

JUDGES AND RETIREMENT AGES

ALYSIA BLACKHAM*

All Commonwealth, state and territory judges in Australia are subject to mandatory retirement ages. While the 1977 referendum, which introduced judicial retirement ages for the Australian federal judiciary, commanded broad public support, this article argues that the aims of judicial retirement ages are no longer valid in a modern society. Judicial retirement ages may be causing undue expense to the public purse and depriving the judiciary of skilled adjudicators. They are also contrary to contemporary notions of age equality. Therefore, demographic change warrants a reconsideration of s 72 of the Constitution and other statutes setting judicial retirement ages. This article sets out three alternatives to the current system of judicial retirement ages. It concludes that the best option is to remove age-based limitations on judicial tenure.

CONTENTS

I	Introduction.....	739
II	Judicial Retirement Ages in Australia	740
	A Federal Judiciary.....	740
	B Australian States and Territories	745
III	Criticism of Judicial Retirement Ages.....	752
	A Critiques of Arguments in Favour of Retirement Ages	752
	1 Contemporising Courts.....	752
	2 Opening Up Opportunities for Younger Appointees	755
	3 Declining Capability	758
	4 Community Acceptance.....	768
	5 No Loss of Expertise	771
	B Practical Impact of Retirement Ages.....	779
IV	Alternatives to Retirement Ages	783
V	Conclusion	791

* BA, LLB (Hons) (Melb), PhD (Cantab); Senior Lecturer, Melbourne Law School, University of Melbourne; Affiliated Lecturer, Faculty of Law, University of Cambridge. The author is grateful to Professor George Williams and Professor Andrew Lynch for comments on an earlier version of this article.

I INTRODUCTION

Justice Graham Bell of the Family Court of Australia retired on 20 February 2015, at the age of 78. Appointed in 1976, Justice Bell took office before the 1977 constitutional referendum that introduced judicial retirement ages for the Australian federal judiciary. Justice Bell was the last judge to whom the 1977 referendum did not apply; thus, all Australian federal judges are now appointed subject to a retirement age. Upon retiring, Justice Bell was quoted as saying:

These days 70 is equal to 60 or 55. ... Judges should be able to go on till 80 provided they pass a medical inspection. After all, the pension makes judges pretty expensive creatures in retirement. They are sent out to pasture too early.¹

Justice Bell's comments reflect broader public concerns with the forced retirement of judges in Australia.² Judicial retirement ages may be causing undue expense to the public purse and depriving the judiciary of skilled adjudicators. They are also contrary to contemporary notions of age equality. However, there has been minimal academic discussion of age limits and retirement ages for the judiciary,³ and whether they are necessary or warranted. More particularly, there has been very limited critical consideration of this topic in the Australian context.

This article considers the rationale and purpose of judicial retirement ages in Australia. It evaluates whether these aims are still valid in a modern society, and whether demographic change warrants a reconsideration of s 72 of the *Constitution* and other statutes setting judicial retirement ages. Finally, it considers how the judiciary might operate without retirement ages, and whether this would require other reforms to be feasible.

¹ Michael Pelly, 'Judges Put to Pasture Too Early, Says Bell', *The Australian* (Australia), 20 February 2015, 26.

² These concerns have been reiterated by the Australian Law Reform Commission's 2013 report on age discrimination in Commonwealth laws: Australian Law Reform Commission, *Access All Ages — Older Workers and Commonwealth Laws*, Report No 120 (2013) 100–1.

³ Brian Opeskin, 'Models of Judicial Tenure: Reconsidering Life Limits, Age Limits and Term Limits for Judges' (2015) 35 *Oxford Journal of Legal Studies* 627, 628.

II JUDICIAL RETIREMENT AGES IN AUSTRALIA

A *Federal Judiciary*

Tenure and retirement of federal judges is provided for in s 72 of the *Constitution*, which says:

The appointment of a Justice of the High Court shall be for a term expiring upon his attaining the age of seventy years, and a person shall not be appointed as a Justice of the High Court if he has attained that age.

The appointment of a Justice of a court created by the Parliament shall be for a term expiring upon his attaining the age that is, at the time of his appointment, the maximum age for Justices of that court and a person shall not be appointed as a Justice of such a court if he has attained the age that is for the time being the maximum age for Justices of that court.

Subject to this section, the maximum age for Justices of any court created by the Parliament is seventy years.

The Parliament may make a law fixing an age that is less than seventy years as the maximum age for Justices of a court created by the Parliament and may at any time repeal or amend such a law, but any such repeal or amendment does not affect the term of office of a Justice under an appointment made before the repeal or amendment. ...

Nothing in the provisions added to this section by the *Constitution Alteration (Retirement of Judges) 1977* affects the continuance of a person in office as a Justice of a court under an appointment made before the commencement of those provisions.

Section 72 was amended to include provision for judicial retirement following the *Constitution Alteration (Retirement of Judges) 1977* (Cth). Prior to this point, federal judges were appointed for life, until they chose to retire or were removed from office.⁴ The decision in *The Waterside Workers' Federation of Australia v J W Alexander Ltd* ('*Alexander's Case*')⁵ led to the original wording of s 72 being interpreted as requiring that 'the tenure of all Federal Judges ...

⁴ Though this has never occurred in the federal context: see below Part III(A)(3).

⁵ (1918) 25 CLR 434.

be for life, subject to the power of removal'.⁶ Any contrary argument was 'completely untenable'.⁷ Thus, according to the High Court, federal judicial tenure could only be amended via a referendum in accordance with s 128 of the *Constitution*.⁸

Justice Kirby argues that the interpretation of s 72 in *Alexander's Case* became inconvenient and impracticable in Justice McTiernan's time on the High Court. When Justice McTiernan stepped in as Acting Chief Justice to swear in new members of the Senate, Justice Kirby noted that

The Members of Parliament, who rarely saw the justices of the High Court in those itinerant days, were uniformly shocked at McTiernan's great age and apparent feebleness. It was the sight of the octogenarian which encouraged the bipartisan support for the amendment of the constitution providing for the compulsory retirement of federal judges. ... Henceforth there would be no more life appointments.⁹

Thus, recommendations were put forward by the Senate Standing Committee on Constitutional and Legal Affairs in 1976,¹⁰ and the Hobart meeting of the Australian Constitutional Convention,¹¹ to introduce retirement ages for federal judges. These recommendations were passed by Parliament as the *Constitution Alteration (Retirement of Judges) 1977* (Cth), and received national endorsement in the 1977 referendum.

When presented to Parliament by Mr Ellicott (the then Attorney-General), the alteration was justified on the basis that following *Alexander's Case*:

It has, in consequence, been generally accepted that justices of the High Court, and other Federal judges including magistrates, cannot be required to retire on reaching a specified age. This is an unsatisfactory situation. There is an almost universal practice that the holders of public offices retire on attaining a maxi-

⁶ Ibid 442 (Griffith CJ).

⁷ Ibid 457 (Barton J). Cf *ibid* 474 (Higgins J).

⁸ Ibid 486–7 (Powers J).

⁹ Justice Michael Kirby, 'Sir Edward McTiernan — A Centenary Reflection' (1991) 20 *Federal Law Review* 165, 181.

¹⁰ Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *Report on Retiring Age for Commonwealth Judges* (1976).

¹¹ *Minutes of Proceedings and Official Record of Debates of the Australian Constitutional Convention*, Hobart, 27–29 October 1976.

mum retirement age. The reasons for this practice are well known and they do not need to be spelt out here.¹²

There was minimal discussion in Parliament regarding *why* such a retirement age should be introduced, and what purpose would be achieved. Indeed, this was seen as self-evident: there could be ‘no rational opposition’ to retirement ages for federal judges.¹³ There was also minimal discussion regarding why 70 was an appropriate age for retirement.¹⁴ The justifications for introducing a retirement age for federal judges are analysed in more detail below in Part III.

According to Williams and Hume, the 1977 proposals for referenda were ‘developed in a spirit of agreement, had bipartisan support and were of modest import’.¹⁵ Opposition to the retirement age proposal was ‘muted’, and there was no official ‘No’ case published.¹⁶ However, Sir Robert Menzies ‘argued that the new rule would deprive Australia of many fine legal minds’, and Professor Pat Lane argued that the proposal was of ‘little benefit’ and would increase the power of government via higher numbers of judicial appointments.¹⁷ These concerns did not change the tide of public support for federal judicial retirement ages, and the referendum passed with a resounding majority.

Section 72 now makes a distinction between the retirement ages of High Court judges and other federal judges. According to Mr Ellicott, this ‘recognises the special position of the High Court as the Federal Supreme Court’.¹⁸ Thus, judges of the High Court must retire at age 70, though this may be

¹² Commonwealth, *Parliamentary Debates*, House of Representatives, 16 February 1977, 147 (Robert Ellicott).

¹³ Commonwealth, *Parliamentary Debates*, House of Representatives, 17 February 1977, 200 (Gough Whitlam).

¹⁴ Opeskin, ‘Models of Judicial Tenure’, above n 3, 14. In the 1976 report of the Senate Standing Committee, a retiring age of 70 was recommended for the High Court on the basis that it was the age most commonly adopted for state and territory judges: Senate Standing Committee on Constitutional and Legal Affairs, above n 10, 15.

¹⁵ George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (University of New South Wales Press, 2010) 155.

¹⁶ *Ibid* 158.

¹⁷ *Ibid* 158–9.

¹⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 16 February 1977, 148.

varied for other federal courts. As it happens, the age of 70 is now applied uniformly to federal judges.¹⁹

The changes to s 72, and any subsequent changes to retirement ages, operated prospectively to safeguard judicial independence.²⁰ Judicial independence requires ‘the absence of certain connections’ between the judiciary and other arms of government²¹ to secure impartiality in the conduct of the judicial role.²² Former Chief Justice of Tasmania, Sir Guy Green, defines judicial independence as the capacity of courts to perform their constitutional functions free from ‘actual or apparent interference’, and to the extent possible, ‘actual or apparent dependence’ on the executive.²³ According to Lane, guaranteed judicial tenure is essential for securing judicial independence.²⁴ Thus, changes to judicial tenure under s 72 risked impairing the appearance and reality of judicial independence if they applied to sitting judges.

¹⁹ See *Federal Circuit Court of Australia Act 1999* (Cth) sch 1 cl 1(4); Federal Court of Australia, *Judges of the Court* <<http://www.fedcourt.gov.au/about/judges>>. For discussion of retirement ages in the Family Court, see John Stapleton, *Chaos At The Crossroads: Family Law Reform in Australia* (Dads on the Air, 2004).

²⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 16 February 1977, 148 (Robert Ellicott). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 17 February 1977, 203–4 (Ian Sinclair), 211 (Michael Hodgman). Compare the effect of the retirement provisions in *European Commission v Hungary* (C-286/12) [2012] ECR 687.

²¹ Peter H Russell, ‘Toward a General Theory of Judicial Independence’ in Peter H Russell and David M O’Brien (eds), *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World* (University Press of Virginia, 2001) 1, 2.

²² Justice R D Nicholson, ‘Judicial Independence and Accountability: Can They Co-exist?’ (1993) 67 *Australian Law Journal* 404, 405. See also Carlo Guarnieri, ‘The Political System’ in Carlo Guarnieri and Patrizia Pederzoli (eds), *The Power of Judges: A Comparative Study of Courts and Democracy* (Cheryl Thomas trans, Oxford University Press, 2002) 150, 156 [trans of: *La Puissance de Juger* (first published 1996)].

²³ David K Malcolm, ‘The Independence of the Judiciary in the Asia-Pacific Region’ (2004) 78 *Australian Law Journal* 458, 458, quoting Sir Guy Green, ‘The Rationale and Some Aspects of Judicial Independence’ (1985) 59 *Australian Law Journal* 135, 135.

²⁴ P H Lane, ‘Constitutional Aspects of Judicial Independence’ in Helen Cunningham (ed), *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (Judicial Commission of New South Wales, 1997) 53. See also Daryl Williams, ‘Judicial Independence and the High Court’ (1998) 27 *University of Western Australia Law Review* 140, 145; Sir Anthony Mason, ‘Judicial Independence and the Separation of Powers — Some Problems Old and New’ (1990) 13 *University of New South Wales Law Journal* 173, 179; Rebecca Ananian-Welsh and George Williams, ‘Judicial Independence from the Executive: A First Principles Review of the Australian Cases’ (2014) 40 *Monash University Law Review* 593.

To manage this risk, the changes to s 72 only affected new judicial appointments. Mr Ellicott therefore argued that there could be no suggestion that retirement ages were 'being manipulated' or that the changes were 'directed against any existing judges'.²⁵ Thus, it was contended that amending s 72 would not affect the appearance or reality of judicial independence. This argument appears to have been accepted in later case law. According to Gleeson CJ in *Forge v Australian Securities and Investments Commission* ('*Forge*'), the 1977 amendment 'illustrates the room for legitimate choice that exists in connection with arrangements affecting judicial independence'.²⁶ While life tenure was perceived to be necessary for federal judicial independence at federation, the introduction of retirement ages for federal judges when life tenure became 'inconvenient' did not mean that the High Court became less independent.²⁷ Thus, while '[t]enure is an important aspect of the arrangements that support the individual and personal aspects of judicial independence ... it is only one of a number of aspects all of which have to be considered in combination'.²⁸ Mandatory retirement ages are therefore not incompatible with judicial independence, but reflect a legislative choice regarding how judicial independence might be secured. So long as judicial retirement ages operate as a general rule, and one that cannot be amended arbitrarily by the executive, the appearance and reality of judicial independence is unlikely to be affected.²⁹

²⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 16 February 1977, 148. In contrast, Opeskin argues that '[a] significant motivation for the change appears to have been the desire to terminate the office of specific judges', though he does not provide evidence for this assertion: Opeskin, 'Models of Judicial Tenure', above n 3, 640. Of course, the repeated references to the reform not affecting individual judges in the House of Representatives debates may indicate that Opeskin's impression is correct.

²⁶ (2006) 228 CLR 45, 66 [37].

²⁷ *Ibid.*

²⁸ *Ibid.* See also Ananian-Welsh and Williams, 'Judicial Independence from the Executive', above n 24.

²⁹ Though see the discussion of judicial independence below.

B Australian States and Territories

Section 72 does not generally apply to state or territory courts.³⁰ As noted by McHugh J in *Kable v Director of Public Prosecutions (NSW)* ('*Kable*'), 'the *Constitution* does not protect the appointment, remuneration and tenure of the judges of state courts invested with federal jurisdiction although it protects the judges of federal courts in respect of those matters'.³¹ There is therefore no requirement in the *Constitution* that state and territory judges have life tenure or hold office during good behaviour. Indeed, in *Spratt v Hermes*, Windeyer J described judges holding office during good behaviour as a form of 'exceptional tenure' generally not enjoyed by judges of subordinate courts.³² Further, in *Re Governor, Goulburn Correctional Centre; Ex parte Eastman*, Gleeson CJ, McHugh and Callinan JJ thought it would have been 'startling' in 1915 to suggest that territory judges should have life tenure.³³

Thus, the Parliaments of the states and territories have far more discretion and latitude regarding the tenure of judges and magistrates. Where s 72 does not apply, 'whether and to what extent the security of tenure of judges or magistrates should be established or enhanced ... is a matter for the legislature to determine'.³⁴ State and territory courts do not need to follow s 72 as a

³⁰ See *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322; *Forge* (2006) 228 CLR 45, 66 [38] (Gleeson CJ), 141 [255] (Heydon J). Cf *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322, 340 (emphasis added) (citations omitted), where Gaudron J said:

If it is not necessary for a [territory court] to conform to the requirements of s 72 of the *Constitution*, a question could arise as to whether, in accordance with the principles recognised in *Kable v Director of Public Prosecutions (NSW)*, there is not some implicit requirement in Ch III with respect to the nature of the matters that may be dealt with by it and perhaps, also, with respect to the *manner in which it is constituted* before federal jurisdiction can be vested in it.

The principles in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 may prevent states from interfering with judicial tenure in a way that would jeopardise judges' independence and impartiality: see generally Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006) 368–9.

³¹ (1996) 189 CLR 51, 115.

³² (1965) 114 CLR 226, 271.

³³ (1999) 200 CLR 322, 332.

³⁴ *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2002) 122 FCR 204, 220 [64] (Black CJ and Hely J).

'template' or 'the Australian standard for judicial independence',³⁵ there is no 'single ideal model' of independence, meaning there is 'room for legislative choice in this area'.³⁶

Further, for the most part, state and territory provisions regarding judicial tenure are not entrenched, and can therefore be amended as the legislature sees fit.³⁷ Exceptionally, in New South Wales an attempt has been made to entrench provisions relating to judicial tenure. The *Constitution Act 1902* (NSW) s 7B(1), amended by the *Constitution (Entrenchment) Amendment Act 1992* (NSW), provides that Bills that expressly or impliedly repeal or amend constitutional provisions relating to judicial tenure must be approved by a majority of the electorate before being presented to the Governor for assent.³⁸ However, this section will likely have limited consequences for judicial retirement ages. Section 55 (which is purportedly entrenched) merely provides that:

- (1) This Part does not prevent the fixing or a change of age at which all judicial officers, or all judicial officers of a court, are required to retire by legislation.
- (2) However, such a change does not apply to a judicial officer holding office when the change takes effect, unless the judicial officer consents.

Thus, the *Constitution Act 1902* (NSW) still provides significant discretion for Parliament to amend judicial tenure: a retirement age is not specified, though provision is made for the legislature to fix or change a retirement age for judges, and there is explicit provision made for term appointments in s 53 of the Act. Thus, entrenchment will not significantly constrain the legislature in this case.

Given state and territory provisions regarding judicial tenure are mostly not entrenched, in *Capital TV & Appliances Pty Ltd v Falconer*, Windeyer J

³⁵ *Forge* (2006) 228 CLR 45, 66 [36] (Gleeson CJ).

³⁶ *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 152 [3] (Gleeson CJ). See also *Forge* (2006) 228 CLR 45, 76–7 [65] (Gummow, Hayne and Crennan JJ).

³⁷ See, eg, *Constitution Act 1975* (Vic) s 18(2AA); Carney, *The Constitutional Systems*, above n 30, 343–4.

³⁸ For further discussion of manner and form provisions in the Australian states, see Gerard Carney, 'An Overview of Manner and Form in Australia' (1989) 5 *Queensland University of Technology Law Journal* 69.

observed that the Commonwealth Parliament could provide for territory judges to hold appointments

during good behaviour ... for life subject to removal in any manner it chooses to prescribe, or it can make them for a term of years, or it can adopt the common law by which offices under the Crown are held at the pleasure of the Crown.³⁹

Similarly, in *McCawley v The King*, the Privy Council held that the Queensland Parliament was ‘fully entitled to vary the tenure of the judicial office’,⁴⁰ and judges could be appointed for a fixed term if desired.⁴¹ This provides obvious scope for state and territory Parliaments to interfere with judicial tenure, and thus judicial independence.⁴²

Within this constitutional framework, all Australian states and territories make some provision for mandatory retirement of judges and magistrates. However, there is no consensus regarding the age of retirement, which can vary within and between jurisdictions from ages 65 to 72. Thus, the Australian Law Reform Commission (‘ALRC’) has noted the ‘jurisdictional inconsistency’ relating to compulsory retirement provisions for judicial and quasi-judicial officers in Australia.⁴³ Most states and territories also make some provision for the post-retirement employment of judges and magistrates. This may be allowed until a specified age, or for a specific period. The noticeable exceptions are the Northern Territory and Queensland (and perhaps South Australia), where those aged over 70 cannot be appointed as temporary magistrates. The different legislative provisions are presented in Table 1.

³⁹ (1971) 125 CLR 591, 611–12.

⁴⁰ [1920] AC 691, 714 (Lord Birkenhead LC for the Privy Council). See also Nicholas Aroney, ‘Politics, Law and the Constitution in *McCawley’s Case*’ (2006) 30 *Melbourne University Law Review* 605.

⁴¹ *McCawley v The King* [1920] AC 691, 716–17 (Lord Birkenhead LC for the Privy Council).

⁴² Ananian-Welsh and Williams, ‘Judicial Independence from the Executive’, above n 24, 605–6. The decision in *Kable* may arguably place some limits on state legislatures’ ability to interfere with judicial tenure: at 608–10.

⁴³ ALRC, *Grey Areas — Age Barriers to Work in Commonwealth Laws*, Discussion Paper No 78 (2012) 60 [2.106]; ALRC, *Access All Ages*, above n 2, 100 [4.99].

Table 1: State and Territory Provisions on Judicial Retirement Ages

State or Territory	Retirement age	Source	Post-retirement employment	Source
ACT	Judges: 70	<i>Supreme Court Act 1933</i> (ACT) s 4(3)	Acting judges for up to 12 months	<i>Supreme Court Act 1933</i> (ACT) s 4B
	Magistrates: 65	<i>Magistrates Court Act 1930</i> (ACT) s 7D	'[S]pecial magistrates' until age 70	<i>Magistrates Court Act 1930</i> (ACT) s 8A
NSW	Judicial officers: 72 (unless granted retiring leave)	<i>Judicial Officers Act 1986</i> (NSW) s 44(1)	Acting judges until age 77	<i>Supreme Court Act 1970</i> (NSW) ss 37(4)–(4A)
	Non-judicial members of the Industrial Relations Commission: 65	<i>Judicial Officers Act 1986</i> (NSW) s 44(2)		
	Magistrates: 72	<i>Judicial Officers Act 1986</i> (NSW) s 44(3)		
NT	Judges: 70	<i>Supreme Court Act 1979</i> (NT) s 38	Cannot appoint those aged 70 or over as acting stipendiary magistrates or 'Relieving Magistrates'	<i>Magistrates Act 1977</i> (NT) ss 9(2A), 9A(1A)
	Magistrates: 70	<i>Magistrates Act 1977</i> (NT) s 7		
Qld	Judges: 70	<i>Constitution of Queensland 2001</i> (Qld) s 60(2); <i>District Court of Queensland Act 1967</i> (Qld) s 14; <i>Supreme Court of Queensland Act 1991</i> (Qld) s 21	Acting judges until age 78	<i>District Court of Queensland Act 1967</i> (Qld) s 17(5); <i>Supreme Court of Queensland Act 1991</i> (Qld) s 6(6)
	Magistrates: 70	<i>Magistrates Act 1991</i> (Qld) s 42(d)	Acting magistrates until age 70	<i>Magistrates Act 1991</i> (Qld) s 6(3)

SA	Judges: 70	<i>Supreme Court Act 1935</i> (SA) s 13A(1); <i>District Court Act 1991</i> (SA) s 16(1)	Acting judges for up to 12 months	<i>Supreme Court Act 1935</i> (SA) s 11(1b); <i>District Court Act 1991</i> (SA) s 12(3)
	Magistrates: 70	<i>Magistrates Act 1983</i> (SA) s 9(1)(c)	Unclear — acting magistrates may also be subject to age limitations	<i>Magistrates Act 1983</i> (SA) ss 5(3), 9(1)(c)
Tas	Supreme Court judges: 72	<i>Supreme Court Act 1887</i> (Tas) s 6A(1)	Acting judges for a specified period or until an event	<i>Supreme Court Act 1887</i> (Tas) ss 3(5), 6A(1)
	Magistrates: 72	<i>Magistrates Court Act 1987</i> (Tas) s 9(4)(a)	Temporary magistrates and permanent part-time magistrates (for up to 5 years)	<i>Magistrates Court Act 1987</i> (Tas) ss 4(1C), 4(4), 8(3)
Vic	Supreme Court judges: 70 or 72 County Court judges: 70 or 72	<i>Constitution Act 1975</i> (Vic) s 77 <i>County Court Act 1958</i> (Vic) s 14(1)	Reserve judges until age 78	<i>Constitution Act 1975</i> (Vic) ss 81(2)(a), 81A(1)(b)
	Associate judges: 70	<i>Supreme Court Act 1986</i> (Vic) s 104		
	Magistrates: 70	<i>Magistrates' Court Act 1989</i> (Vic) s 12(a)		
WA	Judges: 70	<i>District Court of Western Australia Act 1969</i> (WA) s 16; <i>Judges' Retirement Act 1937</i> (WA) s 3(1)	Auxiliary appointments for up to 12 months	<i>District Court of Western Australia Act 1969</i> (WA) s 18A(1)
	Magistrates: 65	<i>Magistrates Court Act 2004</i> (WA) sch 1 cl 11(1)(a)	Acting magistrates until age 70	<i>Magistrates Court Act 2004</i> (WA) sch 1 cl 9(3)(a)

The Australian states and territories generally appear to be seeking to have it both ways, making use of both mandatory retirement ages *and* provisions allowing judges and magistrates to be reappointed after retirement.⁴⁴ This appears to undermine any argument in favour of judicial retirement ages based on judges' declining capacity in old age. Of course, the reappointment of judges after retirement is likely to be highly selective, and individuals with declining capacity would be unlikely to be reappointed. Thus, a system of mandatory retirement with selective reappointment may be one means of managing judicial incapacity in old age. However, the selectivity of this process flags serious concerns related to judicial independence. If the executive is choosing to reappoint certain judges (and not others), this may impair the appearance or reality of individual and institutional independence. It is foreseeable that pressure could be applied to judges in the lead-up to retirement, with the promise of a term appointment in exchange for a favourable decision (or, conversely, declining to make a term appointment following an unfavourable decision).⁴⁵ Given these very real risks to judicial independence (or, at the very least, risks to the appearance of judicial independence), the re-employment of judges after retirement is not the best way to extend judicial service; instead, as noted by Kirby J in *Forge*, 'the course consistent with manifest independence and impartiality of the judiciary of the State is to extend (or remove) the age of mandatory retirement', rather than to rely on acting appointments.⁴⁶ Further, using term appointments to manage judicial incapacity puts the executive in the position of assessing judicial capacity each time a term appointment is made or not made. Vesting this role in the executive could seriously impair the reality or appearance of judicial independence,⁴⁷ a concern that is reflected in the complicated provisions relating to judicial removal at federal, state and territory level.⁴⁸

Despite these concerns, acting appointments have become 'a steady and significant component' of the judiciary in New South Wales,⁴⁹ and represent

⁴⁴ In contrast, acting appointments in the federal courts appear to be precluded by s 72 of the *Constitution*: see Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Australia's Judicial System and the Role of Judges* (2009) 37 [4.30].

⁴⁵ See *Forge* (2006) 228 CLR 45, 94 [124], 118 [181], 132–3 [223] (Kirby J).

⁴⁶ *Ibid* 132 [221].

⁴⁷ *Ibid* 118 [181] (Kirby J).

⁴⁸ See, eg, *Constitution Act 1902* (NSW) s 53; *Judicial Officers Act 1986* (NSW) s 41.

⁴⁹ *Forge* (2006) 228 CLR 45, 110 [157] (Kirby J).

‘an important and relatively stable institutional supplementation of the judicial personnel of the Supreme Court’ and District Court.⁵⁰ This practice shows no signs of abating: in 2013, in the Supreme Court of New South Wales, nine acting judges sat for a cumulative total of 801 days.⁵¹ All of these acting judges were former judges of the Supreme Court of New South Wales or the Federal Court.⁵²

The appointment of acting judges under s 37 of the *Supreme Court Act 1970* (NSW) was challenged in *Forge*. In that case, Gleeson CJ held that acting judges had tenure ‘that [was] secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner’.⁵³ Acting judges were subject to many of the same protections and institutional safeguards as permanent judges.⁵⁴ Further, ‘[m]inimum standards of judicial independence are not developed in a vacuum. They take account of considerations of history, and of the exigencies of government’, and there were ‘sound practical reasons’ for appointing acting judges.⁵⁵ Further, given the growth in the number of retired judges serving as acting judges,⁵⁶ ‘it is difficult to imagine what doubts might reasonably have been entertained about [their] independence or impartiality, except such as could arise from the renewability of [their] temporary appointment’.⁵⁷ While it was ‘possible to imagine extreme cases’ where acting appointments might mean the Supreme Court ‘no longer answered the description of a court or satisfied the minimum requirements of independence and impartiality’, the validity of the section could not be determined by reference to a hypothetical abuse of the power of appointment.⁵⁸ Further, it was just as possible that governments

⁵⁰ Ibid.

⁵¹ Supreme Court of New South Wales, ‘2013 Annual Review’ (Report, 2013) 16.

⁵² Ibid.

⁵³ *Forge* (2006) 228 CLR 45, 59 [12]–[14], quoting *Valente v The Queen* [1985] 2 SCR 673, 698 (Le Dain J).

⁵⁴ Ibid 61–2 [24], 68 [43] (Gleeson CJ), 146–8 [269]–[271] (Heydon J).

⁵⁵ Ibid 68 [42] (Gleeson CJ).

⁵⁶ Ibid 65 [34].

⁵⁷ Ibid 68 [44]. Cf at 79 [71] (Gummow, Hayne and Crennan JJ) (emphasis in original): ‘It is the possibility of permanent appointment, and the possibility of reappointment as an acting judge, which marks the two cases of appointment as a judge and appointment to act as a judge as radically different’.

⁵⁸ Ibid 69 [46] (Gleeson CJ). See also at 87 [97], 88 [101] (Gummow, Hayne and Crennan JJ). This may be compared with the dissent of Kirby J at 94 [124]–[125] (emphasis altered):

could abuse their power to appoint permanent judges.⁵⁹ The ‘desirability’ of acting judges was not justiciable.⁶⁰ Therefore, the use of acting appointments in New South Wales under s 37 of the *Supreme Court Act 1970* (NSW) was upheld. Acting appointments in the New South Wales District Court were also upheld in *Downey v Acting District Court Judge Boulton [No 5]*.⁶¹ Thus, the re-employment of retired judges in an acting capacity in state or territory courts has been upheld as consistent with constitutional principles, despite the clear risks to judicial independence.

III CRITICISM OF JUDICIAL RETIREMENT AGES

Judicial retirement ages have come under sustained criticism for a number of years. These criticisms may be broken down into two parts: first, that the arguments in favour of judicial retirement ages no longer reflect contemporary conditions; and, secondly, that retirement ages are unnecessary in practice. These arguments are explored in more detail in the Parts that follow.

A Critiques of Arguments in Favour of Retirement Ages

It is questionable whether the arguments in favour of judicial retirement ages, as put forward by the Senate Standing Committee on Constitutional and Legal Affairs in 1976, and the parliamentary debates on the *Constitution Alteration (Retirement of Judges) 1977* (Cth), continue to reflect contemporary conditions (indeed, if they ever did). The arguments put forward in favour of judicial retirement ages reflected five key concerns.

1 *Contemporising Courts*

First, there was a desire to increase turnover of judges to achieve ‘vigorous and dynamic courts’, via ‘new and younger judges’ with ‘new ideas and fresh

the number and type of acting appointments ... are such as to amount to an impermissible attempt to alter the character of the Supreme Court. They attempt to work a change in a fundamental respect forbidden by the federal *Constitution*. ... The time has come for this Court to draw a line and to forbid the practice that has emerged in New South Wales, for it is inimical to true judicial independence and impartiality.

⁵⁹ *Ibid* 61 [20] (Gleeson CJ).

⁶⁰ *Ibid*.

⁶¹ (2010) 78 NSWLR 499.

social attitudes'.⁶² In the parliamentary debates, it was argued that retirement ages would allow 'the appointment of younger judges', helping to 'contemporise the courts'.⁶³ Thus, it was 'a good, progressive move'.⁶⁴ Ageing judges might lose touch with the community:

an age limit should be determined so that the community can have confidence that current-day sets of values, which often conflict and which are varied, are within the general realm of experience of the currently sitting judges. In some cases a judge may retain full capacity of mind, full general mental knowledge and vigour but be out of touch with much of what is occurring in the community if he be very elderly.⁶⁵

These arguments adopt a *disengagement* theory of ageing, where older judges gradually and inevitably withdraw from public life as a result of the ageing process, and lose touch with contemporary attitudes and values. Disengagement theory has been extensively critiqued and ultimately rejected in the literature.⁶⁶ Contemporary thinkers aligned with a positive gerontology favour a more positive view of ageing, based on social engagement and continuity across the life course. Researchers in ageing now recognise that 'success, productivity, and engagement are, in fact, features of a "normal"

⁶² Senate Standing Committee on Constitutional and Legal Affairs, above n 10, 14. See also *Minutes of Proceedings and Official Record of Debates of the Australian Constitutional Convention*, Hobart, 27–29 October 1976, 38 (Ian McLaren); *Minutes of Proceedings and Official Record of Debates of the Australian Constitutional Convention*, Melbourne, 24 September 1975, 90 (Kep Enderby).

⁶³ Commonwealth, *Parliamentary Debates*, House of Representatives, 17 February 1977, 211 (Michael Hodgman).

⁶⁴ *Ibid.*

⁶⁵ *Ibid* 220 (James Neil).

⁶⁶ See, eg, Hilary M Lips and Sarah L Hastings, 'Competing Discourses for Older Women: Agency/Leadership vs. Disengagement/Retirement' (2012) 35 *Women & Therapy* 145; J Beth Mabry and Vern L Bengtson, 'Disengagement Theory' in Erdman B Palmore, Laurence Branch and Diana K Harris (eds), *Encyclopedia of Ageism* (Haworth Pastoral Press, 2005) 113; Arlie Russell Hochschild, 'Disengagement Theory: A Critique and Proposal' (1975) 40 *American Sociological Review* 553; W Andrew Achenbaum and Vern L Bengtson, 'Re-engaging the Disengagement Theory of Aging: On the History and Assessment of Theory Development in Gerontology' (1994) 34 *Gerontologist* 756; Robert Crosnoe and Glen H Elder Jr, 'Successful Adaptation in the Later Years: A Life Course Approach to Aging' (2002) 65 *Social Psychology Quarterly* 309; Kimberly J Johnson and Jan E Mutchler, 'The Emergence of a Positive Gerontology: From Disengagement to Social Involvement' (2014) 54 *Gerontologist* 93.

aging experience'.⁶⁷ Further, individuals are likely to respond to the ageing process via a dynamic and adaptive form of continuity; that is, they will generally rely on the roles, skills, relationships, and techniques they have used earlier in life to deal with changes associated with ageing.⁶⁸ While continuity can become 'maladaptive' in some circumstances,⁶⁹ particularly if these relationships and techniques no longer reflect changed social conditions, there is no evidence that individuals (and judges more specifically) simply withdraw from public life and fall out of touch with community values as they age.

If we reject disengagement theory, these arguments cannot be relied upon to support mandatory retirement ages. However, there is still a risk that judges might cling to outdated values and assumptions as they age, which might also lead to maladaptive decision-making. Judging is not a mechanistic task (particularly at the appellate level), and arguably draws on judges' values, attitudes and individual policy preferences,⁷⁰ or at least judges' interpretations of community values.⁷¹ Thus, promoting judicial turnover might lead to new ideas in judicial decision-making and new ways of interpreting existing precedents.⁷² That said, it is also important to acknowledge that judges can change as individuals, and can integrate new ideas into their decision-making.⁷³ Further, it is debatable whether (and how) we want judges to be 'in touch' with community values,⁷⁴ and whether they are 'out of touch' at all.⁷⁵

⁶⁷ Johnson and Mutchler, above n 66, 93.

⁶⁸ Robert C Atchley, 'A Continuity Theory of Normal Aging' (1989) 29 *Gerontologist* 183.

⁶⁹ *Ibid* 187.

⁷⁰ Jeffrey A Segal and Albert D Cover, 'Ideological Values and the Votes of US Supreme Court Justices' (1989) 83 *American Political Science Review* 557.

⁷¹ John Braithwaite, 'Community Values and Australian Jurisprudence' (1995) 17 *Sydney Law Review* 351.

⁷² See below Part III(A)(3).

⁷³ See, eg, 'Out of Touch Judges Go Back to School', *The Daily Telegraph* (online), 16 June 2012 <<http://www.dailytelegraph.com.au/archive/world-old/out-of-touch-judges-go-back-to-school/story-e6firev0r-1226397673126>>.

⁷⁴ Chief Justice A M Gleeson, 'Out of Touch or Out of Reach?' (2005) 7 *Judicial Review* 241.

⁷⁵ Kate Warner et al, 'Are Judges Out of Touch?' (2013) 25 *Current Issues in Criminal Justice* 729.

2 Opening Up Opportunities for Younger Appointees

Mandatory retirement was also supported as it would open up avenues for 'able legal practitioners' to achieve judicial positions 'while at the peak of their professional abilities and before suffering the limitations of declining health'.⁷⁶ This reflects two concerns: first, the need to create opportunities for younger judicial appointees by increasing judicial turnover; and, secondly, concerns about declining capacity in old age.⁷⁷

In careers with a fixed number of positions (including the judiciary), longer work careers may limit opportunities for others. Judicial tenure (and mandatory retirement ages) 'directly impacts the rate of judicial turnover',⁷⁸ facilitating more (and more youthful) judicial appointments. The desire to create opportunities for 'able legal practitioners' to achieve judicial positions reflects the 'fair innings' argument, or the idea that work policies should take into account all advantages an individual has experienced cumulatively over their life.⁷⁹ This argument posits that ill-treatment of or discrimination against older workers can be offset by perceived advantages they enjoyed earlier in life. Older judges have had opportunities for progression and advancement in their youth, and these should be taken into consideration when deciding whether to impose mandatory retirement. Justice Kirby has argued that '[e]very office holder must keep in mind the need to make way for young people of honourable ambition who follow behind ... to make way for fresh blood required to invigorate a vital branch of government'.⁸⁰ By this reasoning, older judges, who have 'had their chance' on the bench, need to retire to make way for the next generation. Mandatory retirement will therefore open up jobs for (younger) judges in a fair and bloodless way.⁸¹ Thus, retirement ages are one way of securing intergenerational fairness in this context.⁸²

⁷⁶ Senate Standing Committee on Constitutional and Legal Affairs, above n 10, 14. See also *Minutes of Proceedings and Official Record of Debates of the Australian Constitutional Convention*, Hobart, 27–29 October 1976, 38 (Ian McLaren).

⁷⁷ See below Part III(A)(3).

⁷⁸ Opeskin, 'Models of Judicial Tenure', above n 3, 657.

⁷⁹ Sandra Fredman, 'The Age of Equality' in Sandra Fredman and Sarah Spencer (eds), *Age as an Equality Issue: Legal and Policy Perspectives* (Hart Publishing, 2003) 21, 47.

⁸⁰ Kirby, 'Sir Edward McTiernan — A Centenary Reflection', above n 9, 182.

⁸¹ See Chief Judge Richard A Posner, *Aging and Old Age* (University of Chicago Press, 1995) 350–1; Bob Hepple, 'Age Discrimination in Employment: Implementing the Framework

The ‘fair innings’ argument has been extensively criticised in the literature as being ‘fundamentally unsound’ and reflecting a flawed understanding of the labour market.⁸³ The argument assumes there are a fixed number of opportunities in the economy, and that employment of a new (younger) worker requires the removal of another (older) worker. This does not hold at the macro-economic level, though it might at the level of an individual firm or, perhaps, within the judiciary as a whole.⁸⁴ Thus, judicial retirement ages may be required to achieve intergenerational fairness in this context, particularly given the limited number of positions available in the most senior courts.

In addition, it is argued that making way for the next generation of judges through mandatory retirement will promote a more diverse judiciary,⁸⁵ enhancing public confidence and the legitimacy of the courts,⁸⁶ encouraging new ideas⁸⁷ and creating a judiciary which has a better overall understanding of society, improving the quality of judicial decision-making.⁸⁸ If older judges are predominantly privileged, heterosexual, Anglo-Saxon men, the use of mandatory retirement ages may open up opportunities for appointees with

Directive 2000/78/EC’ in Sandra Fredman and Sarah Spencer (eds), *Age as an Equality Issue: Legal and Policy Perspectives* (Hart Publishing, 2003) 71, 90–1.

⁸² Cf Department for Business, Innovation and Skills, ‘Phasing Out the Default Retirement Age — Government Response to Consultation’ (Report No BIS/11/536, 13 January 2011) 7.

⁸³ Fredman, above n 79, 47. See also Performance and Innovation Unit, ‘Winning the Generation Game: Improving Opportunities for People Aged 50–65 in Work and Community Activity’ (Report, United Kingdom Cabinet Office, April 2000) 39–40.

⁸⁴ Elaine Dewhurst, ‘Intergenerational Balance, Mandatory Retirement and Age Discrimination in Europe: How Can the ECJ Better Support National Courts in Finding a Balance between the Generations?’ (2013) 50 *Common Market Law Review* 1333, 1352–9. The degree to which the ‘fair innings’ argument holds at the level of the individual firm will depend on the internal labour market in each firm. There is wide variation in internal labour markets across and between firms and in different industries and occupations: Peter B Doeringer and Michael J Piore, *Internal Labor Markets and Manpower Analysis* (M E Sharpe, 1971) xi, 2. The ‘fair innings’ argument is most likely to hold where the internal labour market of a firm has rigid ‘lines of progression’ and ‘internal career ladders’, limited ports of entry, and workers have limited mobility between firms: at 3. This may be an accurate description of the judiciary and judicial careers more generally.

⁸⁵ Christopher R McFadden, ‘Judicial Independence, Age-Based BFOQs, and the Perils of Mandatory Retirement Policies for Appointed State Judges’ (2000) 52 *South Carolina Law Review* 81, 89.

⁸⁶ *Ibid.*

⁸⁷ See Charles Fairman, ‘The Retirement of Federal Judges’ (1938) 51 *Harvard Law Review* 397.

⁸⁸ See Andrew Lynch, ‘Roxon’s High Court Dilemma’, *Inside Story* (online), 9 July 2012 <<http://insidestory.org.au/roxons-high-court-dilemma>>.

more diverse individual characteristics, particularly in the areas of race, gender, sexuality and socio-economic status. According to Justice Kirby, '[f]or an appellate court to reach great strengths there is a need for diversity amongst its members. If everyone has the same judicial philosophy, background and experience, a court is seriously weakened'.⁸⁹ Judicial retirement ages may create space on the bench to appoint judges with more diverse backgrounds and experiences. For example, four of the five female judges who have sat on the High Court have been appointed since 2005, largely as a result of judicial retirements at the mandatory retirement age. Increased age may also be associated with more "pro-elderly" decision-making,⁹⁰ supporting the need for a more diverse and balanced judiciary, and potentially providing a key justification for mandatory retirement ages.

However, while there is increasing recognition that a diverse judiciary is essential for a democratic society,⁹¹ there is limited evidence that new judicial appointments are actually more diverse. At this stage, it does not appear that the existing judicial appointment process in Australia is encouraging or enabling appointment of diverse candidates to the most senior judicial positions. There have been only five women appointed to the High Court in its history, and women comprise only 30.9 per cent of Commonwealth judges and magistrates more generally.⁹² This lack of diversity has led to calls to introduce a judicial appointments commission in Australia, like that in the United Kingdom, to promote a more transparent and accessible system of appointments.⁹³ Judicial retirement ages are unlikely to promote a more diverse judiciary without fundamental reform of judicial appointment

⁸⁹ Justice Michael Kirby, 'Dissent and the Importance of Judicial Diversity' (Paper presented at the Institute of Judicial Studies of New Zealand Conference: Equality and Diversity in Our Community, Rotorua, 18–19 August 2005).

⁹⁰ Kenneth L Manning, Bruce A Carroll and Robert A Carp, 'Does Age Matter? Judicial Decision Making in Age Discrimination Cases' (2004) 85 *Social Science Quarterly* 1, 15.

⁹¹ See, eg, Dame Brenda Hale, 'Equality and the Judiciary: Why Should We Want More Women Judges?' [2001] *Public Law* 489, 502–3; Rachel Davis and George Williams, 'A Century of Appointments but Only One Woman' (2003) 28 *Alternative Law Journal* 54, 55.

⁹² Australian Bureau of Statistics, 'Judges and Magistrates' in *Gender Indicators* (ABS Catalogue No 4125.0, 27 August 2013). Though, as noted above, many of these appointments have occurred in recent years.

⁹³ Rachel Davis and George Williams, 'Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia' (2003) 27 *Melbourne University Law Review* 819, 856–63.

processes; relying on judicial retirement ages alone to achieve diversity is futile and misplaced. That said, judicial retirement ages could be one means of opening up positions for more diverse appointees, and are accompanied by more temporal certainty than natural attrition. This certainty alone, though, is unlikely to be sufficient justification for judicial retirement ages.

3 *Declining Capability*

Judicial retirement ages were also seen as preventing the process of ageing and mental decline from inhibiting the judicial function. As noted by Mr Bowen in the parliamentary debates:

The judges of the High Court ... are not immune from senility. They are not immune from the geriatric process of mental decay and accordingly it follows that there must be some intelligent appraisal by the Australian people of whether we think sixty, sixty-five or seventy should be the age at which the man or the lady ... should retire.⁹⁴

This was put even more bluntly by Mr Falconer: 'We do not want geriatric judges dominating the judicial system. ... [N]ot everyone recognises when those intellectual talents are being dimmed'.⁹⁵ Thus, mandatory retirement would 'avoid the unfortunate necessity of removing a judge' made unfit for office 'by reasons of declining health ... but who is unwilling to resign'.⁹⁶ Removing a judge whose capacity had declined with age was likely to be insurmountably difficult, being 'cumbersome' and 'almost unapproachable':

An address of the 2 Houses would be contemplated only in the most extreme circumstances. A government would be loath to move in such a way against a person of great stature who may have reached an advanced age, possibly with

⁹⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 17 February 1977, 206. Cf *Minutes of Proceedings and Official Record of Debates of the Australian Constitutional Convention*, Hobart, 27–29 October 1976, 46 (John Greenwood).

⁹⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 17 February 1977, 216 (Peter Falconer).

⁹⁶ Senate Standing Committee on Constitutional and Legal Affairs, above n 10, 14. See also *Minutes of Proceedings and Official Record of Debates of the Australian Constitutional Convention*, Hobart, 27–29 October 1976, 38 (Ian McLaren), 42 (Lionel Bowen).

some lack of performance. I think it would be a much simpler and better process to have an automatic retiring age.⁹⁷

If that meant the court 'might lose occasionally a brilliant man who has a lot to offer', that would just be 'one of the penalties of having an automatic cut-off date'.⁹⁸

This argument has three fundamental limitations. First, it reflects a *decline* theory of ageing, buoyed by the assumption that 'older workers [and judges] would decline in competence and capability as they aged'.⁹⁹ The decline theory of ageing fails to consider potential benefits of the ageing process¹⁰⁰ and the social construction of age and ageing.¹⁰¹ Assumptions regarding the relationship between age and competence are normally underpinned by ageist beliefs about biological ageing.¹⁰² However, 'age is a weak predictor' of an individual's capacity to work productively¹⁰³ and '[old] age is not a good proxy for capability'.¹⁰⁴ If anything, older workers form a more heterogeneous group than younger workers, as people age at different rates.¹⁰⁵ Thus, while the capacity of some workers may decline with age, others will continue to fulfil their roles with esteem into very old age. Age-related cognitive decline is a complex area of study, and it is risky to draw any assumptions on the link

⁹⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 17 February 1977, 230 (Gordon Scholes).

⁹⁸ *Ibid.*

⁹⁹ Malcolm Sargeant, 'The Default Retirement Age: Legitimate Aims and Disproportionate Means' (2010) 39 *Industrial Law Journal* 244, 250.

¹⁰⁰ See, eg, K W Schaie, 'Ageing, Theories of' in Neil J Smelser and Paul B Bates (eds), *International Encyclopedia of Social and Behavioural Sciences* (Elsevier, 2001) 317, 319; Caroline Moughton and Simonetta Manfredi, 'Managing Flexible Retirement and Extended Working Lives: A Resource Guide' (Resource Guide, Oxford Brookes University, 2011) 25.

¹⁰¹ Schaie, above n 100, 320.

¹⁰² Bill Bytheway, 'Ageism' in Malcolm Lewis Johnson (ed), *The Cambridge Handbook of Age and Ageing* (Cambridge University Press, 2005) 338, 339.

¹⁰³ See, eg, Scott A Bass and Francis G Caro, 'Productive Aging: A Conceptual Framework' in Nancy Morrow-Howell, James Hinterlong and Michael Sherraden (eds), *Productive Aging: Concepts and Challenges* (John Hopkins University Press, 2001) 37, 40.

¹⁰⁴ See Fredman, above n 79, 40.

¹⁰⁵ John Grimley Evans, 'Age Discrimination: Implications of the Ageing Process' in Sandra Fredman and Sarah Spencer (eds), *Age as an Equality Issue: Legal and Policy Perspectives* (Hart Publishing, 2003) 11, 15–16.

between age and declining capacity.¹⁰⁶ Indeed, based on a study of cognitive information processing capacities in older adults, Ramscar et al have concluded that cognitive decline is no more than a myth: while older adults may take longer to complete certain tasks, this is because they have more information to process, and is not due to any issues of declining ability.¹⁰⁷ These findings increasingly challenge our stereotypical preconceptions of old age, and the assumed correlation between old age and mental capacity.

More particularly, the performance of judges may not decline significantly with age. Longitudinal studies have found two key requirements for maintaining 'high cognitive performance' in later life, namely education in younger age, and 'ongoing intellectual activity'.¹⁰⁸ Judges satisfy both these requirements, reducing any link between declining capability and age. While some studies have found that the productivity of judges declines with age,¹⁰⁹ the way these authors have defined judicial 'productivity' may make the results unreliable.¹¹⁰ Further, other industries with an educated and supported older

¹⁰⁶ See Ian J Deary et al, 'Age-Associated Cognitive Decline' (2009) 92 *British Medical Bulletin* 135.

¹⁰⁷ Michael Ramscar et al, 'The Myth of Cognitive Decline: Non-linear Dynamics of Lifelong Learning' (2014) 6 *Topics in Cognitive Science* 5.

¹⁰⁸ Peggy G Koopman-Boyden and Lesley Macdonald, 'Ageing, Work Performance and Managing Ageing Academics' (2003) 25 *Journal of Higher Education Policy and Management* 29, 31.

¹⁰⁹ Mita Bhattacharya and Russell Smyth, 'Aging and Productivity among Judges: Some Empirical Evidence from the High Court of Australia' (2001) 40 *Australian Economic Papers* 199, 210. See also Russell Smyth and Mita Bhattacharya, 'How Fast Do Old Judges Slow Down? A Life Cycle Study of Aging and Productivity in the Federal Court of Australia' (2003) 23 *International Review of Law and Economics* 141.

¹¹⁰ Bhattacharya and Smyth note the difficulties with defining and quantifying 'productivity' in this context: Bhattacharya and Smyth, above n 109, 210. The authors ultimately use the age-citation profiles of judges as a proxy for productivity (that is, the number of citations each judge receives in later decisions, as compared to their age at the time of delivering the original judgment). Whether judges are cited in later decisions depends on a number of factors unrelated to productivity, such as the nature of the court's caseload, and the cases and judgments that are cited by counsel: Smyth and Bhattacharya, above n 109, 149. Further, the authors' 2001 article covered citations of retired judges in High Court decisions from 1995 to 1999: Bhattacharya and Smyth, above n 109, 209. The 2003 article considered citations of retired judges in Federal Court decisions from 1998 to 2000: Smyth and Bhattacharya, above n 109, 149. These results are now dated, and may not reflect the capacity of today's judges. At a more fundamental level, as in academia, citations do not necessarily indicate quality of output: see Clive Beed and Cara Beed, 'Measuring the Quality of Academic Journals: The Case of Economics' (1996) 18 *Journal of Post Keynesian Economics* 369.

workforce (like academia) have found no significant association between ageing and a decline in performance.¹¹¹ Thus, anecdotal evidence of declining judicial capacity in old age¹¹² may be misleading for the judiciary as a whole.

If ageing *is* associated with decline in a particular case, many individuals will recognise the limits of their own capacity.¹¹³ For those that do not, a process of capability or performance assessment could remedy the issue. As Sir Harry Gibbs has noted:

judges do from time to time become incapable, by reason of illness, of performing their functions and although they can usually be persuaded to resign there have been instances in which judges, unfit by reason of serious and permanent illness, have resisted persuasion for too long.¹¹⁴

Thus, this raises the need for an appropriate process of capability or performance assessment for *all* judges, not just older judges.

The second fundamental limitation, then, is that arguments in favour of mandatory retirement recognise the difficulty of relying on s 72 and comparable state and territory processes as a means of managing declining judicial performance. Managing judicial capacity and performance without affecting judicial independence is an ongoing challenge for democratic systems.¹¹⁵ As noted by Spigelman CJ in *Bruce v Cole*: ‘The independence of the judiciary is, to a very substantial degree, dependent upon the maintenance of a system in which the removal of a judicial officer from office is an absolutely extraordinary occurrence’.¹¹⁶ While individual performance appraisals might be

¹¹¹ Alysia Blackham, ‘Managing without Default Retirement in Universities: A Comparative Picture from Australia’ (2015) 35 *Legal Studies* 502.

¹¹² See, eg, Kirby, ‘Sir Edward McTiernan — A Centenary Reflection’, above n 9, 180–2.

¹¹³ Though, according to former Chief Justice Murray Gleeson in ABC Radio National, ‘Chief Justice Gleeson To Leave Bench’, *PM*, 20 August 2008 <<http://www.abc.net.au/pm/content/2008/s2341693.htm>>:

we all know that there are people over 70 who have all their equipment and we all know that there may be some people under 70 who don’t. But it’s unfair to put people in a position where they have to judge themselves and decide whether they’re still fit to continue in the job.

¹¹⁴ Sir Harry Gibbs, ‘The Appointment and Removal of Judges’ (1987) 17 *Federal Law Review* 141, 149. See also H P Lee and Enid Campbell, *The Australian Judiciary* (Cambridge University Press, 2nd ed, 2013) 143.

¹¹⁵ See Gibbs, above n 114, 146–7.

¹¹⁶ (1998) 48 *NSWLR* 163, 166.

appropriate for the general workforce, their ‘application to judges is problematic because of the countervailing interest in immunising the judiciary from executive discretion, where such assessments might be reposed.’¹¹⁷ Opeskin also questions whether it is possible ‘to make reliable assessments of capacity in relation to the nuanced cognitive activity of judging’.¹¹⁸ At the same time, judges should not occupy their position without scrutiny or assessment. Shartel has argued that judicial tenure should not be unlimited; rather, it should be ‘tenure for so long as the judge is fit to hold judicial office’.¹¹⁹ Thus, tenure should be terminated due to incapacitation, incompetence, neglect of duty or moral unfitness.¹²⁰ The ‘crucial problem’ is how to devise and implement a system that achieves this end,¹²¹ without jeopardising the rule of law, judicial independence or the separation of powers.

The *Constitution* has in-built protection to guard judicial integrity: under s 72(ii), federal judges ‘[s]hall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity’.¹²² There is no power to remove for incompetence.¹²³ According to Opeskin, ‘removal ... is so purposefully demanding that it is seldom invoked’.¹²⁴ Similarly, Sir Harry Gibbs has noted:

the very gravity of the procedure may provide a disincentive to its use, and political considerations may add strength to that disincentive. ... [T]he procedure

¹¹⁷ Opeskin, ‘Models of Judicial Tenure’, above n 3, 629.

¹¹⁸ *Ibid.*

¹¹⁹ Burke Shartel, ‘Retirement and Removal of Judges’ (1936) 20 *Journal of the American Judicature Society* 133, 134.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² For state and territory judges, see *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 48D; *Constitution Act 1902* (NSW) s 53(2); *Judicial Officers Act 1986* (NSW) s 41(1); *Supreme Court Act 1979* (NT) s 40; *Constitution of Queensland 2001* (Qld) s 61; *Constitution Act 1934* (SA) ss 74–5; *Supreme Court (Judges’ Independence) Act 1857* (Tas) s 1; *Constitution Act 1975* (Vic) ss 77(1), 77(4)(aaa), 87AAB; *Constitution Act 1889* (WA) ss 54–5; *Supreme Court Act 1935* (WA) s 9. See also Christine Wheeler, ‘The Removal of Judges from Office in Western Australia’ (1980) 14 *University of Western Australia Law Review* 305.

¹²³ See Gabrielle Appleby and Suzanne Le Mire, ‘Judicial Conduct: Crafting a System that Enhances Institutional Integrity’ (2014) 38 *Melbourne University Law Review* 1, 9.

¹²⁴ Opeskin, ‘Models of Judicial Tenure’, above n 3, 628. Writing in 1987, Gibbs noted that no judge had been removed that century: Gibbs, above n 114, 146.

is hardly a satisfactory one for dealing with the position of a judge who is suffering from mental deterioration.¹²⁵

Judicial pensions are also generally not payable if a federal judge is removed under s 72,¹²⁶ perhaps increasing reluctance to make use of these provisions. Likely as a result, s 72 has been invoked only once, in relation to Justice Murphy of the High Court.¹²⁷ Similar concerns have also been raised in relation to state systems for managing judicial capacity and performance.¹²⁸

Reluctance or inability to address judicial incapacity via these mechanisms may have serious consequences in practice. While there are few recorded instances relating to the federal judiciary, judicial incapacity has raised difficulties at the state level. For example, Chief Justice Mack in Queensland suffered a heart attack in the late 1960s, and was incapable of performing his judicial functions. He stayed in office for a further two years.¹²⁹ There have been a number of occasions where state judges and magistrates with mental health issues have been forced to prove their capacity to the legislature.¹³⁰ However, these issues are not confined to older judges: while potentially more common among older judges, incapacity may occur at any age, and cannot always be addressed via mandatory retirement.¹³¹ Failing to address judicial incapacity is obviously undesirable. As noted by Appleby and Le Mire, '[p]ermanent physical or mental incapacity that is untreatable will not only

¹²⁵ Gibbs, above n 114, 147.

¹²⁶ *Judges' Pensions Act 1968* (Cth) s 17.

¹²⁷ See James Crawford and Brian Opeskin, *Australian Courts of Law* (Oxford University Press, 4th ed, 2004) 66–7; Lee and Campbell, above n 114, 117–20.

¹²⁸ However, it is also important to recognise the presence of 'informal' checks and balances that regulate judicial behaviour, including through peer pressure and scrutiny: see James Thomas, *Judicial Ethics in Australia* (LexisNexis Butterworths, 3rd ed, 2009) 247 [14.1]. According to the Hon James Thomas, formerly a judge of the Queensland Court of Appeal, these informal forms of scrutiny mean formal systems are rarely required: at 247 [14.1]. In relation to judicial capacity, judges have a 'duty to resign' if they no longer are capable of fulfilling their role: at 55 [4.52]. However, it might require a 'discreet appeal' by a 'trusted colleague' before judges will acknowledge their declining capacity. This sort of approach has resulted in a few 'timely resignation[s]': at 56 [4.52].

¹²⁹ *Ibid* 55 n 151.

¹³⁰ Appleby and Le Mire, above n 123, 10–11. See also *Bruce v Cole* (1998) 48 NSWLR 163; Lee and Campbell, above n 114, 124–6.

¹³¹ See Thomas, above n 128, 56 [4.52].

reduce the individual judge's capacity to perform the judicial function, but may also undermine public confidence in the institution'.¹³²

McFadden has noted concerns that performance or capability processes might 'damage the public's perception of the judiciary by raising doubts about the integrity and fitness of all judges'.¹³³ However, there is no indication that the public would regard performance processes for one judge as indicative of the competence of the judiciary as a whole. Further, performance appraisals are not degrading and do not undermine older workers' dignity unless declining capability with age is regarded as 'stigmatic'.¹³⁴ Thus, there is no reason why a system for dealing with incapacity should damage public perceptions of the judiciary, unless this stigma prevails. If so, this raises deeper questions about how Australian society regards age and competence. In sum, then, rather than relying on stereotypical assumptions of capability based on age, judges should be treated as individuals, and have their capabilities assessed on an individual basis in the event that issues arise.

While individual assessments of capacity might be desirable in principle, in practice, establishing more formalised processes for addressing judicial incapacity will be a difficult task. First, any system for managing judicial incapacity will need to be carefully framed to minimise risks to judicial independence and to ensure it does not undermine the judicial process.¹³⁵ Secondly, any process should supplement (rather than usurp) the power of the Governor-General and Parliament under s 72(ii) of the *Constitution* to remove federal judicial officers on the ground of proved misbehaviour or incapacity,¹³⁶ and similar provisions in the states and territories. Thirdly, any body at the federal level must satisfy the restrictions on executive interference with judicial power under ch III of the *Constitution*. Finally, the integrity of the process will need to be protected from collateral challenge through other proceedings.¹³⁷

Balancing these challenges with the need to better address capacity issues, Appleby and Le Mire propose the establishment of a judicial complaints

¹³² Appleby and Le Mire, above n 123, 11.

¹³³ McFadden, above n 85, 89.

¹³⁴ Fredman, above n 79, 45.

¹³⁵ See Appleby and Le Mire, above n 123, 37.

¹³⁶ See Andrew Lynch, 'Judicial Complaints and Suspension' (2012) 23 *Public Law Review* 81, 81.

¹³⁷ Appleby and Le Mire, above n 123, 65.

system ‘administered by a body ... removed from the ordinary judicial hierarchy and process’.¹³⁸ While this body would likely need to be composed of members of the judiciary (and exclude members of the executive) to satisfy ch III of the *Constitution*, it could also include lay members appointed by a judicial panel.¹³⁹ Appleby and Le Mire propose that this body enforce standards developed and adopted by the judiciary to provide guidance and examples of incapacity and inappropriate judicial behaviour.¹⁴⁰ While removal of judicial officers is exclusively a matter for the Governor-General and Parliament under s 72(ii) of the *Constitution*, the authors argue that lesser penalties may be enforced by a judicial body in accordance with ‘judicially adopted standards’.¹⁴¹

Alternatively, a judicial tribunal could be established to examine allegations of misbehaviour or incapacity, and determine whether the facts as proven warranted removal.¹⁴² The tribunal could consider matters upon referral from the Attorney-General, and removal would still ultimately remain a matter for Parliament.¹⁴³ To some extent, this proposal has been enacted via the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth), which provides for the establishment of parliamentary commissions upon the passing of a resolution by both houses of Parliament in the same session, to investigate specific allegations of judicial misbehaviour or incapacity.¹⁴⁴ Commissions are tasked with investigating allegations and reporting to Parliament on whether there is evidence that would let ‘Parliament conclude that the alleged misbehaviour or incapacity is proved’.¹⁴⁵ The commission procedure is intended to inform the process under s 72(ii) of the *Constitution*, meaning it does not interfere with the constitutional role of Parliament and the Governor-General. Commissions are to consist of three members nominated by the Prime Minister after consultation with the leader of the opposition, and at least one member is to be a former Commonwealth

¹³⁸ Ibid 67.

¹³⁹ Ibid 49, 67.

¹⁴⁰ Ibid 55.

¹⁴¹ Ibid 59. Though, on suspension, see Lynch, above n 136, 83–4.

¹⁴² Gibbs, above n 114, 148.

¹⁴³ Ibid. See generally Thomas, above n 128, 302–30.

¹⁴⁴ *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) s 9.

¹⁴⁵ Ibid s 10.

judicial officer, or former state or territory Supreme Court judge.¹⁴⁶ The integrity of commission proceedings is secured by s 65 of the Act, which provides that commission members have the same protection and immunity as a member of a house of the Parliament engaged in parliamentary committee work. Further, witnesses and lawyers are granted the same protection afforded to witnesses before a committee of a house of the Parliament. This may prevent many collateral challenges to committee processes and findings. While the Act has created a supplementary process to facilitate and inform the use of s 72(ii), there are likely to be few cases where this will be engaged in practice, particularly given the limited use of s 72(ii).¹⁴⁷ Unsurprisingly, then, the provisions have not yet been deployed at the time of writing.

Further, the *Courts Legislation Amendment (Judicial Complaints) Act 2012* (Cth) now provides a statutory basis for chief justices to ‘handle’ complaints about judicial officers. In handling complaints, chief justices may consider, investigate, and refer the complaint as required, and may ‘take any measures’ they believe to be ‘reasonably necessary to maintain public confidence in the Court’, such as restricting the judge to non-sitting duties.¹⁴⁸ The Act does not apply to the High Court, and does not significantly extend existing practices in the internal management of courts. Rather, it provides a ‘legislative basis for ... internal management’ processes.¹⁴⁹

Thus, while there has been some legislative activity in this area, neither Act creates a comprehensive system for addressing judicial incapacity. Given s 72(ii) is rarely utilised, the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) will be engaged only rarely, and the *Courts Legislation Amendment (Judicial Complaints) Act 2012* (Cth) still relies on chief justices to address concerns of incapacity on the bench. That said, particularly with the added legitimacy of a legislative basis, this internal management process may resolve many concerns of incapacity. Indeed, informal checks and balances, such as peer pressure and scrutiny, may mean additional formal systems to manage capacity would rarely be required or engaged.¹⁵⁰ Thus, while legislative reforms have not changed the landscape of

¹⁴⁶ Ibid s 13.

¹⁴⁷ See Lynch, above n 136, 82.

¹⁴⁸ *Courts Legislation Amendment (Judicial Complaints) Act 2012* (Cth) sch 1 cl 18.

¹⁴⁹ Lynch, above n 136, 82–3.

¹⁵⁰ Thomas, above n 128, 247 [14.1].

judicial capacity management in any significant way, they may give sufficient symbolic weight to the internal management role of the chief justice that further reform is not required at the federal level.¹⁵¹

Therefore, while arguments in favour of mandatory retirement raised in 1977 correctly identified issues with managing capacity under s 72(ii), this does not mean that retirement ages should be imposed. Rather than relying on mandatory retirement to address capacity issues, these concerns should prompt deeper consideration of how we respond to judicial incapacity, and how we support chief justices in fulfilling their internal management role. This may have beneficial consequences for the integrity of the judiciary as a whole; as Appleby and Le Mire note, ‘a rigorous system of complaints handling is necessary to promote public confidence [in the judiciary]’.¹⁵²

The third fundamental limitation is that seeking to avoid ‘the unfortunate necessity of removing a judge’ made unfit for office by reason of declining health¹⁵³ reflects the *dignity* argument, or a desire to avoid ‘humiliating’ performance management for older judges. This argument is highly controversial in a general employment setting. While mandatory retirement is arguably a ‘less intrusive mechanism’ for managing declining performance of senior judges than ‘degrading’ capability appraisals,¹⁵⁴ this conflates age with capacity and wrongly assumes that ageing is necessarily a process of decline and deterioration.¹⁵⁵ Further, as Fredman argues, ‘it is also an affront to the dignity of the individual to assume that he or she automatically shares the characteristics of everyone else in his or her age group’.¹⁵⁶

¹⁵¹ Though, of course, this could not address incapacity on the part of the chief justices themselves.

¹⁵² Appleby and Le Mire, above n 123, 67.

¹⁵³ Senate Standing Committee on Constitutional and Legal Affairs, above n 10, 14.

¹⁵⁴ Posner, above n 81, 351; Richard Allen Epstein, *Equal Opportunity or More Opportunity? The Good Thing about Discrimination* (Civitas, 2002) 29; Fredman, above n 79, 45.

¹⁵⁵ See also Schaie, above n 100, 319–20; Carroll L Estes, Simon Biggs and Chris Phillipson, *Social Theory, Social Policy and Ageing: A Critical Introduction* (Open University Press, 2003) 18, 29.

¹⁵⁶ Fredman, above n 79, 45.

4 Community Acceptance

In 1977, mandatory retirement was also supported by ‘acceptance of the need for a compulsory retiring age for judges’ in Australia,¹⁵⁷ acceptance of judicial retirement ages overseas and in the Australian states and territories,¹⁵⁸ and public sentiment supporting the introduction of judicial retirement ages.¹⁵⁹ The introduction of retirement ages brought ‘the circumstances of the judiciary into parallel with those of other members of the community’.¹⁶⁰ Until that point, retiring judges had ‘been considerably older than people in other professions’.¹⁶¹ When the Senate Standing Committee delivered its report in 1976, academics had retirement ages of between 55 and 65, and magistrates and public servants were required to retire between the ages of 55 and 65, depending on the state in which they were employed.¹⁶² Retirement ages had also been set for Supreme Court judges in all Australian states and for Family Courts. In that context, it would be ‘anomalous that this distinction between federal and state judges of similar courts should exist and that the Commonwealth Parliament should be unable to do anything about the matter’.¹⁶³

Therefore, retirement ages in 1977 reflected ‘public sentiment’ and were consistent with practices relating to other professions. Further, it brought the Commonwealth in line with state practices. However, as noted above, there is no consensus at state and territory level regarding the appropriate age of retirement for judges and magistrates. Retirement ages vary within and between jurisdictions from ages 65 to 72. Thus, the change has not created consistency within or between jurisdictions.

¹⁵⁷ Senate Standing Committee on Constitutional and Legal Affairs, above n 10, 14.

¹⁵⁸ *Minutes of Proceedings and Official Record of Debates of the Australian Constitutional Convention*, Hobart, 27–29 October 1976, 38 (Ian McLaren), 39 (Peter Coleman), 40 (Frank Walker); *Minutes of Proceedings and Official Record of Debates of the Australian Constitutional Convention*, Melbourne, 24 September 1975, 91 (Kep Enderby).

¹⁵⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 16 February 1977, 147 (Robert Ellicott). See also *Minutes of Proceedings and Official Record of Debates of the Australian Constitutional Convention*, Hobart, 27–29 October 1976, 42 (Lionel Bowen).

¹⁶⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 17 February 1977, 203 (Ian Sinclair).

¹⁶¹ *Ibid.*

¹⁶² Senate Standing Committee on Constitutional and Legal Affairs, above n 10, 19.

¹⁶³ Commonwealth, *Parliamentary Debates*, House of Representatives, 16 February 1977, 148 (Robert Ellicott).

Further, while retirement ages may have been publically accepted in 1977, they are not generally acceptable in a modern employment context. For other occupations, the legislature has decided that mandatory retirement is no longer acceptable. Compulsory retirement was abolished in Australia progressively over the 1990s and 2000s.¹⁶⁴ Compulsory retirement is now prohibited within Australian workplaces.¹⁶⁵ The *Age Discrimination Act 2004* (Cth) provides:

18 Discrimination in employment

...

- (2) It is unlawful for an employer or a person acting or purporting to act on behalf of an employer to discriminate against an employee on the ground of the employee's age ...

(c) by dismissing the employee ...

However, discriminatory behaviour is exempt from the Act where the employee is 'unable to carry out the inherent requirements of the particular employment because of his or her age'.¹⁶⁶

¹⁶⁴ Linda Rosenman and Sylvia McDonald, 'How Should Universities Respond to the Abolition of Compulsory Retirement?' (1995) 38(1) *Australian Universities' Review* 63, 63. See also *Abolition of Compulsory Age Retirement (Statutory Officeholders) Act 2001* (Cth); *Age Discrimination Act 2004* (Cth) pt 4 div 2; *Industrial Relations Reform Act 1993* (Cth); *Anti-Discrimination (Amendment) Act 1994* (NSW).

¹⁶⁵ While some state and territory legislation still contains mandatory retirement as an exception to the principle of age equality, the passage of the *Age Discrimination Act 2004* (Cth) has likely rendered the sections irrelevant: Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination Law* (Federation Press, 2nd ed, 2014) 61–2; *Age Discrimination Act 2004* (Cth) ss 10, 12; *Constitution* s 109; *Anti-Discrimination Act 1992* (NT) s 36; *Anti-Discrimination Act 1998* (Tas) s 35.

¹⁶⁶ *Age Discrimination Act 2004* (Cth) ss 18(4)–(5). In relation to 'inherent requirements': *Qantas Airways Ltd v Christie* (1998) 193 CLR 280. In relation to the limitations of the *Age Discrimination Act 2004* (Cth) as a means of addressing discriminatory behaviour: Therese MacDermott, 'Challenging Age Discrimination in Australian Workplaces: From Anti-discrimination Legislation to Industrial Regulation' (2011) 34 *University of New South Wales Law Journal* 182.

Compulsory retirement is also prohibited by the *Fair Work Act 2009* (Cth), which provides that:

351 Discrimination

- (1) An employer must not take adverse action [including dismissal] against a person who is an employee, or prospective employee, of the employer because of the person's ... age ...¹⁶⁷

Again, this prohibition does not apply to action that is 'taken because of the inherent requirements of the particular position concerned'.¹⁶⁸ Mandatory retirement has been abolished for Commonwealth statutory office holders and other public servants.¹⁶⁹ Thus, judges (and military personnel) are some of the few professions that may still be subjected to compulsory retirement.¹⁷⁰ It cannot be said, then, that mandatory retirement for judges is still consistent with modern workplace practices. Indeed, other legislative provisions provide a clear indication that age discrimination is no longer morally or legally acceptable in Australian workplaces.

Judicial retirement ages have been criticised in the United States as representing 'a prime example of arbitrary age discrimination that has become a serious problem'.¹⁷¹ Like other forms of age discrimination, mandatory retirement for judges raises

inherent questions of whether it is morally right, socially profitable, economically wise or constitutionally sound to declare by legislative fiat that the useful life of these professional people is completed solely because they have reached an arbitrarily designated age.¹⁷²

¹⁶⁷ See also *Fair Work Act 2009* (Cth) s 342. The *Fair Work Act 2009* (Cth) also prohibits modern awards and enterprise agreements from containing clauses which discriminate on the basis of age: ss 153, 194–5. See also *Re Australian Catholic University Ltd* (2011) 207 IR 372.

¹⁶⁸ *Fair Work Act 2009* (Cth) s 351(2)(b). In relation to practical and interpretative issues associated with relying on the *Fair Work Act 2009* (Cth) as a means of addressing age discrimination: MacDermott, above n 166.

¹⁶⁹ ALRC, *Grey Areas*, above n 43, 58 [2.98]. See also *Abolition of Compulsory Age Retirement (Statutory Officeholders) Act 2001* (Cth).

¹⁷⁰ See ALRC, *Grey Areas*, above n 43, 59–62 [2.105]–[2.116].

¹⁷¹ Judge Leslie L Anderson, 'Age Discrimination: Mandatory Retirement from the Bench' (1974) 20 *Loyola Law Review* 153, 153.

¹⁷² *Ibid* 154.

Thus, it must be ‘asked whether federal judges are ... the victim[s] of constitutionally required age-ist discrimination’.¹⁷³ Similarly, Judge Anderson argues that ‘[w]e must continue to ask ourselves whether this abrupt retirement without dignity, hearing, or regard to the respective individual’s health or mental condition is the proper method of approach in our civilized society’.¹⁷⁴

We must therefore critically examine why judges should be the exception to the general prohibition of mandatory retirement in Australia. Judges, like other individuals, are entitled to be protected from age discrimination.¹⁷⁵ The issue is whether the ‘proper administration of justice’ justifies setting aside this entitlement.¹⁷⁶ As noted by the ALRC, the retention of mandatory retirement ages for judges has ‘important symbolic implications with respect to the Australian Government’s view of the “capacity of people to work competently until they are of a certain age”’.¹⁷⁷ Thus, retirement ages for judges are not only inconsistent with provisions relating to the general workforce, but may also undermine government attempts to extend working life and address age discrimination against older workers.

5 *No Loss of Expertise*

Finally, retirement ages for judges were supported on the basis that they would not lead to a loss of skills; rather, judges could just be re-employed in a different capacity. According to Mr Falconer in the parliamentary debates: ‘we would not lose the talents of experienced judges as a result of this measure. We will in fact be able to use them in many other areas where there is often a scarcity of suitable people’, including as royal commissioners.¹⁷⁸

¹⁷³ Justice Michael Barker, ‘On Being a Chapter III Judge’ [2010] *Federal Judicial Scholarship* 14, [44] <http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/FedJSchol/2010/14.html?stem=0&synonyms=0&query=cth%20consol_act%20coaca430%20s72%20and%20retirement>.

¹⁷⁴ Anderson, above n 171, 157.

¹⁷⁵ Opeskin, ‘Models of Judicial Tenure’, above n 3, 635.

¹⁷⁶ Ibid.

¹⁷⁷ ALRC, *Grey Areas*, above n 44, 60 [2.107], quoting Government of South Australia, Submission No 30 to ALRC, *Grey Areas — Age Barriers to Work in Commonwealth Laws*, June 2012, 16; ALRC, *Access All Ages*, above n 2, 100 [4.100], quoting Government of South Australia, Submission No 30 to ALRC, *Grey Areas — Age Barriers to Work in Commonwealth Laws*, June 2012, 16.

¹⁷⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 17 February 1977, 216.

Again, this argument has a number of limitations. First, judicial retirement ages may actually deprive the courts of judicial expertise and experience.¹⁷⁹ Given judges are typically appointed at an advanced age, there is limited time to develop judicial expertise and hone judges' decision-making skills. According to Williams:

Length of service is especially important for High Court judges because it can take a number of years for them to make their mark. They typically develop their views, not in one case, but during a succession of matters heard over years.¹⁸⁰

In a survey of High Court appointees, Leigh found that the average age of appointment had risen from 45 years in 1921–40, to 46 years in 1941–60, 52 years in 1961–80, and 54 years in 1981–2000.¹⁸¹ Opeskin similarly found that the mean age of appointment to the High Court had risen from 51.4 years in 1995 to 58.3 years in 2013.¹⁸² Thus, the average tenure of High Court judges has changed from 19 years in 1903–19, to 25 years in 1921–40, 15 years in 1941–60, 11 years in 1961–80, and 14 years in 1981–2000.¹⁸³ Given the current average age of appointment, High Court appointees will have, on average, less than 12 years on the bench. Indeed, Justice Nettle, who was appointed to the High Court in 2015, will be required to retire after a period of five years and 10 months, making it 'one of the shortest tenures in the history of the court'.¹⁸⁴ Thus, a retirement age of 70 prevents judges from achieving their full potential on the bench, and may limit their ability to

¹⁷⁹ See *Minutes of Proceedings and Official Record of Debates of the Australian Constitutional Convention*, Hobart, 27–29 October 1976, 46 (John Greenwood).

¹⁸⁰ George Williams, 'Bench Retirement Age Needs To Better Reflect Society', *The Sydney Morning Herald* (Sydney), 9 February 2015, 20.

¹⁸¹ Andrew Leigh, 'Tenure' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 664, 664.

¹⁸² Opeskin, 'Models of Judicial Tenure', above n 3, 645.

¹⁸³ Leigh, above n 181, 664–5.

¹⁸⁴ Williams, above n 180, 20. Such a short tenure will also mean that Justice Nettle is not entitled to a full judicial pension: *Judges' Pensions Act 1968* (Cth) s 6. This late age of appointment may be compared with the appointment of Justice Gordon as a High Court judge in June 2015, at age 51: 'New Judge Appointed to the High Court', *SBS News* (online), 14 April 2015 <<http://www.sbs.com.au/news/article/2015/04/14/new-judge-appointed-high-court>>.

influence legal developments. The 1977 referendum therefore now ‘appears short-sighted’.¹⁸⁵

In the majority of the states and territories, this loss of skill and expertise has been managed via the use of retired judges in an acting or fixed term capacity.¹⁸⁶ According to Opeskin, this has become a ‘flexible tool for returning mandatory retirees to the bench’,¹⁸⁷ ameliorating ‘the consequences of forced departure’, and reflecting the states’ recognition that mandatory retirement laws ‘deprive their courts of fine talent’.¹⁸⁸ However, this comes at a significant financial cost: acting judges are paid at a daily rate, in addition to their pension.¹⁸⁹ This is obviously an inefficient use of public funds. The use of retired judges in a short-term, acting capacity may also pose risks to judicial independence. According to Opeskin:

The problem of preserving judicial independence is addressed in part by the fixed term nature of the appointment; by the constitutional prohibition on removing an acting judge during the fixed term other than for proved misbehaviour or incapacity; and by the setting of their remuneration by an independent tribunal. Yet, the ‘fragile bastion’ of judicial independence is not fully protected by these arrangements — there is no restriction on reappointment, which opens the door to executive preferment, and there is no restriction on acting judges holding other offices or employment.¹⁹⁰

The majority in *Forge* rejected these concerns about judicial independence. However, given the scale of the use of acting judges in some states, these concerns should not be dismissed so lightly.¹⁹¹ Reliance on retired acting judges may seriously jeopardise judicial independence and courts’ financial efficiency.¹⁹² As a result, the Senate Legal and Constitutional Affairs Refer-

¹⁸⁵ Williams, above n 180, 20.

¹⁸⁶ See above Part II(B).

¹⁸⁷ Opeskin, ‘Models of Judicial Tenure’, above n 3, 28.

¹⁸⁸ Ibid 653.

¹⁸⁹ Ibid 654.

¹⁹⁰ Ibid 653 (citations omitted).

¹⁹¹ See, eg, ibid 653–4.

¹⁹² See Senate Legal and Constitutional Affairs References Committee, above n 44, 37–8 [4.31]–[4.34]. Though, at 41 [4.45], these concerns were less relevant to the employment of retired judges: ‘in the committee’s view the use of a retired judicial officer is very different

ences Committee was ‘persuaded that acting appointments, by their nature, are inconsistent with the appropriate independence of the judiciary’,¹⁹³ at least in the strict sense of that concept which is applicable at the federal level.

Secondly, while judges may be re-employed in a different capacity following retirement, this also has the potential to jeopardise judicial independence. While Crawford and Opeskin have argued that ‘[i]t is hard ... to see how the independence of the judiciary could be affected by judges having to retire at a fixed age’,¹⁹⁴ other authors have less confidence that this is the case. In North America, judicial retirement ages are seen as having the potential to jeopardise judicial independence in decisions made prior to retirement. According to Friedland, ‘[a] judge who retires at an early age may in many cases start a new career — business? politics? — and the public will then start wondering whether earlier judgments may have been designed to further this later career’.¹⁹⁵ Similarly, McFadden has noted that

mandatory retirement policies create the ... potential for bias or the appearance of bias ... The policies force judges to vacate the bench at an age when many would prefer continued employment. As a result, the policies either tempt, or appear to tempt, judges to decide cases for or against a particular litigant in order to possibly obtain future favors, employment, or other consideration from the litigant.¹⁹⁶

For Chief Judge Posner,

judges are less likely to decide cases with a view toward maximizing their future career opportunities, and are therefore more likely to decide cases impartially, the less of a future they have. We want judging to be a terminal job rather than a springboard to another career.¹⁹⁷

Judicial careers post-retirement, particularly those in legal practice or involving corporate appointments, risk creating an impression of ‘unfair

from the temporary appointment of a legal practitioner who will return to that role at the end of the judicial appointment’.

¹⁹³ Ibid 41 [4.44].

¹⁹⁴ Crawford and Opeskin, above n 127, 36.

¹⁹⁵ Martin L. Friedland, ‘Judicial Independence and Accountability in Canada’ (2001) 59 *Advocate (Vancouver Bar Association)* 859, 861.

¹⁹⁶ McFadden, above n 85, 87.

¹⁹⁷ Posner, above n 81, 193.

advantages' and 'the danger of the perception of corruption while on the Bench'.¹⁹⁸ Justice Alan Blow of the Supreme Court of Tasmania has described the importance of the convention that retired judges do not appear as advocates before courts of which they were previously members: 'The greater the turnover of judges, and the more they retire to resume private practice, the more likely it is that this important convention will be eroded'.¹⁹⁹

However, in the United States context, Friedland has regarded a retirement age of 65 as 'an age when it is more difficult to engage in a further active career',²⁰⁰ minimising any risk to judicial independence. If this were correct in Australia, a retirement age of 70 would be unlikely to raise any concerns. However, it is clear that many High Court judges undertake active and public careers post-retirement. For example, Michael Kirby has held a number of diverse positions since retiring from the High Court, including as President of the Institute of Arbitrators & Mediators Australia, and head of the Commission of Inquiry on Alleged Human Rights Violations in the Democratic People's Republic of Korea.²⁰¹ Similarly, since retiring from the High Court, Dyson Heydon has been involved in an inquiry into Macquarie Generation, and led the Australian Government Royal Commission into Trade Union Governance and Corruption.²⁰² Michael McHugh has worked as an arbitrator and mediator for a number of years,²⁰³ and Margaret Stone, formerly of the

¹⁹⁸ Appleby and Le Mire, above n 123, 28.

¹⁹⁹ Justice Alan Blow, 'Judicial Pensions and Superannuation' (Paper presented at Judicial Conference of Australia Colloquium, Adelaide, October 2004) 3 <<http://jca.asn.au/wp-content/uploads/2013/11/2004-blow.pdf>>. See also Thomas, above n 128, 268–80 [15.1]–[15.14]; Sophie Schroder, 'Former Federal Circuit Court Judge Joins Big National', *Australasian Lawyer* (online), 25 July 2014 <<http://www.australasianlawyer.com.au/news/former-federal-circuit-court-judge-joins-big-national-190083.aspx>>.

²⁰⁰ Friedland, above n 195, 861.

²⁰¹ *The Hon Michael Kirby AC CMG*, *The Hon Michael Kirby AC CMG* <http://www.michaelkirby.com.au/index.php?option=com_content&view=article&id=67&Itemid=2>.

²⁰² Michaela Whitbourn, 'Inquisitor Is a Man of Independent Views', *The Sydney Morning Herald* (Sydney), 11 February 2014, 9.

²⁰³ See, eg, Ben Smees, 'Fig Tree Mediation Collapses — McHugh Backs Out', *Newcastle Herald* (online), 4 August 2011 <<http://www.theherald.com.au/story/473800/fig-tree-mediation-collapses-mchugh-backs-out/>>. For a general discussion of judges as mediators, see Justice Michael Moore, 'Judges as Mediators: A Chapter III Prohibition or Accommodation?' (2003) 14 *Australasian Dispute Resolution Journal* 188. It is debatable whether the same issues apply to retired judges.

Federal Court, was appointed as the Inspector-General of Intelligence and Security in 2015.²⁰⁴ Thus, a retirement age of 70 clearly does not preclude an active career post-retirement.

While there is no suggestion of bias or impropriety in how these judges behaved prior to retirement, their post-retirement careers may have implications for actual or perceived judicial independence.²⁰⁵ This is particularly the case where governments appoint former judges to lend an air of independence to a commission or other body.²⁰⁶ As Dyson Heydon's role on the Royal Commission into Trade Union Governance and Corruption shows, a public perception of bias associated with a judge's post-retirement career has implications for the standing of their former court,²⁰⁷ particularly when a judge's past political linkages are unearthed.²⁰⁸ Ackland has vividly described the impact of the Heydon affair as meaning '[t]he High Court must be wincing in horror at the reflected muck on its escutcheon'.²⁰⁹ Thus, when issues arise in relation to a judge's post-retirement career, this may have implications for the perceived independence of the judicial branch as a whole.

Post-retirement careers may be pursued after both mandatory and voluntary retirement. Thus, removing retirement ages may not address these issues completely. However, judges who have been unwillingly mandatorily retired may be more likely to pursue a post-retirement career. Being tired of working

²⁰⁴ Stefanie Garber, 'Former Judge Appointed Spy Watchdog', *Lawyers Weekly* (online), 20 July 2015 <<http://www.lawyersweekly.com.au/news/16846-former-judge-appointed-as-spy-watchdog>>.

²⁰⁵ Though, of course, this is not confined to those mandatorily retired; Sir William Deane, who resigned from the High Court at the age of 64, was appointed as Governor-General of Australia soon after: *Sir William and Lady Deane* (3 March 2012) Governor-General of the Commonwealth of Australia <<https://www.gg.gov.au/former-governors-general/sir-william-and-lady-deane>>. Similarly, Sir Ninian Stephen was appointed as Governor-General of Australia after resigning at age 58: Hilary Charlesworth, 'Stephen, Ninian Martin' in Michael Coper, Tony Blackshield, and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001).

²⁰⁶ Michael Pelly, 'Dyson Heydon: PM Should Have Picked Michael Kirby for Unions Royal Commission', *The Australian* (online), 4 September 2015 <<http://at.theaustralian.com.au/link/75aee2f1fa774d4fa63318471125ed8d?domain=theaustralian.com.au>>.

²⁰⁷ See Mark Kenny, 'When a Judge Is Asked To Rule on Their Own Fate, It Is Inevitably a Conflict of Interest', *The Sydney Morning Herald* (Sydney), 31 August 2015, 4.

²⁰⁸ Jane Norman, 'Dyson Heydon To Reveal His Decision on Whether To Stay On as Trade Union Royal Commissioner', *ABC News* (online), 31 August 2015 <<http://www.abc.net.au/news/2015-08-31/heydon-to-reveal-whether-he-will-continue-as-royal-commissioner/6736472>>.

²⁰⁹ Richard Ackland, 'Judging Heydon', *The Saturday Paper* (Melbourne), 22 August 2015, 2.

is a significant contributor to the decision to retire,²¹⁰ and previous studies have found that pre-retirees who were feeling tired of work were less likely to be intending to engage in work in retirement.²¹¹ Further, voluntary retirement increases positive attitudes towards retirement, facilitating the transition to being retired, at least in the short term.²¹² Thus, judges who choose to retire, whether due to personal weariness or for other reasons, may be less likely to embark upon a career post-retirement, and are more likely to adjust positively to being retired. Removing mandatory retirement ages may therefore reduce, though not eliminate, the challenges associated with post-retirement careers.

The risks to judicial independence associated with post-retirement careers reflect similar concerns with the conferral of non-judicial roles on federal judges as *persona designata*. In *Grollo v Palmer*, the High Court identified two limits to the conferral of non-judicial functions on federal judges: first, that the judge must consent to the appointment; and, secondly, the appointment cannot be incompatible with the judge's performance of their judicial functions, or with the judiciary's proper discharge of its responsibilities.²¹³ Thus, an appointment to perform non-judicial functions which 'are of such a nature that public confidence in the independence or impartiality of a federal judge to carry out judicial functions is threatened' will be invalid.²¹⁴ It is arguable that similar restrictions could (or should) apply to the roles conferred on judges post-retirement, to address any concerns related to judicial independence. However, these restrictions are unlikely to be derived from

²¹⁰ Terry A Beehr et al, 'Work and Nonwork Predictors of Employees' Retirement Ages' (2000) 57 *Journal of Vocational Behavior* 206, 216–17, 219.

²¹¹ Barbara Griffin and Beryl Hesketh, 'Post-retirement Work: The Individual Determinants of Paid and Volunteer Work' (2008) 81 *Journal of Occupational and Organizational Psychology* 101, 109, 115–16.

²¹² Donald C Reitzes and Elizabeth J Mutran, 'The Transition to Retirement: Stages and Factors That Influence Retirement Adjustment' (2004) 59 *International Journal of Aging and Human Development* 63, 80–1.

²¹³ (1995) 184 CLR 348, 364–5 (Brennan CJ, Deane, Dawson and Toohey JJ), 376 (McHugh J). In relation to state judges: *Wainohu v New South Wales* (2011) 243 CLR 181.

²¹⁴ *Grollo v Palmer* (1995) 184 CLR 348, 376 (McHugh J). For discussion of these concerns in relation to the appointment of judges to perform vice-regal roles: Rebecca Ananian-Welsh and George Williams, 'Judges in Vice-Regal Roles' (2015) 43 *Federal Law Review* 119.

ch III of the *Constitution*, as judges in retirement have already relinquished their judicial power.²¹⁵

Limitations on post-retirement judicial careers may instead be derived from convention, peer-censure or self-censure. However, relying on these informal mechanisms is likely to become more problematic as judges increasingly have extended capacity in old age, and are therefore likely to anticipate having new careers in retirement.²¹⁶ Advancements in medical care and improved living conditions mean that individuals are living longer and can reasonably expect substantially more productive, healthy years in their old age.²¹⁷ Therefore, individuals are likely to be capable of working for a longer period in old age. Further, judges are likely to be productive for a much longer period than the general population.²¹⁸ Judges are in a particularly privileged work position, undertaking a role with few physical demands and high levels of intellectual stimulation. Thus, it has been noted that '[f]ew occupations appear so calculated to preserve one's mental powers and physical stamina',²¹⁹ and Chief Judge Posner has labelled the judiciary the United States' 'premier

²¹⁵ It is also arguable that removing judicial retirement ages will lead to more roles being conferred on sitting federal judges as *persona designata*, thereby increasing risks to judicial independence. However, given the limitations placed on these appointments by ch III of the *Constitution*, which are expressly intended to maintain and protect judicial independence, these risks are unlikely to eventuate. Instead, governments may need to look elsewhere for appropriate appointees to take on these roles. In some cases, this may lead to better appointments; questions have been raised as to whether judges are best placed to act as commissioners, given the different skill sets and approaches required: see, eg, John Barron, 'Dyson Heydon: Who Is the Royal Commissioner Being Urged To Resign over Liberal Links?', *ABC News* (online), 19 August 2015 <<http://www.abc.net.au/news/2015-08-19/dyson-heydon-who-is-the-trade-union-royal-commissioner/6706416>>.

²¹⁶ See Chief Justice Murray Gleeson, 'A Changing Judiciary' (2001) 75 *Australian Law Journal* 547.

²¹⁷ See Australian Institute of Health and Welfare, *Healthy Life Expectancy in Australia: Patterns and Trends 1998 to 2012* (2014) 1–2. This does not mean that older Australians do not have particular health needs; according to the Australian Institute of Health and Welfare, 49 per cent of 65 to 74 year olds living in the community in 2009 had five or more long-term health conditions. For those aged 85 and over, this increased to 70 per cent: Australian Institute of Health and Welfare, *Australia's Health 2012: The Thirteenth Biennial Health Report of the Australian Institute of Health and Welfare* (2012) 9, 82–5. However, overall, older Australians have still seen significant improvements in health and life expectancy in recent years: at 120–3.

²¹⁸ Posner, above n 81, 187.

²¹⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 17 February 1977, 200 (Gough Whitlam).

geriatric occupation'.²²⁰ The extended capacity of judges is also reflected in the push for retired judges to return to the bench in a temporary or acting capacity with short-term tenure,²²¹ and in the variety of roles that increasingly fall to retired judges to fulfil (including under anti-terror legislation).²²² While these roles do not need to be filled by retired judges specifically, governments appear to increasingly desire the appearance of independence and significant skills associated with these appointments. However, there is a very real risk that this instrumental use of retired judges will damage the appearance of judicial independence.²²³ Thus, while retired judges might be a useful source of skill and expertise, there are substantial risks associated with this course of action. A preferable alternative would be to find others with the skillset to fulfil these roles.

B *Practical Impact of Retirement Ages*

At a practical level, it is also unclear whether retirement ages are necessary for the judiciary. Many judges will leave before retirement age, making any legislative limit unnecessary.²²⁴ As noted by Opeskin:

Judges may voluntarily resign by reason of ill health, infirmity, boredom or impecuniosity, or to pursue other positions; they may be nudged out of office by their peers or head of jurisdiction if their capacity to discharge the functions of office is in doubt; or they may be removed by reason of misconduct or incapacity.²²⁵

Judicial pensions may also encourage early retirement: a federal judge (other than a federal circuit judge) who has attained the age of 60 with at least 10 years on the bench can retire with a non-contributory pension of 60 per

²²⁰ Posner, above n 81, 180.

²²¹ Opeskin, 'Models of Judicial Tenure', above n 3, 649–51.

²²² See, eg, Justice Mark Weinberg, 'Australia's Anti-terrorism Legislation — Is There a Boilermakers Spanner in the Works?' [2007] *Federal Judicial Scholarship* 1, [17] <<http://www.austlii.edu.au/au/journals/FedJSchol/2007/1.html>>.

²²³ In relation to anti-terror legislation: see Waleed Aly, 'ASIO Raids Risk Eroding Our Trust in Justice', *The Age* (Melbourne), 1 July 2005, 15.

²²⁴ Pushkar Maitra and Russell Smyth, 'Determinants of Retirement on the High Court of Australia' (2005) 81 *Economic Record* 193, 193.

²²⁵ Opeskin, 'Models of Judicial Tenure', above n 3, 628.

cent of their salary and pursue other interests for additional recompense.²²⁶ There is therefore limited financial incentive for federal judges to continue beyond the age of 60, once they have accrued 10 years' service.²²⁷ Maitra and Smyth have thus concluded that a range of factors, including

pension eligibility, active engagement in the [High] Court's most important cases proxied by judgements [sic] reported in the Commonwealth Law Reports and the political persuasion of the appointing government are important predictors of when [High Court] judges retire.²²⁸

Indeed, a survey of the judiciary in 2007 found only 18 per cent of judges identified statutory age limits as a factor influencing their planned retirement age.²²⁹ Therefore, retirement ages may have limited impact on judicial retirements in practice.

To test this argument, a survey was conducted of the retirement age and tenure of previous High Court judges. In this sample of 44 judges, 15 were subject to the retirement age in s 72.²³⁰ Of these, five had resigned years prior to that age.²³¹ Thus, s 72 influenced individual behaviour in only two-thirds of cases. At the same time, it is entirely possible that some judges would have continued past the age of 70 if allowed.²³² At this stage, the sample of High

²²⁶ *Judges' Pensions Act 1968* (Cth) ss 6(1), 6A(2); Maitra and Smyth, above n 224, 194.

²²⁷ Though with the increasing age of judicial appointments, few High Court judges may benefit from these provisions.

²²⁸ Maitra and Smyth, above n 224, 202.

²²⁹ Senate Legal and Constitutional Affairs References Committee, above n 44, 35 [4.20].

²³⁰ Sir Harry Gibbs, Sir Anthony Mason, Murray Gleeson, Sir Ronald Wilson, Sir Gerard Brennan, Sir William Deane, Sir Daryl Dawson, John Toohey, Mary Gaudron, Michael McHugh, Ian Callinan, Michael Kirby, William Gummow, John Dyson Heydon and Susan Crennan.

²³¹ Sir Ronald Wilson, Sir William Deane, Sir Daryl Dawson, John Toohey and Mary Gaudron.

²³² Alternatively, judges may continue to occupy their position until age 70 due to the presence of the retirement age, with the retirement provisions creating a statutory age boundary or a natural end to their working lives. Given retirement ages can shape individual conduct, it is difficult to anticipate when judges would choose to retire without a retirement age: see, eg, Anne-Marie Guillemard and Martin Rein, 'Comparative Patterns of Retirement: Recent Trends in Developed Societies' (1993) 19 *Annual Review of Sociology* 469, 493; Helga Krüger and Bernd Baldus, 'Work, Gender and the Life Course: Social Construction and Individual Experience' (1999) 24 *The Canadian Journal of Sociology* 355, 356; Martin Kohli, 'The Institutionalization of the Life Course: Looking Back to Look Ahead' (2007) 4 *Research in Human Development* 253, 256-7; Pat Irving, Jennifer Steels and Nicola Hall, 'Factors Affecting the Labour Market Participation of Older Workers' (Qualitative Research Report, Department

Court judges subject to the retirement age in s 72 is still too small to make any generalised conclusions. However, recent retirements from the High Court have all been at or around the retirement age,²³³ indicating that s 72 is having some impact in practice, at least on the High Court.

That said, it is questionable whether the retirement patterns of High Court judges will be representative of the retirement behaviours of judges on lower courts. These patterns have not been the subject of detailed study to date. However, based on data obtained from the Federal Court of Australia, the average age of retirement or resignation of former Federal Court judges was 63.84 years, and the median 65.22 years.²³⁴ Excluding judges who were appointed to another court (such as the High Court or the New South Wales Court of Appeal), the average age of retirement or resignation was 64.65, and the median 66.12.²³⁵ That said, 19 judges have retired at the retirement age. Further, for those not subject to the retirement age, three continued in their role until an advanced age.²³⁶ This may be compared with data obtained from the Federal Circuit Court:²³⁷ of the 24 judges who have left the Court, two passed away in office and five resigned to take up other judicial appointments.²³⁸ The remaining 17 judges had an average age of retirement or resignation of 61, and only six (35 per cent) retired at or around the retirement age.²³⁹

While judicial retirement ages may assist with workplace and succession planning²⁴⁰ by ‘allowing for continuous, efficient retirement and replacement

for Work and Pensions, 2005) 69. See generally Martin Kohli and Camila Arza, ‘The Political Economy of Pension Reform in Europe’ in Robert H Binstock and Linda K George (eds), *Handbook of Aging and the Social Sciences* (Elsevier, 7th ed, 2011) 251.

²³³ Those retirees are Michael McHugh, Ian Callinan, Murray Gleeson, Michael Kirby, William Gummow, John Dyson Heydon, Susan Crennan and Kenneth Hayne.

²³⁴ Author’s own calculations, using data from the Federal Court of Australia: Email from Eva Ryan (Federal Court of Australia) to Alysia Blackham, 21 July 2015.

²³⁵ *Ibid.*

²³⁶ Sir Nigel Bowen (age 79.60), Sir Reginald Smithers (age 83.66), and Charles Sweeney (age 80.17).

²³⁷ Previously known as the Federal Magistrates Service and the Federal Magistrates Court.

²³⁸ Author’s own calculations, using data from the Federal Circuit Court: Email from Albin Smrdel (Assistant Secretary Courts, Tribunals and Justice Policy Branch) to Alysia Blackham, 4 August 2015.

²³⁹ *Ibid.*

²⁴⁰ See Hepple, above n 81, 91; Posner, above n 81, 324; Epstein, above n 154, 28.

of appointed judges',²⁴¹ judicial attrition is not solely dependent on retirement. Indeed, other than for judges on the High Court, members of the judiciary often leave their post as they are promoted to more senior positions. Thus, on its own, mandatory retirement is unlikely to make workforce planning for the judiciary substantially easier. Indeed, judicial retirements may actually exacerbate court planning issues in some cases.²⁴² For example, Justices Hayne and Crennan of the High Court were both required to retire within weeks of each other in mid-2015.²⁴³ This would have left only five members on the High Court, making the hearing of constitutional matters problematic. To resolve this, Justice Crennan retired at the age of 69 and seven months in February 2015. Thus, mandatory retirement ages may also cause disruption and practical difficulties for courts, though these can at least be planned for and proactively managed.²⁴⁴

Planning issues are also compounded by the risk that judges may die in office. According to Maitra and Smyth, 'a sizeable proportion of High Court judges have died in office. Of the 35 High Court Justices who were no longer on the Court as of 2000, 10, or just less than one-third of the total, have died in office'.²⁴⁵ This is a risk for all judges: death and misfortune are by no means confined to the elderly. Indeed, seven of the deaths on the High Court have related to judges under the age of 70.²⁴⁶ Mandatory retirement will not prevent deaths in office or allow a smooth handover of judicial responsibility in all cases, though it may assist workforce planning in some circumstances.

²⁴¹ McFadden, above n 85, 89.

²⁴² Heath Aston, 'Justice Delayed: Chaos Leaves Families at War', *The Sydney Morning Herald* (Sydney), 6 November 2014, 1.

²⁴³ Elizabeth Byrne, 'High Court Justice Susan Crennan to Retire, Paving Way for First Abbott Government Appointment', *ABC News* (online), 25 November 2014 <<http://www.abc.net.au/news/2014-11-25/high-court-justice-to-retire/5915338>>.

²⁴⁴ See *Gould v Brown* (1998) 193 CLR 346, where the High Court was split evenly following Justice Dawson's retirement during the period in which judgment was reserved. See also Jeremy Gans, 'News: Crennan J Stops Hearing Cases ahead of Retirement' on *Opinions on High* (20 November 2014) <<http://blogs.unimelb.edu.au/opinionsonhigh/2014/11/20/news-crennan-j-stops-hearing-cases/>>.

²⁴⁵ Maitra and Smyth, above n 224, 193. These were Sir Edmund Barton, Richard O'Connor, Henry Higgins, Sir Wilfred Fullagar, Sir Alan Taylor, Sir Douglas Menzies, Sir William Owen, Sir Cyril Walsh, Lionel Murphy and Sir Keith Aickin.

²⁴⁶ Richard O'Connor, Sir Wilfred Fullagar, Sir Alan Taylor, Sir Douglas Menzies, Sir Cyril Walsh, Lionel Murphy and Sir Keith Aickin.

Thus, while workforce planning is one argument in favour of mandatory retirement ages, its force should not be overstated.

IV ALTERNATIVES TO RETIREMENT AGES

Recognising these criticisms, and the fact that many of the original justifications for mandatory retirement are no longer persuasive, the ALRC has called for a review of judicial retirement ages. In its 2012 discussion paper *Grey Areas — Age Barriers to Work in Commonwealth Laws*, the ALRC noted that:

As a matter of principle, the ALRC favours individual capacity-based assessment rather than the imposition of compulsory retirement. The imposition of compulsory retirement fails to account for the capacity of individuals, reinforces stereotypes about the abilities of mature age workers and reduces utilisation of the workforce contribution of mature age workers.²⁴⁷

In its 2013 report *Access All Ages — Older Workers and Commonwealth Laws*, the ALRC further recommended that the Australian government, in cooperation with state and territory governments, initiate an independent review of compulsory retirement for judicial and quasi-judicial appointments, to consider whether age limits remain appropriate.²⁴⁸ However, the ALRC has also noted that there are ‘certain complexities associated with removing compulsory retirement for judicial officers’; these might include constitutional requirements, public policy reasons for retaining compulsory

²⁴⁷ ALRC, *Grey Areas*, above n 43, 58 [2.99].

²⁴⁸ ALRC, *Access All Ages*, above n 2, 100 [4.97], 101 [4.103]; ALRC, *Grey Areas*, above n 43, 59 [2.104], 60 [2.110]. Cf Senate Legal and Constitutional Affairs References Committee, above n 44, 33 [4.12], quoting Law Council of Australia, Submission No 11 to Senate Legal and Constitutional Affairs References Committee, *Australia’s Judicial System and the Role of Judges*, 5; International Commission of Jurists, Victoria, Submission No J2 to Senate Legal and Constitutional Affairs References Committee, *Australia’s Judicial System and the Role of Judges*, 28 April 2009, 4:

During this inquiry, no major concern was raised about either the existence of a compulsory retirement age in the federal judiciary, nor the age at which retirement is set. The general view put to the committee is that a compulsory retirement age is appropriate. In fact, the Law Council of Australia noted that ‘the question of security of tenure until the maximum retirement age appears uncontroversial, as it is a fundamental aspect of the separation of powers doctrine and Australia’s constitutional structure, and is an essential underpinning of judicial independence’ and that ‘anything less than those arrangements has the effect of compromising judicial independence’.

retirement, and implications for judicial pensions.²⁴⁹ Thus, the ALRC recommends, as a minimum, that the review achieve ‘national consistency’ in judicial retirement ages.²⁵⁰

Given the ALRC’s recommendations, this section canvasses the possible complexities of removing or amending retirement ages for judges, and considers the alternative structures that might be put in place. While recognising the inherent difficulties of removing judicial retirement ages, and the likely impracticability of constitutional reform at the federal level, I argue in this Part IV that judicial retirement ages represent an arbitrary, discriminatory and outdated feature of Australian constitutional law. Therefore, there is a need to revisit their operation, with a view to their ultimate abolition. However, as the ALRC has foreshadowed, this may also require a review of other areas of law and practice.

There are three key alternatives to the current use of judicial retirement ages. First, we might adopt a later age of retirement for judges. At the federal level, this would require constitutional amendment in accordance with s 128 of the *Constitution*. The process of constitutional change is notoriously difficult, and is generally unsuccessful. According to Williams, ‘[t]he expense and difficulty of [another referendum] means that no change [to s 72] is likely to occur’.²⁵¹ Indeed, Attorney-General George Brandis has expressly disavowed any interest in constitutional change on this issue: ‘Getting a constitutional referendum up is an enormous undertaking. The government is not considering reopening that question’.²⁵²

Further, even if change was possible, merely increasing the federal judicial retirement age is unlikely to ‘future proof’ s 72: as noted by Opeskin, ‘[t]he Australian ... experience show[s] that constitutions falter when they over-specify and thus entrench policy choices that are impervious to changing social circumstances’,²⁵³ like the use of a retirement age of 70. It is likely that any higher retirement age would quickly also appear to be short-sighted. There is also no consensus as to what a higher retirement age should be.²⁵⁴

²⁴⁹ ALRC, *Grey Areas*, above n 43, 60 [2.109]; ALRC, *Access All Ages*, above n 2, 101 [4.102].

²⁵⁰ ALRC, *Grey Areas*, above n 43, 60 [2.110]; ALRC, *Access All Ages*, above n 2, 101 [4.103].

²⁵¹ Williams, above n 180, 20. See generally Williams and Hume, above n 15.

²⁵² ‘New Judge Appointed to the High Court’, above n 184.

²⁵³ Opeskin, ‘Models of Judicial Tenure’, above n 3, 34.

²⁵⁴ See Senate Legal and Constitutional Affairs References Committee, above n 44, 33–5 [4.13]–[4.16].

An alternative endorsed by the Senate Legal and Constitutional Affairs References Committee is to amend s 72 to provide that federal judicial officers are appointed until an age fixed by Parliament.²⁵⁵ This approach 'would enable the age limit to be set from time to time to meet community expectations without the need for constitutional amendment, an historically infrequent and difficult process'.²⁵⁶ However, Justice Michael Barker has argued that age 70 should be retained as the *minimum* retirement age for judges, which Parliament may legislate to increase.²⁵⁷ This approach has also received some endorsement from former Chief Justice of the High Court Murray Gleeson, who has suggested that it might have been 'a little better if [the compulsory retirement age] had been put in a statute than in the [C]onstitution'.²⁵⁸ While this option may to some extent accommodate the extended capacity of judges, and address the loss of judicial skills and expertise occasioned by mandatory retirement, it is unlikely to address the symbolic discriminatory impact of judicial retirement ages. Thus, pursuing this course of action requires serious consideration of why judges, unlike other individuals, should not be protected from age discrimination,²⁵⁹ and whether the administration of justice justifies the use of discriminatory provisions.²⁶⁰ In the event the same public law ends can be achieved in a non-discriminatory manner, that latter approach should be adopted. Thus, if there is a better and non-discriminatory alternative to this option, that should be preferred.

²⁵⁵ Ibid 37 [4.28].

²⁵⁶ Barker, above n 173, [46]. This approach was explicitly rejected in the Australian Constitutional Convention debates in 1976, as it was felt that providing for retirement ages in the *Constitution* 'would be more acceptable to the electors': see, eg, *Minutes of Proceedings and Official Record of Debates of the Australian Constitutional Convention*, Hobart, 27–29 October 1976, 43 (John Button); *Minutes of Proceedings and Official Record of Debates of the Australian Constitutional Convention*, Melbourne, 24 September 1975, 95 (Kep Enderby). Cf *Minutes of Proceedings and Official Record of Debates of the Australian Constitutional Convention*, Hobart, 27–29 October 1976, 45 (Joseph Dixon); *Minutes of Proceedings and Official Record of Debates of the Australian Constitutional Convention*, Melbourne, 24 September 1975, 93 (Doug Lowe).

²⁵⁷ Barker, above n 173, [46].

²⁵⁸ ABC Radio National, above n 113.

²⁵⁹ Opeskin, 'Models of Judicial Tenure', above n 3, 635.

²⁶⁰ Ibid.

Secondly, we could move to a system of fixed-term appointments or term limits for senior judicial figures.²⁶¹ Again, this would likely require constitutional change at the federal level.²⁶² However, there is also the possibility of adopting an informal system of term limits, via term ‘pledges’, court rules or voluntary retirement.²⁶³ A formal model of term limits has been adopted in part for the Constitutional Court of South Africa, via the use of a hybrid model that combines term limits with age limits.²⁶⁴ Such a hybrid model would add additional complexity to the current Australian arrangements, and would not resolve the discriminatory impact of judicial retirement ages. The use of fixed-term appointments also raises complex normative questions about how long a judge *should* occupy judicial office, linked with desires for both ‘constancy and change’,²⁶⁵ and recognising the need for an extended period in office to develop judicial skills and expertise. There are no easy answers to these questions. Using a pragmatic approach, Opeskin has found that the mean length of service of High Court judges was 13.3 years for the last seven terminations, and 15.9 years over the entirety of the Court’s history.²⁶⁶ Thus, if a fixed-term model was to be adopted, 15 years might be an appropriate term to impose. However, this would not address capacity issues that might arise during the term of office, and would therefore still require some improved system of capacity management for judicial officers. Adopting a model of fixed-term appointments is likely to be a problematic and fraught process, particularly given current concerns relating to judicial independence

²⁶¹ Williams, above n 180, 20; *ibid*.

²⁶² But see the dicta in *Alexander’s Case* (1918) 25 CLR 434, 474 (Higgins J):

It seems to me, in short, that under sec. 72 of our *Constitution* there is nothing to prevent a tenure for years, if Parliament (or the Government) so decide. A tenure at will is incompatible with sec. 72; for no Justice is to be removed except on an address from both Houses praying for removal on the ground of proved misbehaviour, &c.: but a tenure for years is not incompatible. The *Constitution*, by sec. 72, does not make a life tenure imperative in all appointments, but provides against that which is the greatest danger — the danger of an offended Government removing a non-compliant Justice, or reducing his remuneration.

See also at 478 (Gavan Duffy J).

²⁶³ See Steven G Calabresi and James Lindgren, ‘Term Limits for the Supreme Court: Life Tenure Reconsidered’ (2006) 29 *Harvard Journal of Law & Public Policy* 769, 871–5.

²⁶⁴ See generally Opeskin, ‘Models of Judicial Tenure’, above n 3.

²⁶⁵ See *ibid* 656–8.

²⁶⁶ *Ibid* 646.

and acting appointments. Thus, the use of term limits is not an ideal alternative to judicial retirement ages.

Thirdly, and finally, we could remove age-based limitations on judicial tenure. This option would eliminate the discriminatory impact of judicial retirement ages; address the loss of judicial skill and expertise due to mandatory retirement; resolve issues related to extended judicial capacity; reduce reliance on acting appointments at the state and territory level; and bring judicial retirement into line with other professional occupations and community expectations. Thus, at least in theory, this third option is to be preferred. Moving to a system without age-based limitations would again require constitutional change for the federal judiciary. Putting these practical challenges temporarily to one side, we also need to ascertain how this change would impact upon key public law principles, and whether this should be the preferred option in practice.

This third option reflects the system in place in federal courts in the United States, where judges are granted life tenure. The United States system has been the subject of extensive academic study,²⁶⁷ particularly in the face of increasing judicial tenure with demographic ageing.²⁶⁸ The merits of introducing retirement ages for federal judges in the United States have been debated for many years, though age limits have not been introduced.²⁶⁹ Thus, the use of life tenure has not been without criticism in other jurisdictions, and should be carefully scrutinised before being applied to the Australian context.

²⁶⁷ See, eg, David N Atkinson, 'Retirement and Death on the United States Supreme Court: From Van Devanter to Douglas' (1976) 45 *University of Missouri-Kansas City Law Review* 1; Artemus Ward, *Deciding To Leave: The Politics of Retirement from the United States Supreme Court* (State University of New York Press, 2012).

²⁶⁸ Albert Yoon, 'Love's Labor's Lost? Judicial Tenure among Federal Court Judges: 1945–2000' (2003) 91 *California Law Review* 1029.

²⁶⁹ See Fairman, above n 87; James C Sheppard, 'Judicial Retirement: The Age of Judges and the Judges of Ages' (1958) 44 *American Bar Association Journal* 145; Philip B Kurland, 'The Constitution and the Tenure of Federal Judges: Some Notes from History' (1969) 36 *University of Chicago Law Review* 665. However, note that retirement ages are in place for the judiciary in some states in the United States, though this has been contentious: see Marc Rosenblum, 'Age Discrimination in Employment and the Permissibility of Occupation Age Restrictions' (1981) 32 *Hastings Law Journal* 1261, 1279–81; Tina E Sciocchetti, 'Comment: Mandatory Retirement of Appointed State Judges — Age Discrimination?' (1991) 85 *Northwestern University Law Review* 866. In relation to state judges: McFadden, above n 85, 83; Bradley McAllister, 'Federal Appeals Court Upholds Mandatory Retirement Age for Pennsylvania Judges', *Jurist* (online), 1 May 2014 <<http://jurist.org/paperchase/2014/05/federal-appeals-court-upholds-mandatory-retirement-age-for-pennsylvania-judges.php>>.

In Australia, the key public law implication of removing judicial retirement ages relates to judicial independence, and how this would be secured without judicial retirement ages. Judicial tenure is 'crucial to judicial independence, particularly from the executive government'.²⁷⁰ Security of tenure may be achieved by life tenure, tenure until a statutory retirement age, or tenure 'for a substantial fixed term'.²⁷¹ According to Opeskin, 'life tenure provides the sturdiest protection against executive interference'.²⁷² However, this comes at a 'high cost' due to the risk of 'mental frailty in old age'.²⁷³ In the United States, where life tenure is granted to federal judges, there have been recurring concerns about judicial capacity.²⁷⁴ Indeed, Garrow describes 'mental decrepitude' on the United States Supreme Court as 'a persistently recurring problem that merits serious attention'.²⁷⁵

If this risk of frailty eventuates (and, as noted above, this is by no means guaranteed), judicial independence is consistent with a process for disciplining or removing judges which is 'limited to cases of serious misconduct or incapacity to discharge the duties of office'; provided decisions are made by an independent judicial body (or, if made by a legislative body, only made on 'recommendation by a court or similar independent judicial body').²⁷⁶ Thus, judicial independence does not preclude a system of life tenure, subject to a process of removing judges on the grounds of capacity. However, this may require additional rigour in the processes for managing declining judicial capacity at federal, state and territory level.²⁷⁷

The removal of age-based restrictions may also require a review of judicial pensions. Pensions may provide some incentive for judges to leave their

²⁷⁰ Ananian-Welsh and Williams, 'Judicial Independence from the Executive', above n 24. See also Opeskin, 'Models of Judicial Tenure', above n 3, 627.

²⁷¹ Ananian-Welsh and Williams, 'Judicial Independence from the Executive', above n 24, 599.

²⁷² Opeskin, 'Models of Judicial Tenure', above n 3, 662.

²⁷³ Ibid.

²⁷⁴ See, eg, Todd C Peppers and Chad M Oldfather, 'Till Death Do Us Part: Chief Justices and the United States Supreme Court' (2011) 95 *Marquette Law Review* 709.

²⁷⁵ David J Garrow, 'Mental Decrepitude on the US Supreme Court: The Historical Case for a 28th Amendment' (2000) 67 *University of Chicago Law Review* 995, 995.

²⁷⁶ Ananian-Welsh and Williams, 'Judicial Independence from the Executive', above n 24, 599–600.

²⁷⁷ See above Part III(A)(3).

employment,²⁷⁸ thereby avoiding potential issues of declining capacity and promoting judicial turnover. Thus, removing age-based restrictions on judicial tenure may arguably prompt stronger reliance on judicial pensions to incentivise judges to retire. However, Australian judges are generally already entitled to a generous pension prior to retirement age,²⁷⁹ which few take up. As noted above, it has been unusual for judges on the High Court to retire prior to the age of 70, at least in recent years. Thus, pensions may not be the only driver of judicial retirement and retention.²⁸⁰ Pensions may therefore have limited utility as a means of encouraging judicial turnover or addressing issues of capacity.²⁸¹ These ends are better achieved via proper systems of capacity assessment or alternative positions for senior judicial figures.

Instead, removing judicial retirement ages may actually decrease the current cost of judicial benefits. The judges' pension scheme for federal courts (excluding the Federal Circuit Court) is non-contributory and unfunded, and is financed from consolidated revenue. Thus, the Commonwealth and taxpayers meet the costs of judicial pension benefits. As at 30 June 2011, the scheme was calculated to have unfunded liability of \$782 million.²⁸² As life expectancy increases, these liabilities will continue to expand, particularly if judicial tenure is constrained by mandatory retirement.²⁸³ Removing judicial retirement ages may allow judges to defer drawing on their pensions, reducing the overall cost to the public purse.²⁸⁴ Further, as noted above, in the states and territories retired judges are often re-employed in an acting or fixed-term

²⁷⁸ Albert Yoon, 'Pensions, Politics, and Judicial Tenure: An Empirical Study of Federal Judges, 1869–2002' (2006) 8 *American Law and Economics Review* 143. These issues were canvassed in the Senate Standing Committee's report in 1976: see Senate Standing Committee on Constitutional and Legal Affairs, above n 10, 9–11.

²⁷⁹ *Judges' Pensions Act 1968* (Cth).

²⁸⁰ In relation to the United States: James F Spriggs II and Paul J Wahlbeck, 'Calling It Quits: Strategic Retirement on the Federal Courts of Appeals, 1893–1991' (1995) 48 *Political Research Quarterly* 573; David C Nixon and J David Haskin, 'Judicial Retirement Strategies: The Judge's Role in Influencing Party Control of the Appellate Courts' (2000) 28 *American Politics Quarterly* 458.

²⁸¹ See Senate Standing Committee on Constitutional and Legal Affairs, above n 10, 9–11.

²⁸² Australian Government Actuary, *The Judges' Pension Scheme Long Term Cost Report 2011* (Department of Finance and Deregulation, 2012).

²⁸³ See Brian Opeskin, 'The High Cost of Judges: Reconsidering Judicial Pensions and Retirement in an Ageing Population' (2011) 39 *Federal Law Review* 33, 56–9, 66.

²⁸⁴ *Ibid* 64–6.

capacity, for which they are paid a day rate *in addition to* their pension. Removing judicial retirement ages would allow the retention of judicial skills, without judges effectively being reimbursed twice. Thus, the removal of judicial retirement ages may have financial benefits for Australian governments and taxpayers.²⁸⁵ As there is increasing attention paid towards the overall cost of judicial pensions,²⁸⁶ this is an attractive possibility.²⁸⁷

Finally, if judges are to remain in employment for a longer period, it may be necessary to consider workplace accommodations to accommodate their changing needs. In reflecting on Justice McTiernan's retirement after breaking his hip, Justice Kirby has noted: 'Chief Justice Barwick declined to alter the accommodation of the High Court to provide for a judge in a wheelchair. It would cost too much'.²⁸⁸ These considerations may become more relevant to the Australian judiciary over time. Modern chief justices would presumably take a more accommodating approach to changing judicial needs.

Similarly, it may be necessary to consider alternative models of utilising judicial skills in older age. For example, the United States judiciary has seen a growth in 'senior judges' with different responsibilities. Senior judges may 'opt out' of certain cases, but are excluded from institutional matters.²⁸⁹ This may be an attractive option for older judges; in the United States, most federal judges choose to become senior judges upon qualifying for their pension.²⁹⁰ This arrangement allows a successor to be appointed, but enables the judge to remain actively engaged in the judiciary.²⁹¹ According to Yoon, '[t]hese older judges feel a continuing responsibility to help the court address its expanding caseload, but at the same time truly appear to enjoy their jobs, even if it means

²⁸⁵ Ibid 65–6.

²⁸⁶ See, eg, Chris Merritt, 'New Judges' Pensions in Question', *The Australian* (Sydney), 5 December 2008, 27; Chris Merritt, 'Push to Reduce Judges' \$782m Pension Hoard To Finance Legal Centres', *The Australian* (Sydney), 24 July 2012, 2; Alex Boxsell, 'Magistrates' \$10m Revolt', *The Australian Financial Review* (Sydney), 29 July 2011, 1, 20.

²⁸⁷ Of course, judicial pensions could be reformed independently of retirement ages, including by moving to a contributory scheme. However, it is worth noting the close interaction between the two issues.

²⁸⁸ Kirby, 'Sir Edward McTiernan — A Centenary Reflection', above n 9, 180.

²⁸⁹ Albert Yoon, 'As You Like It: Senior Federal Judges and the Political Economy of Judicial Tenure' (2005) 2 *Journal of Empirical Legal Studies* 495, 499.

²⁹⁰ Ibid.

²⁹¹ Ibid.

effectively working for free'.²⁹² The introduction of more flexibility in judicial appointments, such as by the use of senior judges, has received the support of Justice Michael Barker: 'In this way we would retain the wisdom, learning and experience of judges who have the desire and the capacity to continue'.²⁹³ It is questionable whether this model would be feasible in Australia; in the United States, senior judges are generally employed on a full salary, making this an expensive model for utilising individual skills and experience. However, given many federal judges are already granted a pension equivalent to 60 per cent of salary,²⁹⁴ and may then be employed at state level as an acting judge on a day rate, the overall cost of this model may not prove to be prohibitive.

V CONCLUSION

When introduced in 1977, mandatory retirement for federal judges was seen as a logical development that brooked limited objection. However, changing social norms, the rejection of age discrimination in employment, and demographic change must prompt a re-examination of judicial retirement ages. Mandatory retirement is not the best way to manage declining judicial capacity, is likely to lead to a loss of judicial skills and expertise, and may jeopardise judicial independence with the growth in post-retirement judicial careers and acting judicial appointments. At the same time, while individual arguments in favour of mandatory retirement are not persuasive on their own, their cumulative effect might be more convincing. Indeed, retirement ages may have some (albeit limited) utility in managing declining performance, facilitating workforce planning, and promoting judicial diversity. Thus, mandatory retirement might be useful in some circumstances, though its functionality should not be overstated. That said, if there is a non-discriminatory alternative that fulfils these functions, that option should be preferred over mandatory retirement ages.

This article has canvassed three alternatives to the current systems of judicial retirement, and has argued for the removal of age-based limitations on judicial tenure in Australia. This is likely to require reconsideration of processes for managing judicial capacity, judicial pensions and workplace

²⁹² Ibid 499–500.

²⁹³ Barker, above n 173, [45].

²⁹⁴ *Judges' Pensions Act 1968* (Cth) ss 6(1), 6A(2); Maitra and Smyth, above n 224, 194.

accommodations for older judges. Managing this new landscape is likely to pose a number of practical and theoretical challenges that warrant further study, particularly in relation to how individual capability assessments might be deployed in this context. That said, operating without age-based limitations is unlikely to undermine key public law principles, and is fully consistent with judicial independence. More difficult, however, will be achieving constitutional change at the federal level, which is likely to be a difficult and fraught road. However, this is no barrier to change at the state and territory level, where judicial retirement ages are not entrenched. One of the significant benefits of a federal structure is the scope for experimentation and mutual learning between the states and territories (the 'laboratory federalism' argument).²⁹⁵ The states and territories must take a lead on this issue, given the barriers to change at the federal level. Indeed, progress at the state or territory level may ease the path to federal change. To advance this, we must continue to seriously consider the practical impacts of removing judicial retirement ages, and how these can best be managed. This will require more detailed empirical consideration of judicial retirement behaviour in both superior and lower-level courts. While a process of reform is unlikely to be easy, it may reap rewards for public finances, individual judges who do not wish to retire, and for the administration of justice more generally. As societal views on age and ageing continue to shift, it is anachronistic to retain judicial retirement ages for Australian judges. The time has come to remove age-based limitations on judicial tenure.

²⁹⁵ Wallace E Oates, 'An Essay on Fiscal Federalism' (1999) 37 *Journal of Economic Literature* 1120, 1132; Brendan Lim, 'Laboratory Federalism and the Kable Principle' (2014) 42 *Federal Law Review* 519, 524.