

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.²⁴

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.

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.²⁵

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 negatived 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 2011.²⁶ 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 negatived, 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.

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

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

