Pension Not Payable for Misconduct) Bill 2020.

³⁶ Gabrielle Appleby, 'Deep cultural shifts required: open letter from 500 legal women calls for reform of way judges are appointed and disciplined', *UNSW Newsroom* (online), 7 July 2020 <<https://newsroom.unsw.edu.au/news/business-law/deep-cultural-shifts-required-open-letter-500-legal-women-calls-reform-way-judges>>.

³⁷ Gabrielle Appleby, 'Deep cultural shifts required: open letter from 500 legal women calls for reform of way judges are appointed and disciplined', *UNSW Newsroom* (online), 7 July 2020 <<https://newsroom.unsw.edu.au/news/business-law/deep-cultural-shifts-required-open-letter-500-legal-women-calls-reform-way-judges>>.

³⁸ Gabrielle Appleby, 'Deep cultural shifts required: open letter from 500 legal women calls for reform of way judges are appointed and disciplined', *UNSW Newsroom* (online), 7 July 2020 <<https://newsroom.unsw.edu.au/news/business-law/deep-cultural-shifts-required-open-letter-500-legal-women-calls-reform-way-judges>>.

³⁹ The Hon Murray Gleeson, 'Public Confidence in the Judiciary' (Speech, Judicial Conference of Australia, 27 April 2002) <https://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleeson/cj_jca.htm>.

⁴⁰ The Hon Murray Gleeson, 'Public Confidence in the Judiciary' (Speech, Judicial Conference of Australia, 27 April 2002) <https://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleeson/cj_jca.htm>.

Namely, this submission has highlighted the lack of a specified standard of proof in the Bill and its vague wording. Given that it is the judiciary this Bill will affect, it is particularly important in this submission's view that this deficiency is remedied, to increase confidence that the powers in this Bill cannot be misused. If amended to address these deficiencies, this submission does view the Bill as useful in remedying the law to ensure accountability and punishment for retired judges that have engaged in misconduct during their tenure. In addition to the recommended amendments to the Bill, this submission has further noted the need for institutional judicial reform to encourage complainants in the first instance that doubts regarding a judicial officer's conduct or capacity will be dealt with independently and with integrity. A summary of the recommendations can be found below.

V SUMMARY OF RECOMMENDATIONS

1. This submission recommends that a specified standard of proof be inserted into the Bill. This is to limit potential misuse of the powers conferred by this Bill, and to continue to uphold an explicitly cautious approach with respect to penalising judicial misconduct as currently exists in Australian law.
2. This submission recommends that more specific wording be used in the construction of the Bill. Such wording limits the amount of potential disagreement and inconsistency when interpreting the Bill.
3. This submission recommends that a clear definition for 'serious misconduct' is stated in the Bill and possibly, the provision of a non-exhaustive list of examples in the Act to illustrate the nature of the wrongdoing that would amount to serious misconduct.
4. This submission recommends that an independent statutory body be created to investigate claims made against federal court judges. This recommendation relies on an understanding that a robust framework for reporting misconduct will aid in fostering a culture of accountability and transparency within the courts, and the legal profession generally.