Increase the retirement age for federal judges

By Arthur Moses SC[1]

United States Supreme Court Justice John Paul Stevens will retire in June 2010, at the end of the court term. His retirement is a timely reminder that the compulsory retirement age of Australian federal judges should be raised from 70 to 75.

Justice Stevens, who turned 90 on 20 April 2010, is a widely respected, hard working judge, whose wisdom and institutional memory will be missed. His retirement will make Justice Ruth Bader Ginsburg, at the age of 77, the oldest member of that court.[2] Before Justice Stevens, the oldest judge in the US Supreme Court's history was Oliver Wendell Holmes Jr, who also retired at the age of 90. His most influential judgments were written *after* he turned 70.

In Australia, the compulsory retirement age for federal judges was enshrined in s 72 of the Constitution following a referendum in 1977.[3] Before then, the Constitution included a similar provision to that found in Article III of the US Constitution, which gave judges life tenure. In October 1976 the Senate Standing Committee on Constitutional and Legal Affairs recommended an end to life tenure. This was based on a number of considerations, such as the need to maintain a vigorous and dynamic court and to avoid the unfortunate necessity of having to remove a judge who was unfit for office due to declining health. It is widely understood that the committee took into account that Justice Edward McTiernan, who retired in September 1976 after more than 45 years on the High Court, had become slow in completing his judgments at the age of 84.

The 1977 referendum was approved by more than 80 per cent of voters. Consequently, the retirement age for all federal judges, including justices of the High Court, was fixed at 70 by the *Constitution Alteration (Retirement of Judges) Act 1977* (Cth).

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The compulsory retirement age has meant that the High Court and the Federal Court have prematurely lost outstanding jurists who may have contributed more to the development of the law. Such judges are not easily replaced. The most significant example is Sir Anthony Mason, arguably the most influential and visionary chief justice in the history of the High Court to date. Sir Anthony, who was appointed to the High Court prior to the 1977 Referendum, lost his life tenure when he was appointed to the office of chief justice. But at the age of 85 he continues to sit on the Hong Kong Court of Final Appeal. Recent examples of the premature departure of High Court chief justices include Gerard Brennan and Murray Gleeson, both of whom were contributing to a vigorous High Court at the time of their retirement.

After 33 years, the time has come to lift the compulsory retirement age for federal judges from 70 to 75.[4] Coincidentally, there should be state and territory amendments to lift their judicial retirement age from 72 to 75. There does not appear to be any rationale for the existing separate retirement age for federal and state judges. Of course, there is no clear rationale for the age of 75 to be selected as the new retirement age for all judges. There are many examples of energetic and hard working judges in their late 60s who have a greater capacity for work than some other judges in their early 50s. However, the age of 75 is justifiable, given the current trends in the average life expectancy and the general state of health amongst older Australians.

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A more controversial proposal should also be examined at the same time –

lifting from 60 to 65 the age at which judges qualify for a judicial pension after 10 years' service. Constitutional impediments and fairness would dictate that such a proposal could only apply to judges appointed after the commencement of any new judicial pension scheme. This change would have two benefits. First, it may encourage judges to remain in office longer rather than retiring at the age of 60, then embarking on another career.

Secondly, it would represent a significant cost saving for taxpayers. The cost of both a judicial pension and the replacement judge's salary would be deferred five years. This change would ensure the long term sustainability of the judicial pension scheme and bring judicial pensions more closely in line with the Rudd Government's move to raise the qualifying age for the pension to 67.

Federal Attorney-General Robert McClelland, and the longest serving state attorney-general, Victoria's Rob Hulls, have both demonstrated a capacity to make difficult decisions which have a long term impact on the legal system. These proposals are worthy of consideration and the federal and Victorian attorneys-general could provide the necessary leadership at the Standing Committee of Attorneys-General to have them properly examined.

Endnotes

1. An earlier version of this article first appeared in *The Australian Financial Review* on 9 April 2010.
2. Justice Scalia is 74 years old and Justice Kennedy will turn 74 later this year.
3. The retirement age was inserted into s 72 of the Constitution which only permits the retiring age to be increased by referendum but oddly permits the retirement age to be set at a lower age by the Commonwealth Parliament.
4. The amendment to s 72 of the Commonwealth Constitution should provide that the retirement age can be increased by the Commonwealth Parliament rather than having to be the subject of a referendum.

Verbatim

On Canadians

'... there can be no denying that Canadian jurisprudence has embraced with enthusiasm the notion of fiduciary duty. I am told that Sir Anthony Mason has said that in Canada there are three types of persons: those who have been held to be fiduciaries; those who are about to become fiduciaries; and judges.'

From Chief Justice Keane's 2009 WA Lee Lecture 'The Conscience of Equity'

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John Alexander's Clubs Pty Limited & Anor v White City Tennis Club [2010] HCATrans 8 (10 February 2010)

Gummow J: I am trying to ascertain what Sir Garfield Barwick said to Mr Handley on occasion. It is good to know the last station on the railway line before you get on the train.

Mr Ireland: They have planes flying to Canberra now.

Gummow J: You say this has gone off the rails?

Mr Ireland: Yes, we do. .... Can I go back on my train?

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From Ipp JA's swearing out speech

Civilian lawyers prefer a unified theory of law and, I confess, so do I. I have always believed that if Albert Einstein thought that a single unified theory could explain the entire universe simple, comprehensible legal principles of overarching application should not be beyond our wit. I recognise, however, that this is contrary to the current orthodoxy which eschews top-down reasoning, focusses on historical purity and holds that judicial decision-making should only move with baby steps away from the umbrella of authoritative canonical cases. This approach has produced an excess of subtlety and complexity and nowadays there are few aspects of legal principle that can be understood by ordinary people – an odd phenomenon in a country that prides itself on being a democracy governed by the rule of law. It should not be forgotten that simplicity, commonsense and adaptation to change are not alien concepts, they are part of the traditional pragmatism of the common law. Where necessary, our law has not been afraid to take great leaps forward leaving established principle far behind: Donoghue v Stevenson, Hedley Byrne, High Trees and Anisminic are but a few examples of this. Maitland's aphorism remains pointedly relevant: 'Today we study the day before yesterday in order that yesterday may not paralyse today and today may not paralyse tomorrow.'