A creature of a momentary panic

Tony Cunneen discusses the passage of the Judges' Retirement Act in NSW, 1917-18[1]

Introduction

Former chief justice, the Honourable Sir Gerard Brennan AC, KBE, in his address to *The Francis Forbes Society for Australian Legal History*, said that 'an appreciation of the law (is not) likely to be accurate without an understanding of the cultural and institutional forces which brought it into existence.'[2] A close examination of the passage of the *Judges' Retirement Act 1918* through the New South Wales Parliament in 1917 and 1918 provides a fascinating example of just how such forces have operated in the past. The bill graphically represents the interplay of political, personal and social issues on legislation, which, in this case, profoundly affected the careers of those in the legal profession. The passing of the bill went against English precedent and made more places available on the bench for lawyers who were Australian born and trained. It was the first time such an Act affecting sitting judges was passed in the British Empire.[3]

'Painful Scene in Court'

The first public mention of the proposal to set a compulsory age of retirement for judges in New South Wales occurred on Tuesday on 1 May 1917 when the *Sydney Morning Herald* reported a 'painful scene'[4] in Sydney's Banco Court. The defendant was one Hugh Beresford Conroy: a candidate in the then current federal parliamentary election, and a man with complicated domestic and business arrangements. His wife was the plaintiff. Conroy's application for an adjournment was not allowed by the chief judge in Equity, 74-year-old, English-born Mr Justice Archibald Simpson[5]. Counsel for the defense withdrew. Conroy said he would appear in person and applied immediately for Justice Simpson not to hear the case. When asked his reason Conroy told Justice Simpson:

> because you have reached a stage of life when it is impossible in the afternoon to remember what took place in the morning. It has gone past your mind. You are not fit to sit and conduct such cases as the present.

That comment was just the beginning of the extraordinary tactics Conroy employed in his own defence. He also claimed that he had been to visit the attorney general, David Robert Hall who 'was of the opinion that (Justice Simpson) had reached a stage when (he) should no longer sit on the bench.' Furthermore, Conroy claimed that Hall said that: 'A bill was being prepared fixing a Judge's retirement at the age of 70 years.' Conroy also claimed that Justice Simpson was 'unable to recognise matters of public interest' and that the New South Wales Bar agreed with this assessment. Conroy's manner was described as 'dramatic in style and almost threatening' by the *Sydney Morning Herald*.

Joseph Browne, a member of the New South Wales Legislative Council, was counsel for the plaintiff. He objected to the attack and said 'it was very painful to listen to such insulting remarks', although this was not the line he took when the bill was discussed in parliament. The exchanges between Conroy and Mr Justice Simpson continued with Conroy becoming increasingly agitated and eventually the *Sydney Morning Herald* reported that he 'made a remark' which caused

> 'considerable excitement . . . throughout the court. The tipstaff approached Mr Conroy and shouted "Silence!" Mr Conroy's excited condition indicated a possibility of something more forcible than his language. The constable attached to the court came into the room.'

The judge and his associate left the court and as they did so Conroy shouted at the top of his voice 'I address you so that you can hear me. I know that you are deaf.' Conroy was still passionately fired up after two brief adjournments. When Justice Simpson refused again to grant the application Conroy shouted: 'You've got a maggot in the brain' amongst other things, and made particular reference to Mr Justice Simpson's supposed deafness and mental acuity.

After the account of the court room scene the *Sydney Morning Herald* included a short disclaimer from the Attorney General Hall and the Acting Premier Fuller admitting contact with Conroy but stating that they did not support his attempt to remove Justice Simpson from the case.[6] Hall and Fuller did not deny the existence of the proposed legislation.

The Meagher Case and 'septic prejudice' on the bench

May 1917 saw another controversial intersection of judicial power and politics when Richard Meagher MLC made his fifth application to be restored as a solicitor of the New South Wales Supreme Court. Meagher had been involved in a protracted process to be reinstated after having been struck off because of his involvement in the celebrated Dean case[7]. On 28 May 1917, not long after Conroy's bizarre performance before Justice Simpson, Meagher's application was heard by the full court, consisting of the chief justice, Sir William Cullen, Mr Justice Pring and Mr Justice Gordon. The high profile of the case meant that 'large numbers of the legal profession' crowded the gallery. The Honourable John Jacob Gannon KC MLC and another well-known barrister, HE Manning, represented Meagher.

The application was made on the grounds of Meagher's conduct in recent years. The *Sydney Morning Herald* had two full columns devoted to the case, which was understandable

as Meagher was the lord mayor of Sydney and had previously been speaker in the Legislative Assembly – although he had lost his seat in the recent election and subsequently been appointed to the Legislative Council.[8] Supporting Meagher's application for readmission were affidavits from a range of barristers and politicians. Much emphasis was laid upon Meagher's political career as a reason for his readmission.

Chief Justice Sir William Cullen responded to the reference to political success in particular. He asked if 'success in politics' was 'solid and substantial' evidence of a changed character. Counsel said it was. Sir William Cullen replied:

> Then it is easier for a successful politician to obtain reinstatement than for an obscure and friendless solicitor?' Counsel said that it gave the person a chance to prove his rehabilitation then Sir William Cullen asked 'Is the Court to take the opinion of politicians as evidence guiding its own opinions?[9]

Counsel stated that he was only submitting it as evidence.

The Incorporated Law Institute was the defendant. Its counsel argued that a man 'must be judged on his whole life' and submitted that the affidavits concerning Meagher's political success should not sway the court. Sir William Cullen agreed. The application was refused. Within a few months Meagher was speaking to support a motion to limit setting the retirement age of the same judges who had so recently sat in judgment over him. Meagher could best be described as incandescent with rage against the chief justice. He made repeated inflammatory speeches on the topic in subsequent years, attained the support (by his own account) of a number of prominent citizens and produced, in 1920, a vitriolic account of his life in which he accused Chief Justice Cullen of all manner of transgressions, including 'gross bias' and 'despicable' and 'septic prejudice' regarding his application for readmission as solicitor.[10]

The newly elected New South Wales Nationalist Coalition Government of the day was also involved in a tense exchange with the New South Wales Bar Council in May 1917. The council opposed the speaker of the Legislative Assembly, John Jacob Cohen KC as an appointee to the bench immediately after the April elections. Attorney General Hall did not take this well and condemned the council as an 'irresponsible body.'[11] Interestingly enough and perhaps in the best tradition of politics there were firm denials in the press in May 1917 that Cohen was even being considered as a judge.[12]

Relations between judges and politicians were not always strained. They appeared together in many patriotic forums. In April 1917 there had been a farewell for Premier Holman before his departure overseas. Judge Backhouse spoke saying how much his respect for Holman as a lawyer was 'real and earnest' and that he had done good work in a variety of social fields. This comment was only one of many in which judges' views on a variety of judicial and social issues were reported. Judges were in the news throughout the year as they supported war-related causes or had their judgments extensively reported in the press. The *Sydney Morning Herald* regularly devoted a full closely typeset page reporting legal proceedings with extended accounts of statements, cross examinations and judges' comments.

Background to the Act - 'tension, bitterness (and) violence' in New South Wales

The Judges' Retirement Bill originated during an extraordinary time in state politics. The year, 1917, was marked by 'escalating industrial tension, bitterness in public life, and violence at levels rarely seen in modern Australian politics.'[13] The Labor party was still raw from the split over the issue of conscription in 1916. In August 1916, Premier Holman and Attorney General Hall had been among those who had been expelled from the Labor Party as a result of that split – taking all the Labor lawyers with them and Prime Minister William Morris Hughes, who was another Sydney barrister. In late 1917 there had been the protracted, intense industrial disputation known as 'The Great Strike'. All this occurred during one of the worst periods of the Great War. Twenty members of the legal profession lost their lives to the war in 1917 – nearly as many as the total number of deaths in the profession for the years of 1914, 1915 and 1916 combined. The battlefield casualties nearly included the state premier, William Holman.

Premier Holman was on a tour of England and the Western Front after the state election and visited the New South Wales units in the front line. General William Holmes was guiding him when they were subject to shellfire. Holmes joked that the enemy had spotted Holman so they moved. Within minutes another shell landed nearby and killed Holmes outright. Holman was badly bruised and shaken by the experience.[14] Amidst all this drama, for some of the murkiest reasons, on 23 October 1917 the Attorney General David Hall stood in the Legislative Assembly and introduced a bill 'to provide for the retirement of certain judges, and to provide for their pensions on retirement.'[15] The intention of the bill was that all judges should retire at 70 years of age.

'A government of Lawyers'

The Nationalist Government, which was voted into office in New South Wales in April 1917 and which proposed the bill for the Judges' Retirement Act, was understandably labelled

'a government of lawyers'[16]. The premier, William Arthur Holman, and his attorney general, David Robert Hall, were both Sydney barristers as were: George Warburton Fuller, the colonial secretary and acting premier from April to October, 1917; Augustus Frederick James, the minister for public instruction; John Garland KC, MLC, the minister of justice and solicitor-general; George Stephenson Beeby, the minister for labour and industry and John Daniel Fitzgerald, MLC, the vice-president of the Executive Council as well as minister for public health and local government. In all seven out of a ministry of twelve were listed as Sydney barristers. Broughton Barnabas O'Conor, also a Sydney barrister was chairman of committees. There were in total seven barristers in the Legislative Council and six solicitors[17] – 13 lawyers out of 71 members. In the Legislative Assembly, there were five solicitors and six barristers out of 90 members. [18] Yet, despite the preponderance of lawyers, this government passed legislation, which in effect, if not in intention, removed judges from office.

Support for the bill created a strange alliance – between deeply antagonistic political rivals. Among the senior members of the Nationalist Government side, led by Holman[19], were those who had been expelled from the Labor Party in 1916 and formed the coalition. Their former colleagues labelled them 'rats'.[20] Opposing the Nationalist coalition government on most issues were the committed members of the Labor party who had stayed faithful to its conference decisions and therefore remained within its organisation. But on the issue of judges' retirement ages these two opposing groups found common ground. There is some mystery as to why such bitter opponents should be in agreement over such a question. The congruence of aims between the two parliamentary groups against judges challenges the notion of an oligarchic alliance of judges, government and business ruling the state. Manning Clark referred to them as the 'comfortable classes'[21]as if they were homogenous a group acting in unison based on their privilege.

Why bring in the Judges' Retirement Act?

Considering the general congruence of values and actions concerning support for the war between the members of the Holman Nationalist Government and the judiciary it is difficult to understand why they should want to bring in the Judges' Retirement Bill. The Nationalists and many others saw the wartime situation as one in which patriotic concerns should override anything else. Industrial matters were considered of little consequence by many people in comparison to the historic mission against German militarism despite the genuine hardship caused by the losses in battle and the falling wages and increasing prices. Generally speaking a quick review of the decisions and public statement made by judges during the war indicates that they agreed with the ideals of the nationalist government.

Various reasons for the introduction of the bill in 1917 have been advanced. Judicial biographer, HTE Holt, writing in *A Court Rises* stated that the Act was rumoured to have been to remove Justice Heydon from the Industrial Court[22]. Andrew Frazer, in his biography of Justice Heydon acknowledges this suspicion but also mentions the references to Justice Simpson's deafness as the impetus for the proposal[23]. Labor Politician, HV Evatt in *Australian Labour Leader* wrote that the Act was passed to open up judicial positions and allow for the fulfillment of some politically based deals – specifically the appointment of Holman's long-term political enemy but Nationalist ally-of-convenience, Charles Wade KC as a judge on the Supreme Court. Wade KC later replaced Mr Justice Sly who, as a result of the Judges' Retirement Act, 'was forced off the bench in 1920 when he was at the very height of his powers.'[24]. There are some hints in the parliamentary debate to possible deals, but it is impossible to discern if these are genuine or simply part of the fabric of heated discussion in the New South Wales Legislative Assembly – known as 'The Bear Pit' for its rambunctious style.

While it may appear that there were many occasions when the judiciary enthusiastically supported government legislation, such as with the *War Precautions Act 1914*, JM Bennett notes that at the time in question there were persistent 'unfriendly relations between the government and the judiciary', which continued into the 1920s[25]. The Judges' Retirement Act can be seen as a feature of that tension. Bennett quotes Sir Thomas Hughes' characterisation of the Act as 'one of the crudest specimens of injustice that has been presented to. . . a creature of a momentary panic.'[26] The panic he had in mind may well have been the result of the incident involving Justice Archibald Simpson and Conroy in May. There is some evidence in the parliamentary debate to support any and all of these explanations as well as revealing much about the nature of judicial functions and pressures at the time. The bill came out of a very specific set of circumstances. Whatever the stated reasons for the bill, there were sufficient allusions and references to specific judges and matters to suggest that there were a variety of agendas influencing those members who supported the bill.

'Judges seem to have their peculiarities and strange ways'

Attorney General Robert Hall introduced the *Judges' Retirement Bill* on 23 October 1917 by stating that: 'There must come a

time in the life of every man when the passing of the years renders him unfit to continue the work in which he was engaged in earlier life.'[27] Hall was of course referring only to men. At the time women were precluded from any legal appointments in New South Wales.[28] Hall had little to offer as a justification of the bill. He said that when a man 'obtains a position on the bench . . . he has reached the end of his hopes and the end of his fears.' He then mentioned the principle which precluded a puisne judge from becoming a chief justice as being that 'when a man takes a judicial position he must never expect any advantage and never fear any disadvantages'.[29] Hall also addressed the possibility of allowing judges to remain on the bench after 70 years of age if they were certified to do so. He claimed that such a process would 'interfere with the entire independence of the judiciary.' The possibility that he was interfering in the independence of the judiciary by introducing the bill in the first place was not addressed in his speech. Hall admitted that the measure would mean that some judges 'who are so blessed that they go down into old age with an eye undimmed and a brain unclouded by the passing years' but he continued to say that the 'principle of allowing a man to decide for himself when he ought to resign is not a good one.'

Despite the bitterness of the split in the Labor Party in 1916 the Labor Opposition, led by John Storey was in furious agreement with the government on this proposal. Storey, the member for Balmain, was in favour of judges retiring at 70 years of age, but also worried about the possible additional costs extra pensions might bring. The issue of judicial pensions resonated throughout the debate. Storey also said that: 'Judges seem to have their peculiarities and strange ways. If one is to judge by the remarks made by some of them, they ought not to be allowed to reach the age of 70 before being asked to retire.' Furthermore he suggested that the only possible reason for introducing the bill while the country was at war was that of 'making room for a lot of barristers who (had) been working hard, and whose efforts (were) to be crowned with promotion.[30] He was supported in this belief by the controversial solicitor Thomas Ley, and other commentators[31]. HV Evatt was another one who believed that a major reason for the bill was to create space for men at the bar.

Following John Storey, the well-known Sydney barrister and newly elected member for the middle class seat of Gordon, Thomas Rainsford Bavin, rose to his feet. Bavin was just beginning a political career that would eventually see him made Premier. At the time he was, among other posts, an officer in the Navy Reserve and about to be put in charge of the Sydney office of naval intelligence[32]. He was also well connected to the judiciary through his involvement in a number of organisations and was 'strongly opposed' to the bill. Bavin stated that 'history disproves' the proposition that men are too old to perform judicial duties at 70 and referred to the certainty of forcibly retiring men who were 'thoroughly efficient in their duties.' He suggested that 'the test should be efficiency, not age . . .' He pointed out that it would affect 'some of the best judges in the state,' to which John Cochran, the Labor Member for the working class, harbourside electorate of Darling Harbour interjected, 'And some of the worst.' John Cochran, a catholic ex–labourer and Union official, was continuing the theme commenced by John Storey: that certain judges were the enemies of the working class.

Three score years and ten

Cochran then spoke for the bill and displayed antipathy for England and judges. He said that he did 'not have too great sympathy for those octogenarians who occupy seats on the bench,' nor did he have 'very much admiration for those old gentry in England who it (was) said have given their best services after having attained the age of 70 years.' As far as he was concerned the determination of 70 years for retirement was appropriate because it was 'the allotted span of three score years and ten' as taken from the Bible. He believed that the judges' decisions were 'notoriously out of joint with the times.' He was more sympathetic with those men who were 'victims of the spleen and irritability' associated with 'certain gentlemen on the bench.' He used as an example the case of one piece of 'storm-tossed human wreckage flung up on the shores of time by the waves of adversity' who had been sentenced to ten years jail for receiving stolen chocolate which had been stolen from a wharf.[33] His dislike of judges became more apparent the longer he spoke. According to him, Criminal Court judges inflicted 'injustices' on those who came within their 'clutches'. Furthermore, Chief Justice Sir William Cullen was drawing two salaries as he was also acting Governor at the same time as occupying the bench. At which point Temporary Chairman Colquhoun ruled he could not discuss the conduct of any judge. Cochran stopped any specific mention but stated that he refused to 'bow down and worship in the religious atmosphere which (surrounded) a judge and his position.' There was more in that vein. Basically he hoped to 'purge the judicial bench of gentlemen who should long since have retired.' His reference to a purge is a good characterisation of the motives of the Labor members in supporting the bill. The interesting aspect is that the attorney general, Robert Hall, joined his political enemy, Cochran in his opposition to Bavin. It is hard to believe that they shared exactly the same reasons

for their positions, unless Hall harboured some residual class loyalty from his years in the Labor Party.

Others who supported the bill did not match Cochran's bile. John McGirr, the Labor member for Yass, was one of those who took the chance offered by the discussion of the bill to lampoon judges. He had a novel suggestion for dealing with those judges 'whose faculties (were) failing before they reach 70 years.' His suggestion was that there should be a

> sliding scale, and that judges should go down the scale as they got older. For example, a Supreme Court judge whose brain was beginning to weaken at 60 years of age should be made a District Court judge; at the age of 64 he should be made a police magistrate; at 65 he should become a justice of the peace; and at 69 his services might be utilised as a policeman.' Furthermore, to correct any injustices already done, he suggested that 'men who have been condemned by judges over the age of 70 years . . . should be liberated and compensated.[34]

The Parliamentary Record does not mention any reaction to this imaginative suggestion.

Percival Brookfield was another Labor party member who had experienced the pressure of having to defend himself in front of a judge. He spoke for the bill and said that 'since the *War Precautions Act* has been in force it has been impossible for any man belonging to the Labor party to speak in the open without the dread of the Act falling upon him.'[35] Brookfield was a militant socialist who had been jailed under that same Act in 1916 for 'cursing the British Empire and calling William Morris Hughes a 'traitor, viper and skunk.'[36]

After Brookfield and Bavin engaged in what appears to have been some good hearted banter over whether or not a judge may recognise or enjoy listening a rendition of *The Red Flag* Brookfield was keen to point out that the class he represented came

> under the ban of the judges more frequently than do members of any other section of the community, and there is a general feeling that both judges and magistrates are allowed to remain on the bench until they become too old. The ideas of old men become warped and out of date, and very few men who reach the age of 70 are able to retain a youthful mind.' When challenged by the example of Jabez Wright, the 65-year-old Labor Member for Willyama, Brookfield had a ready answer that Wright 'was one of those few men who, though old in years, (had) kept his mind evergreen by living with the working-classes.

Whether or not Brookfield was being serious, he was clearly putting forward a vigorous assertion of his class interests. It is hard to escape the conclusion that amongst the Labor members the debate over the Judges' Retirement Bill was a good opportunity to settle some old scores, whether just or unjust. For once their prejudices coincided with the government, and they could achieve a desired outcome in removing the judges they disliked while lampooning the government at the same time. It must have been good sport for Labor. They did not let their opponents off the hook.

Labor's evergreen Jabez Wright was another who believed the bill was introduced because in his words there was 'an immense crop of barristers in Sydney who demand(ed) some recognition on the part of the 'Government, and that if rumour was not the 'lying jade she (was) supposed to be' Hall himself was 'seeking a position on the bench.' It was the 'crop of briefness barristers in Sydney, aspirants for the position of judges (who had) egged' Hall on to make room for some of them on the bench.' The bill was to 'enable some of the Government supporters to win judgeships.'[37] However, he also stated he was against the law because he believed that a judge should be retired when it was 'proved that he was incompetent', which put him in the same camp as Bavin and others. Wright ended by saying that he felt there were 'too many laws and too many lawyers. This government is a Government of lawyers.'[38] Brookfield took over from this somewhat confused rant by reminding people that Labor welcomed the bill but wanted the age to be 65. Perhaps Jabez Wright's mind was not quite as 'evergreen' as Cochran had suggested. Wright's reporting of the rumours had hit a nerve for some and again supports HV Evatt's belief that the bill was to make room for appointments such as that of Wade in fulfillment of a political deal between him and Holman in 1916 to form the Nationalist Government.[39]

The debate continued in much the same vein as described so far. There was minimal discussion of the realties of age, but repeated complaints about judges.[40] Valentine Johnstone, a solicitor's clerk and the Nationalist member for Bathurst hoped that the bill would get rid of 'undesirable' judges who were 'irritable, irascible, and showed bad temper (and) failed to display that calm judicial temperament which, in conjunction with the law, was one of the reasons which brought about their selection to occupy their . . . high position.' He believed it was 'better to risk displacing some mental prodigies (than to) risk piling up of bad judgments and bad precedents.'[41] Labor members such as FM Burke, member for Newtown were able to bring out a number of complaints which suggest that for him the bill was a rejection of the colonial order. His opinion was that Great Britain was lagging behind Australia as far as 'democratic ideas' were concerned. He said that 'when a man reaches the age of 70 he has lost all his democratic ideas, is conservative in his views, and ha s a tendency to look upon

younger members of the community with a very severe eye.'[42] It was clear that the Labor party hoped to get rid of those judges with whom they had had bad experiences, and replace them with others more likely to follow emerging principles of workers' rights and be not quite so aligned with the Imperial cause. Furthermore, they were not content with removing the judges, but wanted them to be without pension rights as well.

On 25 October at 2 am the House went into committee again to consider amendments, which would ensure the preservation of a full pension for any judges who may have been forcibly retired because of the act before their full entitlements were established. The judge specifically named in this regard was Justice Heydon. At the time he was one of the most high profile and perhaps controversial judges sitting in New South Wales – especially for Labor supporters. Jack Lang could not resist the opportunity to speak of what he saw as an 'extra pension' to Judge Heydon.' Lang continued 'Judge Heydon has been one of the bitterest and worst enemies-' but then Thomas Bavin raised the point that the attack was irrelevant and out of order[43]. The speaker of the House had already ruled not to mention any individual judges but Heydon was now out in the open. His name would be mentioned more than that of any other judge. Jack Lang called Heydon 'an enemy of the class' Labor represented. Furthermore he fulminated that 'this so-called National win-the-war Government (was) going to give a pension to the senior judge of the Industrial Arbitration Court, Mr Justice Heydon, for services rendered.' Bavin challenged these remarks, maintaining that Heydon's only enemies were those who attempted 'to destroy the industrial peace and prosperity' of the country. Here he was alluding to the treatment meted out by Heydon to those unions, which had been involved in the Great Strike, which had only just finished, and was a resounding defeat for the labour movement, largely due to Justice Heydon's strong action.[44] He had made some some bitter enemies as a result of his action.

Mr Stuart-Robertson, who favoured a tribunal to examine judges at 70 years of age, also supported Heydon as 'one of the very best lawyers in New South Wales' but mentioned the problem that 'some of his remarks from the bench seem to go beyond the actual meaning of the law he is dealing with.'[45] Justice Heydon did tend to make strong comments. In one judgment he invited a comparison between what he saw as intransigent union activism and the way 'they must have grumbled in the trenches. But the Germans got nothing out of it: no indeed, never!'[46] By late 1917 Justice Heydon was involved in all manner of political, social and judicial issues. As head of the Industrial Court he had the discretionary power to determine which cases he heard as well as their outcomes. He wielded these powers in accordance with his particular worldview of service, loyalty and the need for patriotic restraint. In the war years strikes were seen as treasonous and the responsibility of the appropriate union, whether or not the executive of the particular union had sanctioned the stoppage. Heydon had deregistered 26 unions by November 1917. No wonder the Labor members of parliament disliked his rulings. He was involved in all manner of controversial issues not just in court. In November 1917 he became embroiled in a dramatic public confrontation with Archbishop Mannix. The incident is worth reporting here as it is contemporaneous to the debate and involved another senior lawyer and politician, Sir Thomas Hughes.

Justice Heydon – 'A second or third class judge of some kind or another'

The campaign for the Second Conscription Referendum had taken place in the second half of 1917. Once again all levels of the New South Wales legal profession supported the cause of conscription to fight overseas. If anything they were more involved than during the campaign for the first Conscription Referendum in 1916. One of the key opponents of conscription was the feisty Irish Catholic Archbishop of Melbourne, Daniel Mannix. His views were not shared by the Sydney Catholic Establishment, of which two leading lights were Justice Heydon and solicitor and member of the Legislative Council, Sir Thomas Hughes.[47]

When a new Papal representative, Archbishop Cattaneo, arrived in Australia in early November 1917 Sir Tomas Hughes and Justice Heydon visited him at *Rockleigh Grange*[48] in North Sydney to have, in Hughes' words, 'a solid hour of hard talk' to ask Cattaneo to 'suggest to Mannix to moderate his ardour' in the anti-conscription cause[49]. Cattaneo, like his predecessor, did not intervene. Mannix persisted in promulgating his position regarding conscription so Heydon, with Hughes' approval wrote a letter to all the daily papers in Sydney. *The Telegraph* passed it on to *The Age* in Melbourne. Heydon did not hold back in accusing Mannix of 'faithless disloyalty and enormous folly'. Heydon wrote:

> In proclaiming his sympathy with Sinn Fein, in urging us to put Australia first and the Empire second, the Catholic Archbishop of Melbourne has shown himself to be not only disloyal as a man, but – I say it emphatically, archbishop though he may be, and simply layman though I be – untrue to the teachings of the church . . . .For a Catholic archbishop to lead his flock along the paths of sedition is to disobey the clearest teachings of the Catholic Church.

There was more in this vein, about the 'tyrannical invaders' of

Belgium and the abuse of freedom which allowed such ideas to be promulgated, but then there were even darker hints about 'the time chosen to inflict this stab in the back of the empire – this time of strain and difficulty, with the heavy clouds of disaster lowering around. . .'[50] Apart from Sir Thomas Hughes, Heydon was also supported by another leading Catholic jurist, Mr Justice Gavan Duffy of the High Court, whose sons had attended St Ignatius College, Riverview along with those of the Sir Thomas Hughes' family. Heydon's letter was controversial, but Mannix's response sent the argument into overdrive. Mannix was reported in *The Argus* of 21 November as saying that Heydon was a 'second or third class judge of some kind or another' and the Catholics whom Hughes and Heydon 'led' would comfortably 'fit into a lolly shop.'[51] The colourful hyperbole led a number of prominent Sydney lawyers, such as Richard Teece, to write letters to the *Sydney Morning Herald* defending Justice Heydon. Justice Heydon was certainly a central figure in New South Wales at the end of 1917. There were plenty of people who wanted to get rid of him

'A difficult and a delicate matter'[52]

The next time the bill was extensively discussed was in the Legislative Council 27 February 1918. It was introduced as a 'difficult and a delicate matter' in a long speech by the Honourable John Garland KC, the minister for justice and solicitor general. It was exceedingly strange to find him in agreement with Labor's Jack Lang of the Legislative Assembly. Garland KC mentioned that there were 'cases where men (had) lingered superfluous on the bench after their term of usefulness had expired.'[53] He cited as precedent the situation of stipendiary and police magistrates as well as members of the public service. He referred to 'the constant strain of mental concentration that constitutes the hard and exacting portion of the judicial work'. He spoke in general terms of the need 'to prevent a judge from being the judge (of the time to retire) in his own case.'[54] He did however introduce the idea that the bill should proceed with the proviso that any judges forced to retire because of the bill should 'be entitled to their full pension rights' as if they had been on the bench for the necessary number of years.[55] At the time Supreme Court judges retirement benefits were half their annual salary of five thousand pounds, and District Court judges three thousand pounds. One of the side effects of the bill was to accord Justice Heydon the same pension rights as a Supreme Court judge. Garland KC said of Heydon that 'his position of senior judge of the Industrial Arbitration court, (was) that of a District Court Judge, and strictly speaking the pension to which he would be entitled (was) probably only that of a District Court Judge.'[56]

Garland KC went on to say that Justice Heydon had done great 'yeoman service' and had performed 'excellent judicial work' in his position in the Arbitration Court. Garland KC argued that 'It was never intended that judges should hold office for life.' Rather the intention had been to prevent their arbitrary dismissal by the Crown. He was keen to address the issue that the proposed bill was a beach of contract with the judges. This issue reoccurred throughout the debate and in the reactions of the various people to it[57]. Garland KC believed that the proposed act would prevent the possibility of 'judicial scandal' in the future. Such scandal could cause the situation that 'while the public mind is heated in connection with that matter Government may take advantage of the circumstance and pass a much more drastic measure (and) infinitely worse' than the one being proposed[58]. He admitted that the bill meant that the state could lose the services of some 'competent' men and that it would be desirable for a way to be found to found that those in the 'full vigour of their intellect, may be retained by the State.' He also admitted that the bill entailed some 'hardship' and 'injustice' on the incumbent judges but he completed his speech by saying that on balance it was in the public interest to 'better the administration of justice and 'maintain, if not increase the high respect in which the judicial bench has always been regarded in this State.'

The influential Sydney Solicitor, Sir Thomas Hughes, then spoke. His close ties to the judiciary were indicated by his recent public alliance with Justice Heydon against Archbishop Mannix. Hughes spoke of 'an unfortunate incident in a court of justice' six months previous. No doubt he was referring to the squabble between Conroy and Judge Simpson in Banco Court in May 1917. Hughes said it was this incident which 'caused the government of the day to bring in a measure aimed at one man but which hits the wrong man.' He mentioned that this 'notorious' bill was not needed because the 'difficulty' had long since disappeared: because Justice Simpson had gone on leave from the bench in July then resigned in December 1917. Hughes stated that 'That incident gave rise to the bill, and in that sense the measure (was) really and truly the creature of a moment's agitation and not the product of calm and deliberate consideration as to what (was) best for the administration of justice.' He noted that the Britain avoided such bills but now the New South Wales government was 'introducing in a most insidious way political interference with the office of a judge.' To him the bill was clearly intended only to get rid of one man but would sweep up others. As 'many men have only attained their full ripeness of judgement when they were approaching the age of 70 years'.

Joseph Alexander Browne interjected that 'They were a long

time learning.' And that rather dismissive tone would continue with some of the members of the Legislative Council while they pushed the legislation. This was the same Joseph Browne who had stood in front of Justice Simpson in May 1917 and objected that it was 'painful' to hear Conroy's accusations about judicial deafness, maggots in the brain and suchlike. Browne spoke at length of the possibility of judges' deafness or 'mental feebleness' causing difficulties in complicated cases. Browne claimed that there had already been cases in which litigants had been injured by the poor quality of judges. It was not recorded whether or not he had Justice Simpson in mind at the time.

Sir Thomas Hughes persisted in his attack on the bill. He stated that 'there has been no attempt at legislation of this character to remove existing judges in any part of the British dominions.' For that reason alone the legislation should not pass.[59] To him the danger was that the state could get a 'venal bench. . . depending upon the favour of any government' and compared the current situation to the United States where 'judges (were) often the creatures of a political party.' The bill would set a precedent for 'political interference' in the bench. He too was in favour of a scheme which would allow certain judges to continue occupying the bench beyond the age of 70 and suggested the establishment of some 'neutral body' which would have the 'right to report on the fitness of any occupant of the bench' because the bill was a 'breach of contract between the individual judge and the government who appointed him.'[60]

One of the most effective and articulate opponents of the bill was the recently appointed member of the Legislative Council, Professor John Peden of Sydney University Law School.[61] He mounted a well-argued defence against the bill citing recent English commission, which had 'been sitting to inquire into delay in the King's Bench Division.'[62] The idea of setting a specific age for the retirement of judges had 'been a matter of intense interest in the profession in England' just before the outbreak of the war.[63] Peden reported that the British committee recommended that there should not be 'a hard-and-fast age limit, but an age limit subject the qualification that a judge should continue in office as requested to do so for a period determined by a non-political committee . . . constituted of the Lord Chancellor, the Lord Chief Justice, and ex-Lord Chancellors who were still doing judicial duties either in the Privy Council or the House of Lords.'[64] He suggested that in New South Wales the committee could consist of the chief justice, unless it was his own case, then it would be the senior puisne judge, the senior elected member of the Bar Council, or the attorney general, and the president of the Law Institute. This was an interesting and workable suggestion, in that the proposed committee would be not to get rid of people but to keep them on. The fact that it was not taken up supports the contention that the fundamental motivation behind the bill was to rid the bench of certain judges, not simply that there were concerns about age. The persistent, abusive interjections during the discussion indicate the deep antipathy some members felt towards judges.

There was some discussion over Peden's suggestion and one of the members who questioned the proposal was Richard Denis Meagher. He and others challenged the idea of judges or prospective judges being involved in the process of determining who should stay on the bench after the age of 70 years. Peden's proposal was that judges would automatically retire at a certain age unless some 'competent impartial body (was) prepared to take the responsibility of saying that the judge's mental and physical powers (were) so obviously unimpaired that his retirement under the Act would mean the loss of valuable service to the community.'[65] Meagher seemed to know that he had the numbers on his side as he engaged with the concept of who would be on the committee. Some suggested medical men. Meagher suggested that 'in the case of a deaf judge, one member of the commission should be an aurist.'

Peden did not respond to Meagher directly but continued the argument that the bill was a breach of contract with judges who had been given a life office. He noted that no parliament 'in the British Empire (had) interfered with the tenure of a judge.'[66] Peden repeatedly cited British precedent and reiterated his principle that because 'no case has been made that there are certain judges who should come off the bench (then) the bill should not apply to existing cases.'[67] But as the debate proceeded the comments gave indication that the politicians really wanted to get rid of at least some of the sitting judges. Garland KC, in response to Dr Nash's concern that good men would be lost from the bench, exclaimed: 'It is the only way you will get rid of them!'

Dr Nash was one of these with a lurid view of the situation and he considered the proposal to be 'more extreme perhaps than the Bolsheviks.'[68]

Peden could not change the bill. It proceeded as drafted and guaranteed that all sitting judges received their full pension entitlements on retirement whether they had qualified for them under the terms of the 1906 Judges' Act or not. Garland was not sympathetic to the idea of a committee to assess judges. Arguments against the bill such as that it was of breach of contract were also countered with Garland stating that 'every judge who accepts office under an Act of Parliament knows

that that Act of Parliament may be changed by the power that made it.'[69] There would be no further change to the bill other than those with respect to pensions.

Protracted discussion ranged over the same issues which had already been canvassed: breach of contract; citations of influential men such as Gladstone who had been effective beyond 70 years, with counter examples of men such as Henry Parkes who had declined in later life; comparisons with other areas such as coal contracts; bank retirement ages; the role of government and the responsibility to the community. There were some neat debating points and some convoluted and occasionally contradictory arguments but it is fair to say no one indicated that they had changed their opinion. It was a long debate and Peden's proposal to exclude sitting judges from the bill was defeated two to one.

A tribunal for judges?

Professor Peden tried to modify the bill again. He reiterated his argument that the New South Wales Parliament should follow the suggestion of the British royal commission to establish a tribunal 'to deal with the question whether a judge should or should not be asked to continue in office notwithstanding the fact that he had reached a certain age.'[70] There was a testy exchange with the barrister, John D Fitzgerald who was goaded into admitting that he did not consider all the existing judges competent to perform their judicial duties.[71] Peden persisted in trying to modify the bill and suggested inserting two sub clauses into the proposed act which would allow for the establishment of a tribunal consisting of the chief justice of the Supreme Court, or the senior puisne judge if it was the chief justice who was the subject, a practising barrister elected by the Bar Council of New South Wales and the president of the Incorporated Law Institute of New South Wales.'[72]

There was extended discussion of this proposal. The tenor of the government's comments suggested that the key issue for them was not just that judges should retire but they should not lose control of the process. Garland responded that he did not wish to abrogate the power over judges' tenure to a tribunal and that 'if the term of office of a judge is to be extended, it should be extended by the Government of the day, and no other body.'[73] He was supported by Richard Meagher who was no doubt still smarting over the full bench's recent refusal to readmit him as solicitor.[74] Meagher considered the idea of such a 'triumvirate' tribunal as anomalous in the new country where 'the coalminer of today is the Minister of tomorrow, and where the boilermaker of today is the Premier of tomorrow.'[75] Such egalitarian ideals and statements suggest that one of the background causes of the bill was to recognise the changing nature of the newly independent Australia and remove those judges seen as representative of the previous colonial system. Meagher also made the point that such a tribunal could cause great humiliation to those judges who were not invited to extend their time beyond the statutory 70 years. It was during the discussion on the composition of the tribunal that Meagher revealed his animus towards judges when he interjected that members of the tribunal should include 'the Inspector-General of the insane!'[76]

The next question the Legislative Council dealt with was that of judicial pensions.[77] The new bill retired some judges before they were entitled to their full pension. Justice Heydon would suffer in particular. Peden proposed that the bill be modified so that any sitting judge should be entitled to the full pension regardless of his length of time on the bench. In the process, Justice Heydon was accorded the same pension as that of a Supreme Court judge. There had been some confusion about his status at the time. There was some debate over the cost of the amendment but with all people in general agreement the report was adopted. The question resolved in the affirmative. The bill was read a third time. But then it had to go back to the Legislative Assembly and face the parliamentary Labor Party representatives there, who could now have a real go at opposing it. Judges' pensions were a topic sure to fire up men such as Jack Lang.

When debate on the amended bill commenced in the lower house, John Storey, the leader of the Opposition mocked it as 'The Judges' Protection Act' His colleague Brookfield wanted the whole bill debated again and suggested the retirement age as 60 until the chairman ruled against the discussion. The amendment was agreed to. And so the bill was finally passed. Other parliaments gradually followed suit.[78]

Judges 'rejoin ordinary mortals'

There were three judges who would be immediately affected by the Act: Judges Docker, and Fitzharding, on the District Court, and Justice Heydon on the Industrial Court. Justice Heydon stated that he 'felt extremely indignant and had hard thoughts of those who designed it.'[79] Judge Fitzhardinge had similar feelings. Other lawyers supported it. TS Crawford QC was a crown prosecutor from 1917, the year in which the bill was enacted. He wrote on the death of Judge Bevan that he (Bevan)

> did not belong to the judicial cult which regarded their presence as essential to the maintenance of justice itself. As a homely man I place him on the bridge connecting the lifelong judges with those who knew that, on attaining seventy years, they rejoin ordinary mortals.[80]

Wilfred Shepard writing in the *History of the New South Wales Bar* echoes this opinion of the some early judges as having a tendency towards hubris. He wrote that the judges in the early years of the twentieth century

> though undoubtedly able, formed two distinct types which either lightened or burdened the labours of counsel. On the one hand were the martinets, survivors of an even stricter age, who believed that cases should be conducted in an atmosphere of severity and strictness.' Justice GB Simpson, (no relation to Justice Archibald Simpson) 'not only needlessly asked counsel their names, but also how to spell them. Pring. J was as scrupulously strict as he was fair. On the other hand were those who inclined to a more moderate and less formal control of their courts. Gordon, J., was a distinguished example.[81]

Such commentary suggests that while the class represented so enthusiastically by people such as Jack Lang had cause to be concerned about their treatment by the judiciary, so did practising lawyers.

Over subsequent years a number of politicians who had been in parliament when the *Judges' Retirement Act* was being discussed were themselves appointed to the bench. The Speaker of the Legislative Assembly, John Jacob Cohen, was appointed a judge in the District Court n 1919. Wade was appointed to the Supreme Court in 1920, but died soon after. (Sir) George Beeby was appointed to the Profiteering Prevention Court in 1921 then went on to a successful career in the Industrial Court.

Conclusion: government versus the Judiciary

The passage of Judges' Retirement Act provides was a clear example of a government exerting its power over the judiciary. The bill arose from a variety of political imperatives and personal agendas and was the product of a unique time. The passing of the act may also be seen as one step in the process of moving away from a domination of the Australian judiciary by English precedent. In this case, Australia, specifically New South Wales, set the precedent for the British Empire. This situation indicates a small part of the evolution of Australia's relationship to the 'Mother country'. The implementation of the Act accelerated the process by which judges who had been born and edcuated in England were replaced by those from Australian backgrounds.The majority of the advocates of the bill were themselves lawyers who were passionate in their support of the Imperial cause in the war. But their unwillingness to accept English precedent indicates their desire to move from being a derivative of that country to an equal member of the Empire family.

Endnotes

1. Sir Thomas Hughes *NSWPD* Vol 70, p.2975.
2. Sir Gerard Brennan Former chief justice High Court, Speech to Francis Forbes Society for Legal History Essay Competition Awards Ceremony 25 February 2009 available on http://www.forbessociety.org.au/documents/brennan.pdf
3. New Zealand had passed a law limiting the age of judges but it did not apply to those already on the bench.
4. *Sydney Morning Herald,* 2 May 1917, p.11.
5. Justice Simpson had been on the Supreme Court bench since 1896 and had been Vice-Chancellor of the University of Sydney 1902-1904. He lived in Hunters Hill and had already lost one son in the war, killed in the fighting at Lone Pine on Gallipoli.
6. The incident was widely reported around the country including *The Argus* in Melbourne, the *Adelaide Advertiser* and the *Hobart Mercury*. Conroy did not appear in court the following day and Justice Simpson found for the plaintiff, Conroy's wife.
7. The Dean Case involved an instance where lawyers, including Meagher, defended a man they knew to be guilty. It is described in a number of places, including Cyril Pearl, *Wild Men of Sydney,* 1958 WH Allen London, pp.84-109 and the web site for the Francis Forbes Society for Legal History: http://www.forbessociety.org.au/
8. Meagher's appointment can be seen as a reward for his loyalty to Premier Holman during the Labor Party split over conscription in 1916.
9. *Sydney Morning Herald,* 29 May 1917, p.12.
10. Richard Denis Meagher, Speech in Banco Court 7 November 1919 in The Hon RD Meagher *A Twenty Five Years Battle* William Brooks & Co. Sydney, p.43. See also the front piece of this publication.
11. HTE Holt, p.166.
12. *Sydney Morning Herald,* 19 May 1917 'Mr Cohen not resigning', p.13.
13. Joan Belmont, ibid., p.51.
14. Holmes was closely connected with the New South Wales legal profession. He had been a regular correspondent with Justice Ferguson and had been the commanding officer of both of Ferguson's sons – Arthur who had been killed in action in 1916 and Keith. Keith had been severely wounded in action in 1917 in surprisingly similar circumstances to Holman's close shave. Keith Ferguson had been coming back from a battlefield tour with the same General Holmes who lost his life when he had been with the premier.
15. NSWPD Vol 70, p.1952.
16. NSWPD Vol 70, p.2040.
17. Although one, Richard Denis Meagher was disbarred at the time.
18. There had been a number of high profile lawyers in previous parliaments. Pilcher KC had been a member but had died only recently. So too had Bernard Ringrose Wise who had been a member of the Legislative Assembly and minister for justice, attorney general and acting premier. He had died in 1916. His replacement had been a long standing friend and another barrister: Thomas Rainsford Bavin. In the middle of 1917, Professor John Peden of the Sydney University Law School was appointed a lifetime member of the Legislative Council.
19. Premier Holman was overseas for the second half of 1917.
20. In all, 16 men had been expelled including the three barristers in the Ministry – Holman, Hall and Fitzgerald. The other expelled barrister was the Prime Minister William Morris Hughes. The disbarred solicitor Richard Denis Meagher was with them. Not for nothing was the Labor Party of the time pilloried for 'blowing its own brains out.'

21. Manning Clark, *A History of Australia* Vol VI *The Old Dead Tree and the Young Tree Green* Melbourne University Press. 1987. pp.47-80
22. HTE Holt *A Court Rises.*
23. Andrew Frazer 'Charles Gilbert Heydon' in Greg Patmore, (ed) *Laying the Foundations of Industrial Justice*. n 102.
24. HV Evatt *Labour Leader*
25. JM Bennett A *History of the Supreme Court of New South Wales,* pp.54-55.
26. NSWPD Vol 70, p.2975.
27. NSWPD Vol 70, p.2029.
28. Hall had attempted to remedy that deficiency in 1916. He would be successful in 1918 with the passing of *The Women's Legal Status Act 1918.*
29. NSWPD Vol 70, p.2030.
30. NSWPD Vol 70, p.2031.
31. Thomas Ley had a lurid career, eventually found guilty of murder and ended his days in an asylum for the criminally insane. *Australian Dictionary of Biography.*
32. Frank Cain. *The Origins of Political Surveillance*, 1983 Angus &Robertson. Sydney, p.32.
33. NSWPD Vol 70, p.2034.
34. NSWPD Vol 70, p.2037.
35. NSWPD Vol 70, p.2036.
36. *Australian Dictionary of Biography*. Brookfield, Percival Stanley. 'On 22 March 1921 Brookfield was shot on Riverton railway station, South Australia, while trying to disarm Koorman Tomayoff, a deranged Russian who had already wounded two people; he died that day in Adelaide Hospital and was buried in Broken Hill cemetery, where a memorial headstone was unveiled in 1922. The courageous manner of his death was sufficient answer to those who had attributed his opposition to conscription to cowardice'
37. NSWPD Vol 70, p.2039.
38. NSWPD Vol 70, p.2040.
39. HV Evatt *Australian Labour Leader* pp.420, 462, 485. Evatt was critical that the bill forced the retirement of very capable men such as Mr Justice Sly.
40. This was in keeping with criticism in the press. In an extensive article titled 'The Tyranny of Authority' by a writer using the name 'Lex' in The *Sydney Morning Herald* 10 July 1916 there was considerable criticism of judges in court, saying amongst other things that 'Judges are themselves to blame for countenancing an all too frequent practice of considering the irrelevant.'
41. NSWPD Vol 70, p.2041.
42. NSWPD Vol 70, p.2042.
43. NSWPD Vol 70, p.2134.
44. NSWPD Vol 70, p.2134.
45. NSWPD Vol 70, p.2134.
46. *In re The Australian Society of Engineers and Others* (NSW Court of Industrial Arbitration, Heydon J. 21 May 1918. Private papers of the Heydon family held in Hunters Hill Historical Society Archive.
47. Sir Thomas Hughes's son, Captain Roger Hughes RAAMC had been killed in action in December 1916, and his cousin Lieutenant Brendan Lane-Mullins was killed in June 1917.
48. Now part of the Australian Catholic University.
49. B A Santamaria Daniel Mannix: A biography, pp.84-85.
50. B A Santamaria Daniel Mannix: A biography, pp. 85.
51. Ernest Scott , p.422.
52. NSWPD Vol 70, p.2971.
53. NSWPD Vol 70, p.2971.
54. NSWPD Vol 70, p.2972.
55. NSWPD Vol 70, p.2973.
56. NSWPD Speech by The Hon John Garland, pp.2973-2974.
57. HTE Holt reports that Judge Grantley Hyde Fitzhardinge, who was over 70 years when the Act was passed considered it a scandalous breach of contract and mentioned this opinion in court, comparing it to the German's breach of the 'scrap of paper', p.125.
58. NSWPD Vol 70, pp.2974-5.
59. NSWPD Vol 70, pp.2976.
60. NSWPD Vol 70, pp.2976.
61. Later Sir John Peden. He worked in collaboration with Thomas (later Sir) Bavin in the Lower House.
62. NSWPD Vol 70, p.2984.
63. NSWPD Vol 70, p.2985.
64. NSWPD Vol 70, p.2986.
65. NSWPD Vol 70, p.2988.
66. NSWPD Vol 70, p.2989.
67. NSWPD Vol 70, p.2991.
68. NSWPD Vol 70, p.2994.
69. NSWPD Vol 70, p.3220.
70. NSWPD Vol 70, p.3231.
71. NSWPD Vol 70, p.3232.
72. NSWPD Vol 70, p.3232-3.
73. NSWPD Vol 70, p.3233.
74. Richard Meagher had been one of those expelled from the Labor Party in 1916 and who subsequently lost his seat in the Legislative Assembly. Premier Holman immediately appointed him to the Legislative Council. Such events made the government appear to be rewarding past favours and contributed to belief that the Judges Retirement Act was intended to provide opportunities for further rewards for loyalty.
75. NSWPD Vol 70, p.3234.
76. NSWPD Vol 70, p.3235.
77. The 1906 Act had modified the pension provisions of judges from the previous system where any judge who was appointed, even if only for six months qualified for a pension of seven-tenths of his salary. The 1906 Act changed this provision quite significantly limiting the pension entitlements judges could receive if they did not serve fifteen years on the bench.
78. In Queensland, *The Judges Retirement Act* (1921) removed a number of over-age judges.
79. HTE Holt, p.139.
80. HTE Holt, p.163.
81. Wilfred Shepard 'The Influence of the Bar in the Twentieth Century' in JM Bennett A *History of the Supreme Court of New South Wales* 266n.

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