

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS  
ATTORNEY-GENERAL'S PORTFOLIO

**Program:** 1.4 Justice Services

**Question No. BE16/017**

**Senator Macdonald asked the following question at the hearing on 5 May 2016:**

CHAIR: Can I preface this question by saying that never, in any circumstances, am I suggesting this. No-one should relate this question to anything that has happened in the last three years. What does the act say, what is the provision, in the cases that Senator Heffernan raised, in an entirely different context, about what you do with judges who are misbehaving? What is the provision under the act in relation to commissioners? Again, I emphasise that not for a moment am I suggesting this. I would be the first into the streets for this not to happen.

Senator Brandis: It is not really relevant.

CHAIR: But how do you get rid of a commissioner if the commissioner is—

Senator Brandis: A commissioner could be removed by the Governor-General in Council. But a commissioner is appointed for a fixed term. It would be very unusual—

CHAIR: So are judges.

Senator Brandis: thing to do. But judges, under chapter 3, may only be removed by an address of both houses of the parliament on the ground of proved misbehaviour or incapacity.

CHAIR: In the case of any human rights commissioner?

Senator Brandis: No, that provision of the Constitution does not apply to human rights commissioners.

CHAIR: What does apply?

Senator Brandis: Not that section of the Constitution.

CHAIR: No, forget the Constitution. What does the act provide for a recalcitrant—and again I repeat I am not for a moment suggesting it; I am simply asking at estimates what the—

Senator Brandis: I am not even sure it is covered in the act. I will have that checked, and if those who are watching this—

Mr Moraitis: It is. There is a provision in the act.

...

Senator JACINTA COLLINS: Mr Moraitis can tell us those provisions in the act.

Mr Moraitis: I do not have the details, but—

Senator Brandis: We will look the provision out. I do not have a copy of the act to hand, Senator, but before four o'clock we will get you your answer.

CHAIR: I do not want to really carry this on.

Senator Brandis: No, no; I will have my industrious staff look at it very promptly.

...

Senator Brandis: Yes. My exceptionally industrious staffer here, Mr Brennan, has found the provision, which appears to be section 46I of the Australian Human Rights Commission Act, 'Termination of appointment'. It states:

(1) The Governor-General may terminate the appointment of the Commissioner—

I take it that this applies to any member of the commission, including the president—  
because of:

(a) misbehaviour; or

(b) a disability that makes the Commissioner incapable of performing the inherent requirements of office.

(2) The Governor-General must terminate the appointment of the Commissioner if the Commissioner:

- (a) becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with creditors or makes an assignment of remuneration for their benefit; or
- (b) is absent from duty, except on leave of absence, for 14 consecutive days or for 28 days in any period of 12 months; or
- (c) engages in paid employment outside the duties of the office of Commissioner otherwise than with the approval of the Minister.

It is quite different from the provisions for the removal of judges for several very obvious reasons. Firstly, it does not require the parliament, so the matter can be done by the executive government. Secondly, it is not the same test. The test in chapter III of the Constitution is 'proved misbehaviour or incapacity'; the test here is:

misbehaviour; or ... disability that makes the Commissioner incapable of performing the inherent requirements of office.

Thirdly, there is a requirement that the commissioner be removed in three identified circumstances—namely, insolvency, absence from duty without leave, or engagement in paid employment without the approval of the minister.

...

CHAIR: I am going to stop you there. The answer is not relevant to the question. I will ask you or one of the departmental people to take on notice—I do not want to start a long discussion on this, because we do want to move on, and I am conscious that time is running away—what does misbehaviour involve in the case of the act you have just referred to, as opposed to the Constitution?

Senator Brandis: Sorry to prolong this, but I need to respond to that. Firstly, it is not at all clear whether the word 'misbehaviour' in the act and the word 'misbehaviour' in the Constitution bear a different meaning. They may or may not; that has never been decided. Secondly, I am reasonably sure that section 46I of the Australian Human Rights Commission Act has never been the subject of judicial interpretation. Thirdly, I think that we will find some guidance from the report of the Senate committee to which I referred. I will take that on notice. It is a very interesting topic.

CHAIR: If, on notice, you come to any other conclusion, let me know.

**The answer to the honourable senator's question is as follows:**

Section 46I of the *Australian Human Rights Commission Act 1986* (the Act) sets out the circumstances in which the appointment of the Aboriginal and Torres Strait Islander Social Justice Commissioner may, or must, be terminated. Subsection 41(1) of the Act provides that the Governor-General may terminate the appointment of a member of the Australian Human Rights Commission, including the President, by reason of misbehaviour or physical or mental incapacity.

Subsection 41(1) has not been judicially considered, nor has any member of the Commission ever had their appointment terminated in accordance with the Act.