

## CHAPTER 20

### Relations with the judiciary

A significant feature of the Australian Constitution, and one which is essential for good government, is that the judicial function is separated from the legislative and executive functions, and the judicial power is vested in independent judges with security of tenure.

The Constitution provides for federal courts not only to interpret and apply the law in determining issues between governments and persons and between persons, but, by interpreting and applying the Constitution to such issues, thereby to determine the lawfulness of the actions of the legislative and executive branches of government. It is therefore doubly important that the judges have complete independence from the other two branches. The Constitution seeks to safeguard that independence by its provisions for the appointment and removal of federal judges.

#### Appointment and removal of judges

The Constitution, section 71, vests the judicial power of the Commonwealth in the High Court, which is established by the provisions of the Constitution, such other federal courts as the Parliament by legislation creates, and such other courts as the Parliament vests with federal jurisdiction.

Section 72 of the Constitution provides:

The Justices of the High Court and of the other courts created by the Parliament —

- (i) Shall be appointed by the Governor-General in Council;
- (ii) Shall 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;
- (iii) Shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.

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.

The appointment of federal judges is therefore a matter for the executive government alone. There is no provision, as there is in the United States of America and some other countries, for appointment or approval of appointment by the Houses of the legislature. In this the Constitution follows the British pattern of appointment of judges by the Crown.<sup>1</sup>

Once appointed, however, judges are completely independent in that they may not be removed from office except by the special procedure set out in section 72.

As this procedure involves the two Houses of the Parliament, as well as the executive government, in the constitutionally highly significant process of removing a judge, this chapter considers some questions arising in the interpretation of section 72. The dearth of precedent for action under section 72 may make this consideration more useful.<sup>2</sup> The chapter then proceeds to an examination of the only case in which the Houses have investigated the conduct of a judge to determine whether action should be taken under section 72, the case of Mr Justice Murphy of the High Court in 1984-86, in the course of which two Senate select committees and a statutory parliamentary commission of inquiry were appointed.

## **Constitutional questions**

### ***Section 72 and other provisions***

The provisions in section 72 for the removal of federal judges are quite different from the equivalent provisions in other relevant jurisdictions, although the interpretation of those other provisions throws some light on the interpretation of section 72.

In the United Kingdom the Act of Settlement of 1701 provides for judges to hold office during

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1 Recent constitutional reforms in the United Kingdom included the creation of a Judicial Appointments Commission which now conducts selection processes for judges, although actual appointments continue to be made by the Lord Chancellor.

2 For a more detailed treatment of the interpretation of section 72, with citations of authorities, see 'Parliament and the Judges: the removal of federal judges under section 72 of the Constitution', by Harry Evans, *Legislative Studies*, Spring 1987. This chapter draws upon that article.

good behaviour, but for their removal upon an address by both Houses of the Parliament. This provision has been the subject of differing interpretations. It has been contended that the provision for the removal of judges upon the address of both Houses abolished earlier methods of removal, including termination of appointment on the application of the Crown for misbehaviour. The generally accepted view, however, is that the Act preserved the earlier methods of removal while adding the new mechanism of address by both Houses, which mechanism is not limited to any specific ground such as misbehaviour. In other words, judges may be removed for misbehaviour but may also be removed on any other ground upon the address of both Houses.

In the United States the constitution provides that federal judges hold office during good behaviour and may be removed by means of impeachment by the House of Representatives and trial and conviction by the Senate, the stated grounds of removal being “Treason, Bribery or other high Crimes and Misdemeanours”.

In providing in section 72 of the Constitution that federal judges could be removed only upon an address by both Houses on the ground of proved misbehaviour or incapacity, the Australian constitution-makers deliberately sought to depart from the Act of Settlement and to provide greater security of tenure for the judges, by restricting the method and ground of removal. This is made clear by proceedings in the constitutional conventions.<sup>3</sup>

### *The meaning of misbehaviour*

The most important question arising under section 72 is the scope of the word misbehaviour, and this is also the question which has been most discussed. Five opinions have been given: of the Commonwealth Solicitor-General, 24 February 1984, of the counsel to the Senate Select Committee on the Conduct of a Judge,<sup>4</sup> and of each of the three Commissioners of the Parliamentary Commission of Inquiry appointed under the Act of 1986 establishing that Commission, those three opinions having been presented to each House of the Parliament on 21 August 1986.<sup>5</sup>

There is a line of authoritative statements indicating that, under the common law, misbehaviour in respect of an office held during good behaviour meant misbehaviour in relation to the performance of the duties of that office, such as neglect or refusal to perform those duties, and conviction for infamous offences not connected with the duties of the office. The authorities for this definition are extremely old: they consist of the 17th century treatise by Sir Edward Coke, *Institutes of the Laws of England* (1628-44), the case of the Earl of Shrewsbury (1610), and the judgment in *R v Richardson*, (1758) 97 ER 426. The two cases were not concerned with judges. Relying principally

3 Australasian Federal Convention, Adelaide, 20/4/1897, pp. 946ff.

4 Both were reproduced in the report of that committee: PP 168/1984.

5 PP 443/1986.

on these authorities, the Solicitor-General in 1984 concluded that the scope of misbehaviour within the meaning of section 72 is similarly restricted.

All of the other opinions conclude that misbehaviour under section 72 has no such restricted meaning, but extends to any behaviour indicating unfitness for judicial office.

In the United Kingdom it has been assumed that, whatever the technical legal situation, the provision for the removal of judges upon the address of both Houses made obsolete other methods of removal, that that mechanism is, as a matter of practice, the only available method for removal of a judge, and that, as a matter of practice, the British Parliament would not make an address for the removal of a judge except on the ground of misbehaviour. If these assumptions are correct, then it is clear that in Britain misbehaviour is not thought to be confined as indicated by the old authorities. The established grounds for an address have been stated to include misconduct involving moral turpitude, partisanship and partiality, and misconduct in private life. These grounds have been taken to be no more than different forms of misbehaviour.

Article III, section 1 of the constitution of the United States provides that federal judges “hold their offices during good Behaviour”. Article II, section 4 provides that “all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery or other high Crimes and Misdemeanours”. It was explicitly stated by the framers of the constitution that the latter section applies to judges.

These provisions have been interpreted as meaning that:

- the judicial tenure provision implies a power to remove judges for breach of good behaviour, either by some implied procedure or by a procedure provided by Congress by legislation;
- judges may be impeached for misbehaviour.

Both of these interpretations hold that judges are removable for breach of the condition of good behaviour. Statements by American authorities on the question of what constitutes misbehaviour are therefore relevant to Australia despite the different method by which US federal judges may be removed. The American authorities are very well aware of the old English law as to what constitutes breach of the condition of good behaviour, but none of them have concluded that the English law exhaustively defines the categories of misbehaviour as postulated by the Australian Solicitor-General.

And whatever the correct interpretation of the US constitution, in the various cases in which US federal judges have been impeached, the Congress has assumed that it has the power to impeach them for misbehaviour, that impeachment is not restricted to high crimes and misdemeanours, and that misbehaviour extends to any conduct indicating unfitness for office.

In 1980 the US Congress passed the Judicial Councils Reform and Judicial Conduct and Disability Act<sup>6</sup>. This empowers federal judicial councils, which consist of certain judges, to investigate complaints that any federal judge or magistrate “has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts”. The councils may not remove a judge, but may send to a coordinating body called the Judicial Conference, which may forward to the House of Representatives, any information indicating that a judge has engaged in conduct which might constitute ground for impeachment. The judicial councils may impose sanctions short of removal; a challenge to their power to do so was rejected by the Supreme Court.<sup>7</sup> A report in 2006 of a review of this system, commissioned by the Supreme Court, found that it had worked well.

Thus the American law supports the majority of the Australian opinions in viewing the concept of judicial misbehaviour as extending to any conduct indicating unfitness for office.

### *Review of removals on address*

It is not settled whether the removal of a judge upon an address would be subject to judicial review.

The constitutional provision strongly indicates that the two Houses are the only judges of misbehaviour and that their address and the action of the Governor-General upon it would not be reviewable by the High Court. This appears to have been the clear intention of the constitution-makers, as expressed in the convention debates. The convention delegates who most strongly favoured a provision similar to the Act of Settlement accepted the more restrictive provision on the basis that the Houses of the Parliament would be the only judges of proved misbehaviour or incapacity.<sup>8</sup>

The earliest commentators on the Constitution were in no doubt:

It will be noted that proved misbehaviour or incapacity is laid down as the ground of removal, but it is clear that it would still have rested on the Parliament to decide what proof it would ask of such incapacity or misbehaviour. Accordingly the direction amounted to no more than that the Parliament should satisfy itself before passing addresses that the incapacity or misbehaviour clearly existed.<sup>9</sup>

The Ministry of the day and the two Houses of The Parliament would, it cannot be

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6 Public Law 96458, 15/10/1980.

7 *McBryde v Committee to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the United States*, 264 F 3d 52 (DC Cir, 2001); Supreme Court declined to hear appeal, 7/10/2002.

8 Australasian Federal Convention, Adelaide, 20/4/1897, pp. 9523; 959; Melbourne, 31/1/1898, p. 318; see the exchange between Mr Isaacs and Mr Barton, Adelaide, 20/4/1897, p. 952.

9 A B Keith, *Responsible Government in the Dominions*, 1912, vol. III, pp. 1339-40.

doubted, be the sole judges of what constituted misbehaviour or incapacity, and when or how such misbehaviour or incapacity was 'proved'; their action would not be subject to review in any court of law.<sup>10</sup>

Two of the Parliamentary Commissioners, however, in the opinions referred to above, expressed the view that the High Court could review a removal and quash it where the evidence did not disclose matters which could amount to misbehaviour.

In *Nixon v United States* 508 US 927 (1993) the US Supreme Court held that the removal of a judge by impeachment is not judicially reviewable.

### ***Discretion of the Governor-General***

It is also not settled whether the Governor-General in Council would be bound to act in accordance with an address by both Houses. It is generally thought that, because the Australian Houses act on proved grounds, their address should be binding.

One of the Parliamentary Commissioners, however, took the view that section 72 preserves the Crown's discretion to act upon an address.

The question is somewhat academic, because for the House of Representatives to agree to an address the agreement of the ministry would be required, that House generally being controlled by the ministry, and therefore the Governor-General, advised by the ministry, would probably accept an address on ministerial advice.

As in relation to many other matters, therefore, the power would in practice be possessed by the ministry alone, but for the Senate.

### ***Advice on misbehaviour***

If it is for the two Houses to determine whether particular conduct amounts to misbehaviour, the question arises whether it is proper for the Houses to ask some other body to advise them on that question.

The Houses have assumed that such a course is open to them. Each of the two Senate committees appointed in 1984 and the statutory Parliamentary Commission of Inquiry appointed in 1986 to inquire into the conduct of a High Court justice were asked to advise whether particular conduct constituted misbehaviour, as well as finding facts.

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10 W Harrison Moore, *The Constitution of the Commonwealth of Australia*, 1902, p. 279.

It would appear to be legitimate for the Houses to seek advice in this way, provided that they do not delegate the actual determination of the question of whether misbehaviour has occurred.

### *Procedural requirements*

The question of the procedural requirements imposed upon the Houses by the presence of the word “proved” in the relevant part of section 72 has not been much examined.

It has been assumed that the procedures adopted must, because of the terms of section 72, be judicial in character, with a definite formulation of charges and a full inquiry with the opportunity for the accused judge to be heard by the Houses themselves and to answer the charges.

It is also generally assumed that the process would begin with an inquiry by way of evidence and fact-finding and finding whether there is a prima facie case of misbehaviour, followed by a formal hearing of evidence. It is presumed that a matter may not be proved except by such a hearing of evidence broadly following the procedures of a trial before the courts. The Houses might adopt some other procedures, perhaps in an inquisitorial mode. It is likely, however, that they would use a hearing of evidence at least partly following the form of a trial, for reasons of familiarity.

It may be questioned whether a hearing of evidence is necessary at all if facts have already been proved outside of the consideration by the Houses, for example, by some other inquiry or by conviction for an offence in a court. The Houses might then confine themselves to determining whether the proved facts constitute misbehaviour.

It is generally assumed that when allegations of misbehaviour on the part of a judge come to the attention of a House, it would use the device of a select committee to commence an investigation. This was done on both occasions on which it was suggested that a House of the Parliament inquire whether there were grounds for some action under section 72. On 29 April 1980 a joint select committee was proposed in the Senate to inquire into the business transactions of the Chief Justice of the High Court.<sup>11</sup> Two successive Senate select committees were appointed in 1984 to inquire into the conduct of Mr Justice Murphy of the High Court. In the first case the proposal was for a joint committee of both Houses, but it remained nothing more than a proposal. In the case of the inquiry into the conduct of Mr Justice Murphy, select committees were appointed.

These committees were committees of the Senate only, and the reason for this was political: the ministry in control of the House of Representatives did not wish to have any inquiry. It may be thought that an inquiry on behalf of both Houses would have something to commend it, but a strong argument could be made out that any inquiry should always be initiated and followed

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11 J.12913.

up by one House, and that the other House should not become involved at all until it receives a message requesting its concurrence in an address. The two Houses proceeding separately in this way would give the judge who was the subject of the inquiry the safeguard of two hearings, which is probably what the framers of section 72 intended. Any joint action by the two Houses may remove this safeguard.

At first sight it is not clear why it should be thought necessary to have a select committee to conduct the initial inquiry. A House could appoint counsel or expert investigators to gather evidence and take statements from potential witnesses, and to advise the House whether to proceed further. In fact, a select committee is unsuited to this task; select committees are designed to hear evidence rather than to gather evidence.

A select committee, however, has one significant advantage over other vehicles for an initial inquiry: it can be given the power to compel evidence, that is, to summon witnesses and to require the production of documents, with the Senate having the power to punish as a contempt any failure to comply. It may be thought that, for an effective initial inquiry, this power should always be conferred.

A select committee may be the *only* available vehicle where a House wishes the initial inquiring body to have the power to compel evidence. It is doubtful whether a House acting alone may lawfully confer that power on persons other than its own members, in spite of certain precedents suggesting that the House of Commons has not regarded itself as restricted to its own members in delegating its powers of inquiry, and has thought itself able to make such delegation to other persons.

A body which is merely gathering evidence probably does not require any elaborate procedures or safeguards. A body which has the power to compel evidence, however, should have some restraints imposed upon it. Where it is also formally to hear evidence and come to a judgment on it, procedures and safeguards are essential.

It is suggested that it may be best to separate the functions of locating and hearing evidence. Then for the initial inquiry some investigative body other than a select committee may be properly considered, and the questions of the power to compel evidence and of safeguards may be more readily considered at the later stage.

It would appear that insufficient consideration was given to any of the foregoing questions when the Act of the Parliament was passed in 1986 to establish the Parliamentary Commission of Inquiry (see the account of this case below). That body also combined the functions of locating evidence, conducting a formal hearing of evidence and advising the Houses on the judgment of the evidence. It was given power to compel evidence. It was, in effect, a joint body, reporting to

both Houses. It was also virtually required to meet in closed session, which may be appropriate for an initial inquiry but is inappropriate for the hearing of evidence. Because the Commission met in private and did not complete its task, it is not possible to assess how well it performed all those roles, but if similar circumstances arise again it is to be expected that greater thought will be given to whether all these features should be combined in one body.

It has generally been assumed that a formal hearing of evidence, following the procedures of a trial, would take place before a House agreed to an address under section 72. As with the initial inquiry, the major question which arises in relation to the hearing of evidence is whether the Houses may delegate this task to some other body.

In the past it was presumed that it would be necessary to have a hearing of evidence actually in the presence of the Houses, presumably with each House hearing the evidence separately. This procedure has been followed in impeachment trials before the House of Lords and, until recently, the US Senate.

In the one instance of the removal of a British judge under the Act of Settlement, in 1830, the House of Commons relied on a report of a select committee, but the House of Lords heard evidence before agreeing to the address.

In 1986 the US Senate adopted the practice, in the impeachment of a federal judge, of delegating the hearing of evidence to a committee. This procedure was unsuccessfully challenged before the Supreme Court.<sup>12</sup>

The Australian Houses, in making provisions already referred to, have assumed that they can delegate the hearing of evidence. The second Senate committee, the Select Committee on Allegations Concerning a Judge, was appointed explicitly to hold a formal hearing of evidence and to report findings to the Senate. The Parliamentary Commission of Inquiry established by statute also was to undertake the task of hearing the evidence and, even more remarkably, was virtually directed to hear that evidence in private session and not to report all of it to the Houses. As the Senate refrained from taking any action following the report of the committee when the judge was prosecuted on the basis of the evidence heard by the committee, and the Parliamentary Commission of Inquiry did not complete its work, it is not known how the Houses would have acted on the reports of those two bodies or whether rehearings of the evidence would have taken place.

It is therefore an unresolved question whether the Houses can act on a hearing of evidence conducted elsewhere. It may still be argued that, even where the evidence has been formally heard elsewhere, it is necessary for the Houses to rehear the evidence, and separately, in which case the removal of

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12 *Nixon v United States* 508 US 927 (1993).

a judge under section 72 would be a protracted and difficult process. It is more likely, however, that the Houses would accept evidence heard in a committee.

As to the standard of proof required for the Houses to reach a finding of misbehaviour against a judge, presumably this is a matter for the Houses themselves to determine. It may depend on what interpretation is adopted of the meaning of misbehaviour. The restricted interpretation adopted by the Solicitor-General in 1984 would seem virtually to entail the criminal standard, proof beyond reasonable doubt. Apart from this, it may be argued that the removal of a judge is such a grave step that the most stringent standard of proof should be required.

It is possible, however, to make out a strong argument that the civil standard, proof on the balance of probabilities, is more appropriate. It may be thought to be irresponsible for the Houses to leave a judge on the bench when it is probable that the judge has engaged in acts constituting grave misbehaviour simply because proof beyond reasonable doubt is lacking. Moreover, removal under section 72 may be seen as a remedy to protect the state rather than a penalty imposed upon the judge. This is the view which is taken of impeachment proceedings in the United States, where the penalty is constitutionally limited to removal from and disqualification for office. The importance of keeping separate removal from office and any subsequent criminal proceedings was urged in relation to impeachment proceedings by the framers of the American constitution. Indeed, it may be argued that the civil standard of proof for removal is an essential safeguard for the accused judge. Misbehaviour which consists of acts which may constitute offences may well be the subject of criminal charges after removal from office. It would be highly prejudicial to have a judge on trial for acts which had already been found beyond reasonable doubt by the Houses to have been committed. Different standards of proof in the removal proceedings and the criminal proceedings may be seen as favourable to the judge. If the trial precedes the parliamentary action, an acquittal may unduly inhibit the Houses in acting even where the evidence discloses misbehaviour but not proof sufficient for conviction.

The second Senate committee was required by the Senate to make findings by both standards of proof, as well as on both interpretations of the meaning of misbehaviour. This was because the Senate had not made up its mind on those questions. The Parliamentary Commission of Inquiry was not statutorily directed to adopt either standard of proof.

It is also an open question whether the Houses should make findings under section 72 only in accordance with evidence admissible under the rules of evidence.

The first Senate committee was not bound by the rules of evidence, and accepted as evidence a written statement from the judge which was subsequently regarded as inadmissible by the second Senate committee. The latter heard only evidence admissible under the rules of evidence, though some matters otherwise not admissible were brought out at its hearings as a result of

cross-examination. The Parliamentary Commission of Inquiry similarly was enjoined to hear only evidence admissible in court proceedings.

The rules of evidence are not necessarily followed by royal commissions and other forms of inquiry which may result in findings highly damaging to individuals, and presumably those rules have been regarded as unduly restrictive of the diligent pursuit of the truth, notwithstanding that the findings may lead to criminal charges.

It may well be argued that the public would be outraged by a judge remaining on the bench simply because what would otherwise be regarded as significant adverse evidence is technically inadmissible. In this context also it may be contended that removal from office is a protection for the state and not a penalty, and that the adoption of rules of evidence for removal less technical than those of any subsequent criminal proceedings is appropriate.

### *Compellability of judges as witnesses*

A significant question, going beyond procedural requirements, is whether it is proper, or within the power, of the Houses to compel a judge to give evidence, either in the course of an inquiry or in the course of a hearing of evidence.

As to the question of power, it may be asked whether the Houses possess any power to require a judge to give evidence in any circumstances.

Among the undoubted powers of the Australian Houses is the power to order the attendance of witnesses and the production of documents. Witnesses may be summoned, or may be ordered to be taken into custody and brought before either House for the purpose of examination.<sup>13</sup> This power applies to all persons within the jurisdiction. The only definite exception to this is that if a House wishes to secure the attendance of a member of the other House, it requests that House to order the attendance of that member. This restriction follows from the power of each House to order the attendance of its own members: the only way in which the attendance of a member may be enforced is by the agreement of the member's House.<sup>14</sup> It is also well established that the power to summon witnesses may be delegated by the Houses to their committees. The refusal by witnesses to answer the summonses of committees or to cooperate with committees in their inquiries is another well established category of contempt, for which the Houses may commit the persons concerned. Committees, of course, have no power to punish or coerce recalcitrant witnesses.

There are no precedents of the Australian Houses or their committees summoning judges to appear

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13 See Chapter 2, Parliamentary Privilege.

14 See also Chapter 2, Parliamentary Privilege, under Power to conduct inquiries.

before them. There are several precedents, however, which indicate that the power of the House of Commons, which is conferred upon the Australian Houses by section 49 of the Constitution, extends to judges. Judges have been summoned by the House of Commons, both before and after the enactment of the Act of Settlement of 1701, which allowed judges to be removed upon an address by both Houses, and judges have appeared before the House in answer to its summonses. That these precedents are old no doubt reflects the fact that there have been relatively few inquiries into the conduct of judges since the enactment of the Act of Settlement, and no inquiries in contemporary times, due to the great integrity of the judiciary. The House of Commons has not only summoned judges but has committed judges of superior courts.

An argument may be developed that the constitutional situation in Australia is different from that in the United Kingdom, and that this constitutional situation imposes an implied limitation on the use in relation to judges of the powers of the Houses. It might be urged that because of the constitutional separation of the legislative and judicial powers in Australia, the Australian Houses do not or should not have the power to summon a judge.

This argument might gain plausibility from the fact that the British Parliament long regarded itself as a court, and the House of Lords exercised a judicial function. It is to be noted, however, that the British precedents referred to relate to inquiries apparently unconnected with this conception of Parliament as a court, and the post-1701 precedents may be safely accepted as arising under the power contained in the Act of Settlement. The precedents were also not dependent upon the power of impeachment, a power which the Australian Houses do not possess.

Even if the separation of powers argument had general validity, it probably could have no application to inquiries into the conduct of judges and hearings of evidence for the purposes of determining whether action is warranted under section 72. Such inquiries and hearings may be effective only if the Houses have the power to compel witnesses, including judges. If this were not so, a judge could prevent a proper inquiry and hearing preceding an address by refusing to appear. Even if the accused judge is not to be a compellable witness, a matter which will be further mentioned below, other judges may be essential witnesses, especially in the case of alleged misbehaviour on the bench.

### *The rights of the accused judge*

The first Senate committee was not restrained from summoning Mr Justice Murphy, but did not do so. Instead it invited him to give evidence and received a written statement in response. The second Senate committee was explicitly denied the power to compel the judge to give evidence, but was required to invite him to do so after all other evidence had been heard. This invitation was issued and declined, and a statement of reasons for his not giving evidence was offered. The Parliamentary Commission of Inquiry was empowered to require the judge to give evidence, but only where it formed the opinion that it had before it evidence of misbehaviour within the

meaning of section 72 sufficient to require an answer. Presumably all of these bodies could have summoned other judges if that had been necessary.

Mr Justice Murphy, in submissions made on his behalf to the first Senate committee, claimed that in any inquiry and hearing of evidence under section 72 the judge in question should be given all the rights of an accused person in a criminal trial, particularly the right not to be compelled to give evidence. This claim was virtually acceded to by the Senate in establishing the second select committee. Before that committee the judge was treated as an accused in a criminal trial, with one significant exception, namely, that if he chose to give evidence he could be cross-examined by counsel representing other witnesses in relation to matters affecting the interests of those witnesses as well as by counsel assisting the committee, who performed the task imposed upon a prosecutor in a trial. Mr Justice Murphy objected to this feature of the committee, but it was deliberately provided by the Senate for the protection of witnesses before the committee. Apart from this, the proceedings of the committee closely followed those of a court in a criminal trial.

It may be argued that a judge accused of misbehaviour should not enjoy all the rights of an accused in a criminal matter. The rights to have specific charges or allegations formulated, to be present at the hearing of evidence and to cross-examine witnesses may not be disputed, and were granted in respect of the second Senate committee and the Parliamentary Commission of Inquiry. The right not to be compelled to give evidence and to make an unsworn non-examinable statement, which Mr Justice Murphy, in effect, exercised before the second Senate committee, is more controversial and has been questioned even in relation to persons accused of offences. It may well be contended that, as a holder of high office in whom the public must have confidence, a judge should be obliged to answer any case reasonably made against him. This view seems to have been taken by the government in drafting the Parliamentary Commission of Inquiry Act and inserting the provision concerning the giving of evidence by the judge, to which reference has already been made.

### *Interested senators*

During the various debates leading up to the establishment of the first and second Senate committees, senators expressed views, favourable and unfavourable, about Mr Justice Murphy's conduct. The question arises whether, in subsequent proceedings for an address, those senators should have disqualified themselves from participating or voting. This question was raised by counsel for Mr Justice Murphy before the second Senate committee, when an unsuccessful attempt was made to have those members of the committee who had also served on the first committee disqualify themselves.

The possibility of members of the legislature having formed views on matters which may subsequently come before them in proceedings under section 72 would appear to be inherent in the use of

the legislature as the tribunal of removal. If all of those who had expressed views favourable or unfavourable of Mr Justice Murphy had subsequently been unable to take part in proceedings for an address, the principal members of all parties in both Houses would have had to absent themselves. This would have been highly anomalous, because they would have left behind all those members and senators who had listened to the debates and could have been unduly influenced thereby even if they did not express any views.

Any action under section 72, such as the establishment of an inquiry or a decision to hear evidence, must start with a motion in either House, and such a motion must be open to debate. It is difficult to see how any debate about whether such action is warranted could take place without all members present running the risk of disqualifying themselves, if members were to be regarded as being subject to the same rules as jurors.

There is also the problem of members and senators being acquainted with the judge under inquiry. Disregarding the fact that Mr Justice Murphy was a former senator and minister and well known to many senators, there is still the problem that federal judges tend to be known to federal legislators, before or after assuming the bench.

The same questions arise in relation to impeachments in the United States, and senators known and even related to the accused have sat in impeachment trials.

It would appear that, so long as the Houses have the responsibility for removing judges, reliance must be placed on the members being enjoined to act properly and make findings in accordance with the evidence before them. Under the United States constitution (article I, section 3) the senators make an oath or affirmation before sitting as a court of impeachment, and perhaps this could be introduced as a procedural matter for the Australian Houses.

This raises the question of whether some other method of removing federal judges should be adopted.

### ***Should section 72 be changed?***

It may be thought that the framers of section 72 took too optimistic a view of the capabilities of the Parliament, or a view which may have been justified by Parliament as it was then, but which sits ill with the party-bound Parliament of today. It may therefore be thought that section 72 should be changed to impose the primary responsibility for the removal of judges on some other body.

If the Houses and the executive government are regarded as unfit to exercise the power of removal, only the judiciary itself remains to be the repository of the power.

The Constitutional Commission of 1988 recommended that the Constitution be amended

to provide that the Houses of Parliament would be empowered to remove a judge only on the recommendation of a tribunal consisting of senior chief justices. The main rationale of this proposal was that it would prevent the removal of a judge by the Houses for political reasons. It is presumed in this argument that political reasons are improper reasons. It may be thought that political considerations, in the best sense of those words, the sense of considerations relating to the health of the polity, may legitimately be taken into account in assessing what constitutes misbehaviour.

Such a proposal as suggested by the Commission would mean that the judiciary would be given the responsibility for removing judges, because the Houses could not act without a report from the proposed tribunal and probably would not feel able to refrain from acting in accordance with a recommendation of the tribunal. It is one thing to have judges or former judges advising the Houses, but quite another to give them the effective power of determination.

There is no historical basis for the assertion that the Parliament might remove a judge for (improper) political reasons. There is no Australian example of such a thing occurring, no such example in Britain since the Houses were given the power to remove judges by the Act of Settlement in 1701, and no such example in the United States, where several judges have been removed. There is no basis for an assumption that the Houses would exercise their powers under section 72 of the Constitution in anything other than a responsible manner. It is simply an assumption that the elected Houses are incapable.

The other stated rationale for the proposal is that it would maintain the separation of powers principle. In reality, the proposal would involve the clearest and most fundamental violation of the principle of the separation of powers, which is the main rationale of giving to the Parliament the sole power to remove judges. To have judges sitting in judgment on their fellow judges would be the clearest instance of a body, the judiciary, being a judge in its own cause. The proposal ignores the obvious fact that members of the judiciary have an interest in maintaining the current highly favourable public perception of judges. This interest may lead to bias towards undue leniency or undue harshness. The proposal also ignores the likelihood of personal friendships or animosities between persons performing the same work as members of a relatively small functional group, and the greater danger of a small body, such as three judges as proposed, making improper or erroneous decisions than a more numerous body of persons such as the two Houses.

The American constitution-makers gave careful consideration to the question of which method for the removal of judges would be most consistent with constitutional principles, and, in particular, to the proposal that the judiciary itself should be responsible for administering sanctions against incapable or corrupt judges. They determined that the removal of judges by action in the Congress was the only appropriate method. Their reasons may be summarised as follows:

- (a) the removal of judges is a high national responsibility appropriate to the elected

- and politically responsible national legislature;
- (b) the requirement for the two Houses of the legislature to act separately is an important safeguard;
  - (c) being numerous in membership, the legislature is fit to perform a function analogous to that of a jury (a two-thirds majority of the Senate is required for an impeachment to succeed);
  - (d) judges are not normally entrusted with the fact-finding function of a jury; and
  - (e) the removed judge may subsequently have to stand trial, and it would be undesirable to have the courts performing both functions.

These kinds of arguments rest upon a conception of the legislature as a body of elected representatives with a high degree of independence from the other branches of the government, a devotion to constitutional principles and a willingness to perform their constitutional duties without allowing their activities to be distorted by partisan considerations. The recommendations of the Constitutional Commission of 1988 are based upon a presumption that the intense party discipline and extreme partisanship of an Australian Parliament would effectively prevent the proper exercise of the high constitutional responsibility imposed by section 72.

The debilitating effect of party discipline and partisanship upon the Australian Parliament is not, however, a sound reason for transferring the power contained in section 72 to the judiciary. Party discipline and partisanship may be destructive of every organ of the Constitution and of every constitutional principle, and it may prevent the judiciary from operating in a proper constitutional manner just as effectively as it may hinder the Parliament. Partisanship will bear upon the operation of section 72 only if judges are seen as partisans. If partisan appointments are made to the bench the judiciary will be destroyed regardless of any action under section 72, and will be just as incapable as the Parliament is supposed to be of properly exercising the function of removing judges. The answer to party control, therefore, is to seek to lessen its stranglehold over the Parliament rather than to write off the Parliament as an institution because of it. One of the ways of mitigating its influence is to ensure that the Parliament retains its high constitutional responsibilities and is reminded of the need to exercise them properly.

Apart from these considerations, the proposal of the Constitutional Commission in any case may involve a significant inroad upon the independence of the judiciary, the very principle which it is supposed it would uphold, by making judges in effect regularly accountable for their performance of their duties to a permanent tribunal of higher judges.

It is clear that the framers of section 72 aimed to achieve a high degree of independence of the judiciary from the other branches of government, and they had the task of achieving this aim

while providing a mechanism for the removal of unfit judges. It may well be concluded that they succeeded in reconciling these two goals and that, as the American constitution-makers claimed, they provided the only mechanism consistent with judicial independence. They provided that the removal of judges must involve a deliberate decision on the part of all parts of the other two branches of government, the two Houses of the Parliament and the Crown represented by the Governor-General in Council. They thereby involved all the other high authorities of the state. The fact that the Houses are politically responsible bodies which deliberate in public may be regarded as additional safeguards for the proper exercise of the power. The removal of a judge under section 72 probably would be a protracted and difficult process, which would make great impositions upon the operations of the legislature and the executive government. The likely difficulty and length of any proceedings may well be regarded as the best safeguard for the proper use of the power.

In August 1993 a National Commission on Judicial Discipline and Removal, which was formed after a series of troublesome impeachments of judges, reported on the procedures for the removal of judges under the constitution of the United States. The Commission, consisting of members of both Houses of Congress, judges, academics and lawyers, recommended that the existing mechanism of impeachment by the House of Representatives and trial by the Senate be retained as the sole appropriate means for the removal of judges. The Commission concluded that the constitutional standard for impeachment, as interpreted over the years, had been adequate to its purpose and should not be changed.

### **Inquiries into conduct of a judge**

As was mentioned above, apart from an unsuccessful motion in the Senate in 1980 to establish a joint select committee to examine certain business interests of the Chief Justice of the High Court, the only precedent for the Houses contemplating action under section 72 of the Constitution is provided by two Senate select committees in 1984 and a statutory parliamentary commission of inquiry established in 1986 to inquire into the conduct of Mr Justice Murphy of the High Court.

#### ***The first Senate committee***

Late in 1983 and early in 1984 two newspapers published what they claimed were transcripts of tape recordings of telephone conversations which had been illegally intercepted and recorded by members of the New South Wales Police Force. The newspapers claimed that the transcripts revealed the activities of persons associated with organised crime. Most of the parties to the conversations were not identified by name, but one of them was referred to as “a senior judge”. Included in the published transcripts were conversations between the judge and “a Sydney solicitor” who was alleged to be associated with leaders of organised crime. The judge was subsequently identified as Mr Justice Murphy, a justice of the High Court, former senator, Leader of the Labor Party in the Senate and Attorney-General in the Labor Government of Mr Whitlam.

Demands for an inquiry into the matters revealed in the alleged transcripts were immediately made by the Opposition. The Labor Government took the view that no inquiry was necessary, on the basis that the transcripts had not been authenticated and the conduct of the judge revealed by the transcripts could not amount to misbehaviour within the restricted meaning expounded by the Solicitor-General and adhered to by the government (see above). The Opposition Liberal-National parties and the Australian Democrats, who together held a majority in the Senate, took the view that an inquiry should be held into the conduct of the judge. Their preference was for a royal commission or other nonpartisan quasi-judicial tribunal to conduct the inquiry, but the government refused to appoint such a body, and it is very doubtful whether it could constitutionally do so except by statute. Against the wishes of the government, the Senate therefore appointed on 28 March 1984 a select committee, which was called the Select Committee on the Conduct of a Judge.

The committee was required to report upon the authenticity of the alleged transcripts which, together with some tape recordings, had been provided by one of the newspapers to the Attorney-General, and upon whether the conduct of the judge as revealed in the materials constituted misbehaviour which could amount to sufficient grounds for his removal.

The resolution appointing the committee contained a number of unusual features. The committee was enjoined to take care to protect the privacy, rights and reputations of individuals, and to protect from disclosure the operational methods and investigations of law enforcement agencies (there were police investigations on foot into the tapes and transcripts). Witnesses before the committee were to be given notice of the matters proposed to be dealt with during their appearance and an opportunity to make submission in writing before appearing, and were entitled to be assisted by counsel.

The committee determined for itself guidelines for proceedings, which elaborated upon and supplemented the matters contained in the resolution of appointment. These guidelines contained the following major provisions.

- (1) The committee was to meet in private unless it made a determination that it was necessary to meet in public, and evidence given in private session and material submitted to the committee were not to be published except to persons associated with the inquiry.
- (2) Witnesses were to be notified of their rights under the Senate resolution, and were to be informed in writing of the nature of any allegations made against them and of particulars of the matters on which they were to be heard.
- (3) Witnesses were to be allowed to consult counsel during their appearance and counsel could make submissions to the committee.

- (4) The committee would accede to any request by a witness for evidence to be heard in private, unless it made a definite determination that it was necessary to hear the evidence in public.
- (5) Witnesses were given the right and the opportunity to object to any questions, on grounds including irrelevance and self-incrimination, and procedures were laid down for the committee to consider and determine such objections.

The committee appointed, with the approval of the President of the Senate, counsel to assist it. The committee's counsel advised the committee, participated in its deliberations and attended during the questioning of some witnesses, but did not put questions to witnesses. All of the hearings of the committee were held in private session.

When it had taken evidence in relation to the tapes and transcripts and matters purportedly recorded in them, the committee indicated to Mr Justice Murphy that it wished to hear evidence from him on a number of matters, and invited him to appear before it. He was not summoned. The question of whether the Senate or its committees could summon a High Court or any judge (see above) had been the subject of some discussion, without any conclusion being reached on the matter.

The judge's response to the invitation raised the major procedural difficulty of the committee's inquiry. The judge claimed all of the rights of an accused person in a criminal trial, including the right to be notified of a specific charge, the right not to give evidence if he so chose, and the right, before making that decision, to have all the evidence heard in the presence of his counsel and to have his counsel cross-examine witnesses. It was not within the power of the committee to allow the cross-examination of witnesses by the judge's counsel, or, indeed, to allow the examination of witnesses by any counsel. The standing orders of the Senate provide that witnesses before Senate committees are to be examined by the members of the committee; witnesses could not be examined by counsel except with the explicit authorisation of the Senate, and the Senate had not given that authorisation in the resolution appointing the committee. Had the committee wished to accede to the judge's demands, it would have had to go back to the Senate for an enlargement of its powers.

As it turned out, this was not necessary. The committee took the view that it was engaged in an investigatory inquiry, analogous to the inquiries undertaken by a prosecuting authority to determine whether a prosecution will be commenced. The committee considered that only if it determined that the evidence so warranted should it recommend to the Senate that there be a formal hearing of the evidence, with the rights of an accused person extended to the judge.

The judge declined to give evidence, but gave the committee a written statement on the evidence which it had received. His counsel made submissions to the committee on its evidence and on matters of law.

### ***Report of the first committee***

In its report<sup>15</sup> the committee concluded that it could not be satisfied of the authenticity of the tapes and transcripts, and that therefore no facts had been established which amounted to proved misbehaviour, whatever view of misbehaviour was accepted. The committee was divided, however, on another matter which did not relate to the conduct of the judge as revealed by the tapes and transcripts, but which arose from the evidence taken by the committee in its attempts to determine the authenticity of the materials.

One of the persons mentioned in the conversations purportedly recorded in the transcripts was Mr C R Briese, the Chairman of the Bench of Stipendiary Magistrates of New South Wales. Mr Briese was invited to appear before the committee to see if he could throw some light on the matters referred to in the conversations. In the course of his appearance he gave evidence of conversations he had had with Mr Justice Murphy which could be interpreted as an attempt on the part of the judge to influence committal proceedings in the Magistrates Court. Those proceedings related to charges laid against Mr Morgan Ryan, the "Sydney solicitor" whose conversations with the judge were purportedly recorded in the transcripts. This raised the possibility that the judge had been guilty of the criminal offence of attempting to pervert the course of justice, which would amount to misbehaviour whatever view of the meaning of misbehaviour was accepted.

The three government senators on the committee, who held the majority with the chairman's casting vote, did not consider that the evidence of Mr Briese established a prima facie case against the judge of attempting to pervert the course of justice, and therefore did not recommend any further action. The two Opposition senators, in a dissenting report, found that the evidence of Mr Briese did establish a prima facie case, and the one Australian Democrat senator considered that the evidence ought to be examined in a formal hearing.

### ***The second Senate committee***

With the Opposition and the Democrats holding the majority in the Senate, and able to make their views prevail there, it was inevitable that a further inquiry would take place.

It was expected that the second inquiry would be conducted as a formal hearing of the evidence relating to the matter raised by Mr Briese. The idea that there should be some nonpartisan and independent body to conduct the inquiry was again mooted. The government was adamant that it would not appoint a royal commission, but proposed that the Director of Public Prosecutions consider the evidence. Attention was directed to the possibility of the Senate appointing some nonpolitical person, such as a former judge, or a panel of former judges, to conduct the inquiry. The term "parliamentary commission" came into use to describe such a tribunal. There was a

15 PP 168/1984.

discussion on the question of whether the Senate had the power to appoint someone other than a committee of its own members to conduct an inquiry on its behalf, the crucial component of this question being the ability to confer upon someone other than a committee the power to compel evidence.<sup>16</sup> There are virtually no precedents or authorities on this matter, and the debate largely rested on reasoning from first principle. It was argued that there was nothing to prevent the Senate from delegating its powers to someone other than its own members, but if the powers of the proposed tribunal were challenged before the High Court no one could be certain of the result. For this reason another idea came to the fore, that of a nonpolitical tribunal operating under the “umbrella” of a Senate committee. In other words, the Senate would delegate its powers to a committee, but the committee would have attached to it independent commissioners, who would make their own findings on the evidence and communicate those findings to the Senate through the committee. This concept originated in a paper on the question of the appointment of commissioners by the Senate, and was the one which was eventually adopted.

The Senate therefore established on 6 September 1984 a second select committee, again on an Opposition motion and against the wishes of the government.

The Senate also agreed, by the Democrats voting with the Government, to the suggestion of the Government that the evidence be referred to the Director of Public Prosecutions. That independent statutory officer, however, declined to consider the matter until the second committee had reported. The Senate therefore was compelled to rescind the resolution referring the evidence to him.

The second committee was to inquire only into the matters raised by Mr Briese. It was called the Select Committee on Allegations Concerning a Judge, and it was designed to conduct a formal hearing of the evidence relating to that matter. The resolution appointing the committee was complex, amounting to some 23 substantial paragraphs. The most interesting features of the resolution were as follows.

- (1) The committee was to make findings of fact upon the allegations of Mr Briese, but was also to report on whether Mr Justice Murphy engaged in conduct which could justify his removal. Initially it was suggested that the committee should simply pass on the findings of the commissioners without comment, but this was thought to be unnecessarily risky of challenge in the courts, so the committee was empowered to make its own report.
- (2) The committee was to report whether there was misbehaviour in accordance with the two different interpretations of misbehaviour, and whether the misbehaviour was proved in accordance with the two different standards of proof.
- (3) Two commissioners were to be appointed by the Senate to assist the committee. Two

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16 See Chapter 2, Parliamentary Privilege, under Power to conduct inquiries.

retired Supreme Court judges were appointed by subsequent resolution. The commissioners had the right to participate in the committee's deliberations, to examine witnesses and to recommend to the committee that particular witnesses be summoned. The commissioners were to provide the committee with their written advices on the matters upon which the committee was to report, and the committee was required to include the commissioners' advices in its report to the Senate.

- (4) The committee was required to appoint counsel to assist it.
- (5) Witnesses before the committee were to be examined by counsel assisting the committee, counsel for Mr Justice Murphy and counsel for other witnesses.
- (6) Hearings of the committee were to be held in public unless the committee by absolute majority determined otherwise.
- (7) The committee was to determine rules and procedures for the examination of witnesses before it, having regard to those followed by the courts.
- (8) Mr Justice Murphy was given the rights of an accused person in a criminal trial, with one modification. All evidence was to be taken in the presence of his counsel, and he was not to be summoned to give evidence but was to be invited to do so when all the other evidence had been heard. If he chose to give evidence, however, he was to be subject to examination by counsel for the committee and counsel for other witnesses. This raised the possibility of his being cross-examined by more than one party if he gave evidence, and his counsel objected to this. The committee, while in the process of determining its procedures for the examination of witnesses, asked the Senate to abandon this rule, but the Senate declined to do so. It was clear that Mr Briese and any other witnesses would be subjected to rigorous examination by the judge's counsel, and it was intended that those witnesses should have the additional protection afforded by their counsel being able to cross-examine the judge if he gave evidence.
- (9) The committee, commissioners and counsel appearing before the committee were given access to the documents and evidence of the previous committee, and were at liberty to refer to those documents and evidence in the public proceedings. The committee subsequently persuaded the Senate to restrict this right of access to counsel for the judge and counsel for Mr Briese, and submissions made by the judge's counsel to the first committee were excluded from the right of access, so that witnesses would not be forewarned of the line of cross-examination on behalf of the judge.

In determining its rules and procedures for the examination of witnesses, the committee made the important determinations that it would formulate a statement of the allegation against the judge, that it would follow judicial proceedings as closely as possible, that it would observe the rules of evidence and would hear only evidence admissible in court proceedings. These decisions

led to one significant development. Part of Mr Briese's evidence before the first committee was inadmissible. Mr Briese had stated his belief that Mr Justice Murphy, Mr Ryan and Mr Briese's predecessor as chief magistrate, Mr M. F. Farquhar, were parties to a criminal conspiracy apparently having as one of its aims the improper influencing of cases before the Magistrates Court of New South Wales. This allegation did not appear in Mr Briese's evidence in chief before the second committee, but counsel for Mr Justice Murphy, in accordance with the provision in the resolution already mentioned, chose to make it a basis of his cross-examination, and it was thereby made public. The committee reserved the right to hear inadmissible evidence, but did not in fact do so except where such evidence emerged as a result of cross-examination.

At one stage the committee made an order prohibiting the publication of the names of certain persons mentioned in Mr Briese's evidence, including Mr Farquhar against whom criminal proceedings were then in train, but was forced to rescind the order, largely because of speculation as to the identity of the unnamed persons.

The proceedings of the committee departed from parliamentary norms in many other ways. Counsel assisting the committee made recommendations to the commissioners as to witnesses to be brought before the committee, on the basis of preliminary statements taken from those witnesses. The commissioners then advised the committee and their advice was invariably accepted. The members refrained from looking at the preliminary statements by witnesses, and the members and the commissioners refrained from exercising their right of access to the documents and evidence of the previous committee, except as necessary in the course of the examination of witnesses.

Witnesses were taken through their evidence in chief by counsel assisting and were then cross-examined by counsel for Mr Justice Murphy and counsel for witnesses. The committee limited cross-examination by counsel for witnesses to matters relevant to the interests of those witnesses. Counsel also made submissions on law and on the evidence. When questions of law or procedure were raised in the hearings, the commissioners publicly advised the committee, which invariably accepted the advice.

When the committee was established it was thought that the only evidence to be heard would be that of Mr Briese. It happened, however, that there were several witnesses able to give evidence relevant to the judge's intention in his conversations with Mr Briese, and ten witnesses were heard. Of particular significance was the evidence of a judge of the District Court of New South Wales, Judge P. Flannery, who had tried Mr Ryan. This evidence was crucial in the assessment of Mr Justice Murphy's intention. Under cross-examination by counsel for Mr Justice Murphy, Judge Flannery stated that he believed that conversations he had had with Mr Justice Murphy represented an attempt by Mr Justice Murphy improperly to influence the trial.

Mr Briese was subject to hostile examination from two quarters. His statement to the first committee provided Mr Farquhar's counsel with grounds for extensive examination. The former chief magistrate

was then heard and was subject to cross-examination by counsel for Mr Briese. The witnesses heard included two other judges of New South Wales courts and Mr Ryan.

Mr Justice Murphy again declined to give evidence when invited to do so. His counsel made a statement before the committee of his reasons for this decision, the principal reason being that a general election was about to be held and the Senate as then constituted could not and should not take any further action in relation to him.

During the hearings of the committee the then Premier of New South Wales, Mr Wran, made comments on the evidence of Mr Briese which could have been interpreted as threats to him, as his reappointment to the Magistrates Bench was then under consideration following a restructuring of the court. These comments caused the Senate to pass the following resolution:

That the Senate —

- (a) reaffirms the long-established principle that it is a serious contempt for any person to attempt to deter or hinder any witness from giving evidence before the Senate or a Senate committee, or to improperly influence a witness in respect of such evidence; and
- (b) warns all persons against taking any action which might amount to attempting to improperly influence a witness in respect of such evidence.<sup>17</sup>

This resolution was adopted by the committee for itself. The committee also felt constrained to correct a federal minister, who was later the Attorney-General, and who made comments critical of the committee's proceedings.

### ***Report of the second committee***

The commissioners made separate reports to the committee, and these were included in the committee's report. The committee adopted the procedure of having each of its members report findings and conclusions to it, and these reports were also included in the committee's report to the Senate.<sup>18</sup>

Both commissioners found that the actions of Mr Justice Murphy had a tendency to pervert the course of justice. One commissioner was satisfied beyond reasonable doubt that the judge had the intention to do so, and that therefore his conduct could amount to misbehaviour under both interpretations of that term. The other commissioner confessed to some wavering on the matter

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17 13/9/1984, J.1129.

18 PP 271/1984.

but was not satisfied beyond reasonable doubt that Mr Justice Murphy intended to pervert the course of justice. He was of the view that there was conduct which could amount to misbehaviour under the broad interpretation of that term. Two members of the committee, one Labor senator and the Australian Democrat senator, were not satisfied beyond reasonable doubt that Mr Justice Murphy intended to pervert the course of justice, but found on the balance of probabilities that he did so intend. One member, the Opposition senator, was satisfied beyond reasonable doubt that the judge had attempted to pervert the course of justice. Those three senators therefore found that there was conduct which could amount to misbehaviour in accordance with both interpretations of the term. The other Labor Party senator did not find on either standard of proof that the judge had attempted to pervert the course of justice.

The committee's report was published while the Senate was not sitting, as authorised by a Senate resolution, the House of Representatives having been dissolved for a general election and the Senate having adjourned. Before the Senate met again, in February 1985, the Director of Public Prosecutions had examined the evidence and decided that Mr Justice Murphy should be prosecuted on two charges of attempting to pervert the course of justice (the prosecution, of course, could not make direct use of the committee's evidence). When the Senate met and received the report, senators of all parties agreed that they would refrain from any further consideration of the matter until the criminal proceedings against the judge were concluded.

### *Criminal proceedings against the judge*

The criminal proceedings against Mr Justice Murphy, which took place in 1985 and 1986, gave rise to a disagreement between the Senate and the Supreme Court of New South Wales about the use which could be made in the court proceedings of the evidence given before the two Senate committees. This disagreement led to the passage of the *Parliamentary Privileges Act 1987*.<sup>19</sup>

In accordance with the law of New South Wales the prosecution of the judge began with committal hearings before a magistrate, who heard the evidence to decide whether the accused should be sent for trial by jury in the District Court or the Supreme Court of the State. After committal proceedings, Mr Justice Murphy was committed for trial in the Supreme Court. He unsuccessfully attempted to have the Federal Court review the magistrate's decision to commit him.<sup>20</sup>

The justice, who gave evidence and was cross-examined in the trial, was convicted by a jury in the Supreme Court in July 1985 on one charge of attempting to pervert the course of justice, the charge relating to his alleged approaches to Mr Briese. He was acquitted of the charge relating to his alleged approaches to Judge Flannery. He was then sentenced to eighteen months imprisonment

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19 For an account of the disagreement and the provisions of the Act, see Chapter 2, Parliamentary Privilege.  
20 *Murphy v Director of Public Prosecutions* (1985) 7 FCR 55.

and released pending the hearing of an appeal.

As a result of that appeal, the conviction was quashed because of legal and procedural deficiencies in the original trial, and a new trial in the Supreme Court was ordered.

The second trial on one charge of attempting to pervert the course of justice, in April 1986, was restricted to matters relevant to that charge. The prosecution could not refer to the judge's alleged approaches to Judge Flannery of the District Court in relation to the trial of the solicitor, Morgan Ryan, which were the subject of the other charge of which the judge had been acquitted. Other evidence which had been admitted at the first trial was excluded. In the second trial the judge chose not to give evidence but exercised the right, afforded to accused persons under the law of New South Wales, to make an unsworn statement to the jury upon which he could not be cross-examined. There was, therefore, no opportunity for the prosecution to cross-examine the judge on the statement which he made to one of the Senate committees, as had occurred in the first trial. The main prosecution witness, however, was again cross-examined on the basis of his evidence to the committees.

The result of the trial was that the judge was acquitted of the one remaining charge, but that was far from the end of the allegations against him. It was revealed that, on the basis of other evidence which had come to light during the trial, the prosecuting counsel had recommended that the judge be prosecuted on charges of bribery and conspiracy, again relating to alleged attempts to influence the outcome of criminal inquiries and proceedings. The Director of Public Prosecutions declined to act on this recommendation for reasons which were not disclosed, but there were demands that the matter be cleared up, in conjunction with outstanding allegations arising from the transcripts and tapes of telephone conversations which were the beginning of the whole affair.

In May 1986 a royal commission, the Royal Commission into Alleged Telephone Interceptions, which had been given the task of examining those transcripts and tapes, reported. It concluded that the materials were what they purported to be: tapes and transcripts of telephone conversations which had been illegally intercepted by New South Wales police officers. The Commission concluded:

The interceptions were put in place and maintained by otherwise honest, able and effective members of an elite division of the New South Wales Police force engaged not in the pursuit of some private purpose but in the very difficult and often frustrating fight against deeply entrenched organised crime. Indeed, it has been suggested in evidence that it was out of a sense of frustration that this unlawful method of gathering information was adopted.<sup>21</sup>

This report put an entirely new light on the whole affair. Hitherto those who had defended the

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21 PP 155/1986, p. 337.

judge and resisted an inquiry into his conduct as purportedly revealed by the tapes and transcripts had done so largely on the basis of the unauthenticated nature of the materials. The first Senate committee had been unable to draw any conclusions from those materials because it was not able to authenticate them.

There was also the question of whether the judge's conduct in his dealings with the New South Wales chief magistrate and Judge Flannery had amounted to misbehaviour as distinct from the criminal offence of attempting to pervert the course of justice, of which the second jury had acquitted him.

Mr Justice Murphy expressed his intention to resume his seat on the High Court, but it was reported that there was some disquiet on the part of the other justices of the Court about his resuming his seat with the new and the old allegations unresolved. There were apparently discussions between the justices and Mr Justice Murphy and the Chief Justice and the government, but the exact nature of those discussions is not known and were the subject of some disputation.

The government then decided that a new inquiry should be established to deal with all outstanding allegations against the judge and to determine whether he had engaged in any conduct amounting to misbehaviour within the terms of the Constitution and warranting his removal from the bench.

### *The parliamentary commission of inquiry*

The new inquiry took the form of a parliamentary commission, that is, a commission operating similarly to a royal commission but established by statute and reporting to the two Houses of the Parliament. As was noted above, the expression "parliamentary commission" came into use when the Senate was moving towards its first inquiry and there was some contemplation of appointing commissioners to conduct the inquiry on behalf of the Senate. The bill to establish the Commission was brought in and speedily passed by both Houses. The legislation was drafted to make it clear that the Commission was a body established by Parliament for the purpose of advising Parliament in the exercise of its constitutional responsibility. The Commission was to consider all outstanding allegations against the judge, to formulate those it considered worthy of investigation in precise terms and conduct a hearing of the evidence in closed session. The Commission was then to report to each House its findings of fact and its advice as to whether the judge had been guilty of misbehaviour within the meaning of the Constitution. Three distinguished former Supreme Court judges were appointed as the Commissioners.

The Act precluded the Commission from examining the issues dealt with in the trials of the judge except for the purpose of examining other issues. Unlike the second Senate committee, it was empowered to compel the judge to give evidence if it came to the conclusion that there were matters which he should answer. It was to admit only evidence admissible in court, and it was given access to the documents of the two Senate committees and to certain material held by the

National Crime Authority. It was to hear evidence in private, and to report to the Houses only such evidence as it thought necessary to support its findings and conclusions.

Questions about the constitutionality of the Houses appointing a Commission to advise them in this way were again raised. Mr Justice Murphy's reaction to the establishment of the Commission was to bring an action before his fellow judges of the High Court to have the Commission stopped. The High Court, however, unanimously rejected the application for an injunction to restrain the Commission, and deferred hearing arguments on the question of the validity of the legislation establishing it.<sup>22</sup> Mr Justice Murphy subsequently abandoned the attempt to have the Commission declared unconstitutional.

The establishment of the Commission once again took the matter out of the hands of the Houses of the Parliament, and it was expected that the report of the Commission would finally resolve the question of whether Mr Justice Murphy had engaged in any conduct warranting his removal.

In early August 1986, when the Commission had concluded its initial inquiries and was about to start taking evidence on a number of specific allegations, it was revealed that Mr Justice Murphy was suffering from terminal cancer and had only a short time to live. He announced that he did not intend to cooperate with the Commission any further, and the Government indicated that it would introduce legislation to wind up the inquiry. The Parliamentary Commissioners presented a special report to the Houses indicating that they had intended to hear evidence on a number of specific matters, that this process would take a considerable time, and that, in view of the judge's condition it would probably not be possible to conclude the inquiry consistent with the requirements of natural justice, which dictated that the judge be present during the hearing of evidence.

A bill to repeal the Act establishing the Commission, and to provide for the disposal of the large volume of material which the Commission had collected, was the subject of some disputation. As originally drafted it would have provided for the perpetual suppression of all material before the Commission and for heavy penalties for any person who revealed any matters placed before the Commission. It was amended in the Senate, however, to provide for the release of material after thirty years and for penalties only for persons associated with the Commission who revealed its deliberations or documents. Even so the bill was criticised as being unduly restrictive. The Presiding Officers were given the custody of the documents of the Commission, which were placed in the archives under conditions of high security.

Before it ceased to exist, the Commission presented another report to the Houses on 21 August 1986.<sup>23</sup> This consisted of the findings of the Commissioners on the question of what constitutes

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22 *Murphy v Lush* (1986) 65 ALR 651.

23 PP 443/1986.

misbehaviour within the meaning of the Constitution. In detailed and closely argued findings, all of the Commissioners rejected the view of the Solicitor-General that misbehaviour could be constituted only by misbehaviour in the performance of judicial duties or conviction for a criminal offence. All of the Commissioners supported the opinion of the counsel to the first Senate committee, that misbehaviour consisted of conduct which, in the judgment of the Houses, indicated unfitness of a judge to continue in office. It is expected that these findings will carry great weight in any future deliberations relating to section 72 of the Constitution.

The last attempt to investigate the judge's behaviour thus ended. The prognostications of the judge's physicians, which had been presented to the Commission and to the two Houses, proved only too accurate, and in October 1986 the judge died, leaving the questions as to his conduct unresolved. Early in 1999 there were press reports claiming that relevant evidence had been withheld from the Senate committees and the Commission, but no further investigatory action was taken.

If a case arises in the future which causes the Houses to consider action under section 72 of the Constitution, it is likely that the Parliamentary Commission of Inquiry of 1986 will be looked to as a precedent. As this chapter has suggested, that body, apart from the question of its constitutionality, had serious defects, particularly the provisions for hearing evidence in private and for withholding evidence from the Houses. Those features of the Commission should not be followed in any future cases.<sup>24</sup> (See supplement)

### *Queensland precedent*

The relevant provisions of the Constitution of Queensland replicated the Act of Settlement: judges had tenure of office during good behaviour but could be removed by the Governor on the address of the Legislative Assembly. Misbehaviour was not stated to be the ground of removal.

In the case of the removal of a justice of the Supreme Court of the State in 1989, the body appointed to advise the Legislative Assembly, the Assembly in its address to the Governor and the Governor in his response to the address were all careful not to say that misbehaviour was the ground of removal. The case, however, is a significant precedent for a consideration of conduct which may be regarded as constituting misbehaviour under the federal constitutional provision, if the restricted interpretation of that provision by the Solicitor-General is not accepted and the interpretation of the parliamentary commissioners and the other authorities referred to above is followed.

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24 Several private members' and senators' bills proposing the establishment of a standing body to assess the conduct of judges and report to both Houses have since been introduced but none have been passed. In 2012, a bill to provide for the appointment of parliamentary commissions to inquire into allegations of judicial misbehaviour or incapacity and to provide information to the Houses was introduced by the government.

After certain evidence was given before a commission of inquiry concerning the conduct of a justice of the Supreme Court, Justice Angelo Vasta, a statutory commission, called the Parliamentary Judges Commission of Inquiry, was established in 1988 to inquire into the conduct of the justice. The Commission consisted of three retired superior court justices, including a former Chief Justice of the High Court. The Commission was enjoined to advise the Legislative Assembly whether any behaviour of the justice following his appointment to the Court warranted his removal from office. The Commission was to present to the Legislative Assembly only so much of its evidence as it thought necessary to support its findings of fact and conclusions. The Commission clearly was modelled on the 1986 federal Parliamentary Commission of Inquiry.

The Commission reported that the following behaviour by the judge warranted his removal from office:

- (a) giving false evidence at a defamation hearing
- (b) making and maintaining allegations that the Chief Justice, the Attorney-General and the inquiry commissioner had conspired to injure him
- (c) making a false statement to an accountant who prepared income tax returns
- (d) arranging sham transactions to gain income tax advantages
- (e) making false claims for taxation deductions.

None of the grounds of removal related to the judge's conduct as a judge, and the Commission did not advert to the question of whether any of the judge's actions could constitute criminal offences.

The Legislative Assembly allowed the judge to address the Assembly to show cause why he should not be removed from office. Having heard the judge's address, the Assembly on 7 June 1989 concurred with the conclusions of the Commission and resolved to address the Governor requesting the removal of the judge on the grounds specified by the Commission. On the presentation of the address, the Governor removed the judge from office.

### ***New South Wales precedents***

The New South Wales constitution and relevant legislation provide that judicial officers may be removed upon address by both Houses of the Parliament on ground of proved misbehaviour or incapacity, but only after a report by the Conduct Division of the Judicial Commission, a panel of judges and barristers which considers complaints about such officers, indicating that matters may justify parliamentary consideration of removal.

In 1998 the Conduct Division found that incapacity had been proved in respect of a justice of

the state Supreme Court, Justice Vincent Bruce, as evidenced by unreasonable delay in delivering judgments. A challenge by the justice to the validity of the Conduct Division's report failed in the Court of Appeal.<sup>25</sup>

The Legislative Council, however, on 25 June 1998, rejected a government motion to remove the justice, although the motion was supported by major party leaders. The Council heard the justice before considering the motion. In February 1999, after further criticism of delays in his cases, the judge resigned.

In 2011, the Conduct Division reported on two cases, one of proved misbehaviour and incapacity and one of proved incapacity that could justify parliamentary consideration of the removal of the judicial officers concerned. The reports and responses by their subjects were tabled in the NSW Parliament. Magistrate Jennifer Betts was called on to address the Legislative Council on 15 June 2011 to show cause why she should not be removed from office. A motion for an Address to the Governor for the removal of Magistrate Betts on grounds of incapacity was moved the following day by the Leader of the Government and negated after a free vote.

Magistrate Brian Maloney was similarly called to address the Council on 21 June 2011, his challenge to the validity of the Conduct Division's report having been dismissed by the Supreme Court in May 2011.<sup>26</sup> Again, a motion was moved the following day by the Leader of the Government for an Address to the Governor for Magistrate Maloney's removal on grounds of incapacity. The debate was adjourned after correspondence was tabled seeking advice in relation to further complaints against the magistrate. Debate resumed on 13 October following the receipt of further material and the motion was negated, again, after a free vote.

### ***Other office-holders***

Various statutes passed by the Parliament provide for independent and quasi-judicial office-holders other than judges to be removed on address of both Houses, including the Auditor-General, members of the Administrative Appeals Tribunal, the Commonwealth Ombudsman and the Parliamentary Budget Officer. The stated grounds for removal vary, but generally refer to misbehaviour and incapacity. There are no precedents of these provisions being activated, but many of the considerations analysed in this chapter may be applicable to them.

### **Other aspects of relations with the judiciary**

Other aspects of relations between the Senate and the judiciary have been analysed in other chapters.

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25 *Bruce v Cole* (1998) 45 NSWLR 163.

26 *Maloney v The Honourable Michael Campbell QC* [2011] NSWSC 470 (Unreported, 24 May 2011).

For the jurisdiction of the courts in relation to parliamentary proceedings, the production of Senate documents before courts and tribunals, and reference to Senate proceedings in the proceedings of courts and tribunals, see Chapter 2, Parliamentary Privilege.

For debate and inquiry on matters before courts and on decisions of courts, see Chapter 10, Debate, under Sub judge convention and Discussion of court decisions, and Chapter 16, Committees, under Privilege of proceedings.

For reflection on judicial officers in debate, see Chapter 10, Debate, under Rules of debate.

### **Scrutiny of judicial administration**

While the judges are and must be completely independent of the legislature and the executive in performing their judicial functions, the Houses of the Parliament have a responsibility to provide for and scrutinise the conduct of the administration of the courts.

Various acts of the Parliament provide for the administration of the courts. Rules of court, made by courts under such acts of Parliament, and providing for matters of judicial administration, are subject to disallowance by either House and are scrutinised by the Senate Standing Committee on Regulations and Ordinances.<sup>27</sup>

Estimates of expenditure and appropriations for the federal courts are scrutinised by Senate committees and by the Senate before the appropriations are passed. Annual reports of the courts are also subject to scrutiny by Senate committees.<sup>28</sup>

In June 1986, in a report on the annual report of the High Court, the Standing Committee on Constitutional and Legal Affairs asserted the principle that the constitutional independence of the Court is not affected by the accountability of the Court to Parliament in financial and administrative matters.<sup>29</sup>

In its 101st report, presented in June 1995,<sup>30</sup> the Regulations and Ordinances Committee asserted its right, and that of the Senate, to scrutinise rules of court and other legislative instruments made by judicial bodies. Such instruments, like other forms of delegated legislation, are subject to disallowance by the Senate.<sup>31</sup>

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27 See Chapter 15, Delegated Legislation.

28 See Chapter 13, Financial Legislation, and Chapter 16, Committees.

29 PP 177/1986.

30 PP 97/1995.

31 See Chapter 15, Delegated Legislation; see also statement by the committee, SD 23/6/1997, pp. 4868-70.