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4 June 2002

The Research Director
Legal, Constitutional and
Administrative Review Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Madam/Sir

**RE: THE QUEENSLAND CONSTITUTION: SPECIFIC CONTENT ISSUES
PAPER – COMPULSORY RETIREMENT FOR JUDGES**

Please find attached a submission from the Anti-Discrimination Commission Queensland in response to the Queensland Constitution: Specific Content Issues Paper – April 2002 Chapter 14.5 – The Judiciary – Compulsory Retirement.

Should you require clarification of any information included in the submission please contact me on 3247 0909.

Yours sincerely



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Anti-Discrimination Commissioner
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Submission by

Anti-Discrimination Commission Queensland

on

**The Queensland Constitution: Specific Content Issues
Issues Paper – April 2002 Chapter 14.5
The Judiciary – Compulsory Retirement**

4 June 2002

Compulsory retirement and age discrimination

Compulsory retirement is clearly one form of age discrimination. Dismissing a worker (which is defined to include ending the work of a person by forced retirement) on the basis of a person's age is prohibited by the Queensland *Anti-Discrimination Act 1991*.

The practice of compulsory retirement was once commonplace. However, the *Anti-Discrimination Amendment Act 1994* was brought in to abolish compulsory retirement age provisions in force as at 30 June 1994. The *Anti-Discrimination Amendment Act* preserved pre-existing contractual arrangements and maintained the status quo with respect to the compulsory retirement of the judiciary, magistrates, industrial commissioners, Queensland Police Service, Queensland Fire Service, and certain other employees see Explanatory Notes to the *Anti-Discrimination Amendment Bill 1994*.

I understand that compulsory retiring ages for police and fire officers are presently under review.

Exception for judiciary

Are there occupations which are such that they should be exempted from the abolition of compulsory retirement? Is judicial office one such occupation where retiring ages should be retained?

The Commission's view is that the nature and function of the judiciary sets it apart from other occupations and fundamental aspects of the nature of judicial office do not sit comfortably with abolishing compulsory retirement for the judiciary.

There are two aspects of the judiciary which necessitate in our view the retention of a compulsory retirement age.

Judicial independence

Life tenure, one of the fundamentals to the notion of judicial independence, was originally provided for Federal judges under the Constitution. Justice Michael Kirby has stated, "*In Australia, federal judges were originally held, like those of the United States, to be entitled under the Constitution to appointment for life. This created certain inconvenience. It was repaired by one of the few formal constitutional amendments carried by referendum in Australia. This provides that judges of the highest court must retire at the age of 70. Parliament may provide a retirement age for other federal judges. Judges of the State courts in Australia generally have no precisely equivalent constitutional protection. Their protections lie in statutory provisions (most of which may be amended by ordinary legislation) and longstanding convention and practice.*" At page 6, *Independence of the Judiciary – Basic Principles, New Challenges*, 12 June 1998, a speech given by Justice Kirby at the International Bar Association Human

Rights Institute conference in Hong Kong (www.lawfoundation.net.au/resources/kirby/papers).

Independence of the judiciary is a fundamental of the rule of law, and much has been written on this topic, see for example the report *Fragile Bastion – Judicial Independence in the Nineties and Beyond*, Judicial Commission of New South Wales (www.judcom.nsw.gov.au).

It is clear that if compulsory retirement is removed in a particular workgroup, there must be a performance review system in place. As the New South Wales Minister said during his second reading speech when the Amendment Act was introduced abolishing compulsory retirement in New South Wales, *“The practice of compulsory retirement has been questioned both in Australia and overseas. Specifically, concern has been expressed that the use of age as a substitute for judgment on individual performance is both economically and socially inefficient...”* (New South Wales Parliamentary Debates (Legislative Assembly) 22 November 1990, 10390f, quoted by President Kirby as he then was in *Lorang v Mater Misericordiae Hospital* [1994] EOC 92-602 at 77,229. This case was brought by an anaesthetist contesting the lawfulness of his forced retirement.)

Monitoring work performance of judges, however, is not compatible with judicial independence. The Human Rights and Equal Opportunity Commission's report *Age Matters: a report on age discrimination*, Commonwealth of Australia, May 2000 (at page 42) found in relation to the Federal judiciary: *“There is a conflict between the principle of non-discrimination and the principle of judicial independence. If judges were not subjected to age-based retirement their capacity would have to be assessed periodically. This would give rise to possibilities of compromising their independence, especially if the assessment were undertaken by the executive or the legislature.”*

New South Wales has a Judicial Commission which has as two of its major functions to organise and supervise an appropriate scheme for the continuing education and training of judicial officers; and to examine complaints against judicial officers. (See Ernest Schmitt PSM, *The Role and Functions of the Judicial Commission of New South Wales*, presented at the Judicial Conduct & Ethics Committee Conference in Dublin, Ireland, 6 May 2000 (see www.judcom.nsw.gov.au/dublin/htm).

The Judicial Commission was established in response to public concerns about judicial accountability. However, there was significant concern about the threat the Commission posed to judicial independence which was addressed by an amendment to the *Judicial Officers Act* in 1987. Despite the Judicial Commission's existence, New South Wales retains a retiring age for judges (see *Judicial Officers Act 1986*). The absence of a Judicial Commission in Queensland reinforces the necessity to retain compulsory retirement.

An argument in favour of retention of compulsory retirement was cited in a New South Wales Law Reform Commission Report: *"It is a fact of life that at some stage, intellectual and physical capabilities deteriorate. Abolition of compulsory retirement might reduce effective "life tenure" in that employers are then encouraged to subjecting staff to merit review all their life. A scheme without compulsory retirement requires the individual to retire voluntarily with the possible implication that they are no longer "up to the mark" or have to wait to be told this by their employer."* New South Wales Law Reform Commission in 1999 (Report 92, Review of the Anti-Discrimination Act 1977) para 5.114.

It would be an erosion of judicial independence for periodic assessment of capabilities of a judge; it would be similarly undesirable for the dignity of the office for a judge to have to be removed who can no longer perform acceptably but who is unwilling to retire voluntarily. Other occupations where compulsory retirement is now unlawful are different in nature. Workers in these occupations are subject to an employer's directions and subject to monitoring of their performance by that employer and not holders of a statutory office with independent responsibilities.

The Commission therefore endorses in relation to the State's judiciary the view of the Human Rights and Equal Opportunities Commission in their report 'Age Matters' cited above.

More representative courts

While there has been an increase recently of women on the Queensland bench, women are still hugely under represented. Likewise, other non-Anglo groups are enormously under represented on the bench which is drawn largely from senior barristers, who are, in the main, white socially advantaged males.

In a report by the New South Wales Law Reform Commission in 1999 (Report 92, Review of the Anti-Discrimination Act 1977), there was discussion (at para 5.112) about the abolition of compulsory retirement's potential inconsistency with other grounds of discrimination. *"For example, in university employment, where traditionally there has been an imbalance in favour of men over women, especially amongst senior ranks of teaching staff, the abolition of retirement ages is likely to perpetuate that inequality. Thus, women who previously had a reasonable expectation of promotion upon the retirement of their senior male colleagues, may find that expectation is significantly delayed."*

This point can also be made about the unrepresentative nature of the judiciary.

One of the arguments raised in 1977 (which were listed in the Issues Paper) in support of the inclusion of a compulsory retiring age for judges in the Commonwealth Constitution was that *"compulsory retirement of judges assists to maintain vigorous and*

dynamic courts, which require the input of new and younger judges who will bring to the bench new ideas and fresh social attitude". It is acknowledged that this argument tends to promote an incorrect, stereotypical view that only younger judges will lead to vigorous and dynamic courts. However, the opportunity that presents itself every time a judge retires to broaden the judiciary to a judiciary which is more representative of the community is valuable and is another persuasive reason for retention of compulsory retirement.

Increasing the age of retirement

While 70 is a relatively advanced age, and it would not be expected that many judges would wish to retire beyond age 70 in any event, some thought might be given to increasing the retiring age to, say, 72. This would bring Queensland's retiring age for judges in line with New South Wales (see *Judicial Officers Act 1986 (NSW)*). Victoria has a retiring age of 72 for some judicial members, see section 77 *Constitution Act 1975 (Vic)*.

Conclusion

In summary, the Commission supports the retention of the status quo in relation to compulsory retirement for the judiciary. While compulsory retirement is a form of age discrimination, which is *prima facie* unlawful, an exemption is justified for judicial officers because of the importance of preserving judicial independence. Additionally, the shift to a more representative judiciary is aided by retiring ages remaining. While the Commission does not have a strong view, it may be appropriate to increase the retiring age from 70 to 72.