Judicial pensions: time for reform?

By Brian Opeskin, professor of legal governance, Macquarie University

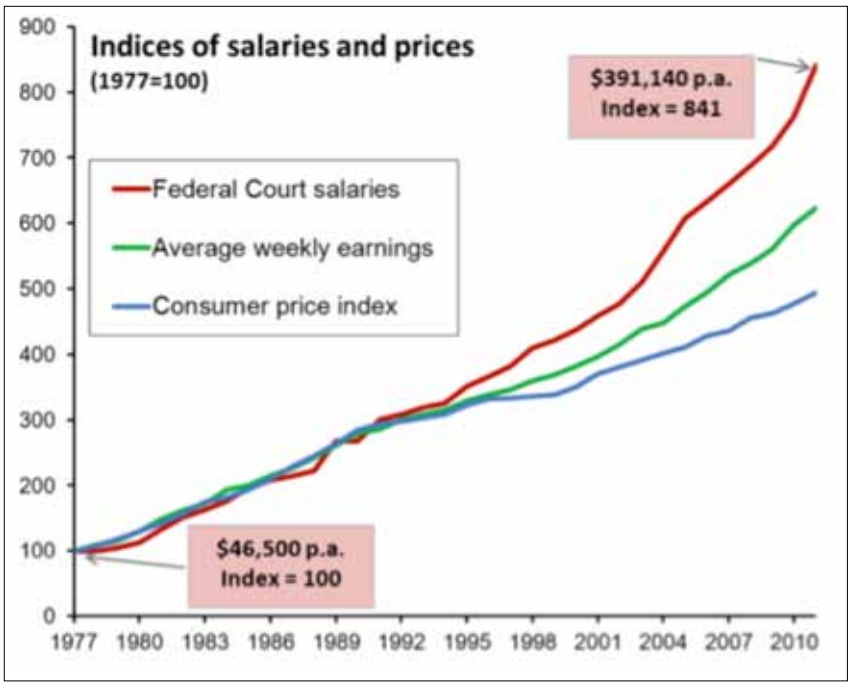
The rise and rise of long-term costs

In July 2012 the Australian Government Actuary released its latest triennial report on the long term cost of the pension scheme for federal judges.[1] At 30 June 2011, the unfunded liability of the scheme amounted to $782 million—an increase of 38 per cent in nominal terms (27 per cent in real terms) in just three years. This was the fourth substantial rise since the cost of the scheme was first pegged at $267 million in 1999, despite the fact that the number of serving judges included in the estimates has declined steadily from 131 to 102 over that 12 year period. For the first time the Actuary also provided long term cost projections, estimating an accrued liability of $3,342 million by 2054–55. This is a very large number, and yet a very conservative one because it rests on the implausible assumption that the courts covered by the scheme—the High Court, the Federal Court and the Family Court—will not increase in size over the next 40-odd years.[2]

The future cost burden of the judges' pension scheme raises an important issue of public policy. The scheme is non-contributory in the sense that it is funded from consolidated revenue and judges make no financial contribution during their years of service towards their later pension entitlements. Is the scheme sustainable in the long term? The answer to this question has implications beyond the federal sphere because the scheme is replicated to a substantial degree in every Australian state and territory, other than Tasmania.[3]

Parameters of the federal judicial pension scheme

The remuneration arrangements for judges are undoubtedly well known to judges, but are less familiar outside judicial circles. Federal judges are remunerated through a package of benefits that includes salary during their years of judicial service, a judicial pension paid during their years of retirement, and a spousal pension paid to a judge's surviving spouse until the spouse's death. The judicial pension is set at 60 per cent of current judicial salary and the spousal pension is set at 62.5 per cent of the judicial pension. There are two qualifying conditions: to be eligible for the pension a judge must be 60 years of age and have served for 10 years (there are pro-rata arrangements for service between six and 10 years). These key parameters are set by legislation—the *Judges' Pensions Act 1968* (Cth)—and have remained unchanged since the 1970s.[4] Also relevant is the fact that federal judges must retire by 70 years of age.



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Reasons for cost escalation

Why has the cost of the scheme ballooned so substantially over such a short period? One reason identified by the actuary is that judicial salaries have increased much faster than inflation, and this automatically flows through to pensions. Between 2008 and 2011 salaries increased at an average rate of 5.4 per cent per annum. This is consistent with the long-term growth in judicial salaries, which has outstripped both inflation and average weekly earnings since the early 1990s (see *Figure 1*). The cost of the pension scheme is very sensitive to assumptions about future salary increases,[5] but from a

policy perspective there is little that can or should be done about this. Federal judicial salaries are set by the Remuneration Tribunal, subject only to disallowance by parliament,[6] and the statutory independence of the tribunal is an important pillar in maintaining the independence of the judiciary.

The second reason for the escalation in cost is demographic—judges are living longer.[7] Australia already has one of the highest life expectancies in the world—currently 79 years for newborn boys and 84 years for newborn girls—and by 2056 these figures are projected to rise to 94 years for males and 96 years for females. What effect will these changes have on the viability of the judicial pension scheme?

Substantial increases in life expectancy over the next 45 years will impose a very significant strain on the system of judicial remuneration. This is because the long tail of judicial and spousal pensions will continue to lengthen, while the period of judicial service remains tightly constrained—at the lower end, by the need to acquire legal skills prior to judicial appointment; and at the upper end, by mandatory retirement of federal judges at age 70. As an illustration, consider the position of a male Federal Court judge who is appointed at age 50 and retires at age 60, as soon as his pension vests.[8] Based on actuarial and demographic data, the government can expect to pay pensions to the judge and his spouse for 33 years beyond his retirement. At the current salary level ($391,140 per annum),[9] the total benefits are equivalent to a payment of $1.56 million for each of the 10 years the judge serves on the bench. These calculations are based on *current* longevity. By 2056, when life expectancy at birth will extend to the mid-90s, a judge who serves for 10 years can expected to be paid more than four times as much in retirement and death than during active service. A scheme that produces such perverse outcomes invites review.

A third factor identified by the actuary as having the potential to increase the cost of the scheme in the future is the changing retirement patterns of federal judges. Under the present scheme, once the qualifying conditions are met, the same pension is payable on retirement regardless of how many years' service a judge has rendered. Historically, judges tended to remain on the bench until they reached the age of mandatory retirement at age 70, so that a long pension tail was often balanced by a long period of active service. In recent times, a larger number of judges have retired soon after their pension vests. This led the actuary, in 2005, to triple the assumed retirement rates for judges aged 61–64 years, and in the latest report he notes that secular trends in this direction may lead to

further revisions in assumptions in the future.

A changed environment

The escalating cost of the pension scheme may not be sufficient, on its own, to justify reform. However, the milieu in which the pension scheme operates has altered dramatically, and this must also be considered. First, the demographic reality of an ageing population is confronting government policy everywhere. It is an irresistible force from which there is no escape, and is reflected in the practice of the Australian Treasury—now mandated by legislation—to deliver periodic *Intergenerational Reports* to assess the long term sustainability of current government policies over the following forty years.[10] The judicial system will also need to respond to these demographic pressures if it is to maintain the confidence of the public.

Secondly, the employment circumstances of potential judicial appointees have changed significantly in the past 20 years. The introduction of mandatory superannuation in 1992 has provided increased retirement security for all Australians. Today, a legal practitioner might make 20–30 years of superannuation contributions before his or her judicial appointment. This provides significant financial resources for retirement, apart from the pension.

Thirdly, many judges today have an expectation of professional life after the bench—as acting judges, arbitrators or commissioners—which did not exist when the current federal pension scheme was crafted. As former chief justice Murray Gleeson has remarked, this is a major shift in attitude in the profession,[11] and gives many judges the prospect of substantial post-retirement income.

Fourthly, spouses too have greater financial security than in times past. Nowhere is this more evident than in the increasing labour force participation rate of women of working age, which is now above 65 per cent. The financial dependency of spouses was a major argument for generous judicial pensions when the current scheme was first debated. Although we have not yet arrived at a point of gender equality in employment, progress in that direction should be considered in evaluating the current scheme.

Finally, there has been a transformation of the federal judiciary, with the establishment of new courts with significant jurisdiction,[12] and the appointment of many new judges to administer justice in those courts. A generous pension scheme adopted for a small number of federal judges in a different era may no longer be appropriate for present circumstances.

Directions for reform

These problems deserve a remedy, but the answer is not simple. Judicial office must continue to be attractive to the most meritorious barristers and solicitors, most of whom have lucrative alternatives in the legal profession. The challenge is to design a system of judicial remuneration that is cost-effective and sustainable in the long term, without eviscerating the benefits paid to judges. The system must also recognise the paramount importance of judicial independence, which requires remuneration to be high enough for judges to resist pressure from any quarter and avoid seeking favour, in their last years in office, among those who might facilitate post-retirement earnings.

Three policy changes should be given serious consideration. The need for reform is pressing because any change in the remuneration of federal judges must comport with the requirement in s 72(iii) of the Constitution that 'remuneration shall not be diminished during [a judge's] continuance in office'. There seems little doubt that this limitation applies equally to serving and retired judges. The practical result of this is that any change in pension arrangements (other than an extension of the mandatory retirement age) could take effect only for new appointees, and the *impact* of such changes will not be felt until those new appointees begin to retire, many years hence.

First, the maximum retirement age of judges should be increased beyond 70 years so that judges can choose longer working lives if they are capable of doing so. In 2009, the Senate Legal and Constitutional Affairs References Committee made just such a recommendation.[13] Second, the minimum age at which judges qualify for the judicial pension should be increased from 60 years to align with community expectations (the age pension will soon be available only from age 67). There is precedent for this in Victoria, where state judges must generally attain age 65 before they can access their judicial pensions. And thirdly, the minimum years of

service needed to qualify for the judicial pension should be increased beyond the current ten years. Again, there are precedents: in South Australia, state judges receive the maximum pension of 60 per cent of salary only after 15 years of service; and 15 years was also the qualifying period for justices of the High Court (the first federal judges) from 1903 to 1948.

These are modest proposals. Whether discussion is limited to these or extended to include bolder options (e.g. contributory schemes, removal of spousal benefits, or recalibration of pension rates), it is important that the legal community have the debate. In this author's view, it is only through prompt action that the remuneration framework for judges will be able to meet the inexorable pressures of tomorrow's demographic change.

Endnotes

1. Australian Government Actuary, *The Judges' Pension Scheme: Long Term Cost Report 2011* (Department of Finance and Deregulation, 2011).
2. The assumption is credible in relation to the High Court, which has had no more than seven justices for the past century. See James Popple, 'Number of Justices' in *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 505. Beyond the High Court, the assumption is unrealistic.
3. See Brian Opeskin, 'The High Cost of Judges: Reconsidering Judicial Pensions and Retirement in an Ageing Population' (2011) 39 *Federal Law Review* 33, 45–6.
4. The qualifying condition of 60 years of age and 10 years' service was introduced in 1948; the pension rate of 60 per cent was introduced in 1973 (up from 50 per cent): see Opeskin n 3, 61.
5. The actuary has estimated that an additional one per cent per annum salary increase would add $100 million, or 13 per cent, to the cost of the scheme: Australian Government Actuary, n 1 above, 18.
6. *Remuneration Tribunal Act 1973* (Cth) s 7.
7. Other demographic changes that have driven cost increases are the higher proportion of judges with spouses (hence there are more spousal pensions to pay), and the larger age differential between male judges and their (younger) spouses (hence spousal pensions are paid over a longer period).
8. The example is taken from Opeskin, n 3 above.
9. Remuneration Tribunal, 'Determination 2011/10: Judicial and Related Officers: Remuneration and Allowances' (Remuneration Tribunal, 2011).
10. *Charter of Budget Honesty Act 1998* (Cth) s 21.
11. Murray Gleeson, 'A Changing Judiciary' (Paper presented at the Fifth Colloquium of the Judicial Conference of Australia, Uluru, 7-9 April 2001).
12. Brian Opeskin, 'Federal Jurisdiction in Australian Courts: Policies and Prospects' (1995) 46 *South Carolina Law Review* 765.
13. Australian Senate, 'Australia's Judicial System and the Role of Judges' (Legal and Constitutional Affairs References Committee, 2009) [4.16], [4.21]–[4.26].

Response to Professor Opeskin

Bar News thanks Professor Opeskin for this very interesting and informative piece. The issue of judicial pensions raises many policy questions and *Bar News* would welcome further contributions on this topic. In the meantime a few preliminary observations can be made.

Professor Opeskin uses the example of a male Federal Court judge who is appointed at age 50 and then retires at age 60, as soon as his pension vests. Professor Opeskin says that at current salary levels and life expectancies the total benefits which would be payable under the pension scheme to a judge in this position could end up being $1.56 million for each of the ten years the judge serves on the bench. He concludes that a scheme that produces 'perverse outcomes' of this kind invites review.

This hypothetical example is of course possible. But it is certainly not typical. An analysis by *Bar News* of Federal Court judges who were serving judges in 1999 or who were appointed in 2000 or 2001[1] reveals the following:

1. There were 50 judges serving in 1999 and a further four were appointed in 2000 and 2001, being a total of 54 judges.
2. Of those 54 judges, eight are still sitting (as at 19 October 2012). The length of service of the remaining 46 judges was as follows:

20 years or more	6
15-19 years	14
11-14 years	17
10 years	3
Under 10 years	6

3. Of the three judges who served for 10 years, only one left the Federal Court at the age of 60 and this was on appointment to another court. The other two judges retired at the ages of 64 and 70 years respectively.

4. Of the 17 judges who served 11–14 years, seven judges were 65 years of age or above, eight were between 60 and 64 and two were under 60 years of age. This does not distinguish between the reasons for which these judges retired (for example due to ill health or who were appointed to another judicial or government position).

In short, appointment at 50 and retirement at 60 is not the typical pattern of judicial service for Federal Court judges. The benefits payable per year of service to a more typical judge, namely one who served longer than ten years and who was older than 60 when he or she retired, would be considerably less than those contemplated by Professor Opeskin's example (the extent less depending on the age and time period involved).

It may equally be said that younger judicial appointees are already disadvantaged by having to remain on the bench longer in order for their pension to vest. Thus, a judge appointed to the Federal Court at the age of 45 or younger already will have to serve at least 15 years until he or she is eligible to receive their full judicial pension. Of the 46 retired judges referred to above, seven were appointed at the age of 45 or younger and another 14 were appointed between the ages of 46 and 49.

Some further observations may be made in respect of the points raised by Professor Opeskin.

First, it is of course correct that some retired judges become mediators, arbitrators or the like, but it is difficult to assess how common this is in the context of all judicial retirements. Plainly it is not the case for all retired judges, it may not even be the case for a majority.

It is equally difficult to assess how many retired judges provide important service to the community by involving themselves in unpaid work (for example, for schools, universities, charities or sporting organisations) – work which may be facilitated by the current pension scheme.

Secondly, if changes to the current arrangements are to be made, the suggestion of increasing the retirement age of federal judges seems a good one, if it can be implemented. In New South Wales the judicial retirement age is 72 and, for acting judges, a maximum of 77.

Lastly, and most importantly, any variations to the age of retirement for federal judges or to the federal judicial pension arrangements should only be considered after an analysis of the effect of the proposed variations on the administration of justice and the efficient working of federal courts, rather than by reference solely to the cost of judicial pensions.

In particular, as is noted by Professor Opeskin, it is of paramount importance to the public's confidence in the administration of justice to ensure that the most meritorious barristers and solicitors continue to accept appointment to judicial office, and that judicial independence is maintained.

The editor, Daniel Klineberg and Nicolas Kirby

Endnotes

1. This period is chosen since (1) paragraph 1 of Professor Opeskin's paper discusses the period from 1999 to 30 June 2011 and (2) a judge appointed after 2001 could not have retired by 30 June 2011 and served 10 years on the bench. The analysis is based on publically available Federal Court records, judges' entries in *Who's Who in Australia* and other public data.