

**The Judicial Conference of Australia
The Marriott Resort, Gold Coast, Queensland
7 November 1998**

The Honourable Justice DH Lloyd

1. There are two kinds of judicial accountability. The *first* is the accountability which arises as a result of the requirement for every judicial officer to give reasons for his or her decision. Those reasons are exposed to enable the parties and other interested persons to know why a particular decision was reached. Such reasons are also necessary to enable any appellate court to also know why the particular decision was reached and to enable any errors as a result of such reasoning to be corrected.

2. The *second* kind of judicial accountability relates to tenure and, in particular, to the circumstances which give rise to disciplinary measures, including dismissal from office. It is this kind of judicial accountability which I propose to discuss.

3. Before discussing the position in New South Wales it is convenient to briefly review the position in other states and Federally.

4. The Commonwealth Constitution, s 72 provides:

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

...

(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;

..."

This provision applies to all Federal judges, including judges of the High Court, the Federal Court and the Family Court. It may not apply to members of the Australian Industrial Relations Commission, since that is not a court. The *Industrial Relations Act*, 1988 (Cth), s 362(2), nevertheless, contains a similar provision. A similar provision is contained in the *Federal Court of Australia Act*, 1976 (Cth), s 6(1)(d), and the *Family Law Act*, 1975 (Cth), s 22(1)(b).

5. Similar, but not identical, legislation exists in the states. The *Constitution Act* 1975 (Vic), s 77, provides:

"The commissions of the judges of the [Supreme] Court shall [subject to a fixed age] ... remain in full force during their good behaviour ... but the Governor may remove any such judge upon the address of the Council and the Assembly".

6. The *Constitution Act*, 1867 (Qld) provides:

"15. The commissions of the present judges of the Supreme Court of the said colony and of all future judges thereof shall be continue and remain in full force during their good behaviour notwithstanding the demise of Her Majesty (whom may God long preserve) or of Her Heirs and Successors any law usage or practice to the contrary thereof in anywise notwithstanding.

16. It shall be lawful nevertheless for Her Majesty Her Heirs or Successors to remove any such judge or judges upon the address of both Houses of the Legislature of this colony."

The *Supreme Court Act* 1995 (Qld), s 195, provides:

"(1) The commissions of any present/future judges of the said Supreme Court shall be continue and remain in force during his, her or their good behaviour ...

(2) However, it shall be lawful for Her Majesty ... to remove any such judge or judges upon the address of the Legislative Assembly."

7. The *Constitution Act*, 1889 (WA) provides:

"54. The Commissions of the present Judges of the Supreme Court and of all future Judges thereof shall be, continue, and remain in full force during their good behaviour, notwithstanding the demise of Her Majesty (whom may God long preserve), any law, usage, or practice to the contrary notwithstanding.

55. It shall be lawful nevertheless for Her Majesty to remove any such Judge upon the Address of both Houses of the Legislature of the Colony."

The *Supreme Court Act*, 1935 (WA), s 9(1) provides:

"All Judges of the Supreme Court shall hold their office during good behaviour, subject to a power of removal by His Majesty upon the address of both Houses of Parliament."

8. The *Constitution Act*, 1934 (SA) provides:

"74. The commissions of all Judges of the Supreme Court shall be and remain in full force during their good behaviour.

75. It shall be lawful for the King to remove any Judge of the Supreme Court upon the address of both Houses of the Parliament."

9. The *Supreme Court Judges' Independence Act*, 1857 (Tas) s 1, provides:

"It shall not be lawful for the Governor, either with or without the advice of the Executive Council, to suspend, or for the Governor to amove, any judge of the Supreme Court unless upon the address of both Houses of Parliament."

10. The Legislative Assembly of the Australian Capital Territory may legislate for the removal of a judicial officer. It has done so: The *Judicial Commissions Act*, 1994. Under that Act, where a complaint of the behaviour or the physical or mental incapacity of a *resident* judge is made to the Attorney-General, the Attorney-General may refer that complaint to a judicial commission. After tabling the report of the Judicial Commission the Legislative Assembly may, after affording the judge the opportunity to address it, resolve that the findings of the Commission amount to misbehaviour or physical or mental incapacity, whereupon the Executive must remove the judge from office.

11. The *Supreme Court Act*, 1979 (NT), s 40(1), provides:

"A judge ... may be removed from office by the Administrator on an address from the Legislative Assembly praying for his removal on the ground of proved misbehaviour or incapacity, but shall not otherwise be removed from office."

12. The statutory position in states other than New South Wales, in the Territories and Federally may be summarised as follows:

- (i) Federal Judges can only be removed on an address from both Houses of Parliament on the ground of proved misbehaviour or incapacity;
- (ii) In Victoria, Queensland, Western Australia and South Australia there are two methods of removal of a judge:
 - (a) By either the Governor or the Executive on the ground of misbehaviour; *or*
 - (b) On an address of the Parliament without any question of misbehaviour.
- (iii) In Tasmania judges may be removed on an address of the Parliament without any question of misbehaviour;
- (iv) In the Northern Territory removal must be on an address of the Parliament on the ground of proved misbehaviour or incapacity;
- (v) In the Australian Capital Territory, the *resident* judges may be removed by the Executive on a resolution of the Assembly following a report of a judicial commission, on the ground of misbehaviour or incapacity.

13. With the exception of the ACT and New South Wales (to which I will presently refer), in those jurisdictions in which a judge may be dismissed for misbehaviour or for incapacity, no special authority is required by the law for the making of inquiries or the finding of facts concerning the misbehaviour or incapacity of a judge.

14. How does the Parliament, or the Executive, determine whether there has been misconduct by a judge, or that a judge is suffering from an incapacity?

15. When allegations were made against the late Mr Justice Murphy of an attempt to pervert the course of justice, the Commonwealth Parliament established a Parliamentary Commission of Inquiry, constituted by three retired Supreme Court judges, to examine whether there existed grounds for removal: *Parliamentary Commission of Inquiry Act*, 1986 (Cth). Similarly, in Queensland, a Parliamentary Judges' Commission of Inquiry, comprising three retired judges, was appointed to inquire into the conduct of Mr Justice Vasta: *Parliamentary (Judges') Commission of Inquiry Act*, 1988 (Qld). In all jurisdictions, however, including the ACT and New South Wales, Parliament has a residual discretion not to present an address for removal, even if proved misbehaviour or incapacity be found.

The Position in New South Wales

16. The *Constitution Act*, 1902 (NSW), s 53, provides:

"53.(1) No holder of a judicial office can be removed from the office, except as provided by this Part.

(2) The holder of a judicial office can be removed from the office by the Governor, on an address from both Houses of Parliament in the same session, seeking removal on the ground of proved misbehaviour or incapacity.

(3) Legislation may lay down additional procedures and requirements to be complied with before a judicial officer may be removed from office."

This section is entrenched and requires a referendum to repeal or amend it: *Constitution (Entrenchment) Amendment Act*, 1992, s 7B. "Judicial office" means judges of all State courts and magistrates: *Constitution Act*, s 52(1).

17. The legislation referred to in s 53(3) has been enacted: *Judicial Officers Act*, 1986 (NSW). Section 41 of that Act provides:

"41.(1) A judicial officer may not be removed from office in the absence of a report of the Conduct Division to the Governor under this Act that sets out the Division's opinion that the matters referred to in the report could justify parliamentary consideration of the removal of the judicial officer on the ground of proved misbehaviour or incapacity.

(2) The provisions of this section are additional to those of section 53 of the *Constitution Act 1902*."

The Judicial Commission of New South Wales

18. The Commission is established as a statutory corporation (*Judicial Officers Act*, s 5). It consists of eight members:

The Chief Justice of the Supreme Court

The Chief Judge of the Industrial Court

The Chief Judge of the Land & Environment Court

The Chief Judge of the District Court

The Chief Judge of the Compensation Court

The Chief Magistrate

A legal practitioner appointed by the Minister (at present Mr Norman Lyall)

A person who, in the opinion of the Minister, has high standing in the community (at present the Honourable Susan Lenehan).

The *Judicial Officers Amendment Bill 1998* will amend the Act so as to increase by two the number of community members on the Commission. It provides that community members are to be nominated following consultation by the Minister with the Chief Justice of the Supreme Court.

The functions of the Commission

19. The functions are:

- (a) to assist courts to achieve consistency in sentencing (s 8);
- (b) to provide continuing education and training of judicial officers (s 9);
- (c) to examine complaints against judicial officers (ss 15, 18-21); and
- (d) to advise the Minister on such matters as it thinks appropriate (s 11).

20. The functions of the Conduct Division are to examine and to deal with complaints referred to it by the Commission (s 14).

21. The Conduct Division consists of a panel of three judicial officers, or two judicial officers and one retired judicial officer, appointed by the Commission in relation to a complaint referred to the Division (s 22). One panel may deal with two or more complaints if the Commission considers it appropriate.

22. Any person may make a complaint to the Commission concerning the ability or behaviour of a judicial officer (s 15(1)), or in relation to a judicial officer's competence in performing judicial or official duties (s 15(4)). The Minister may also refer any matter relating to a judicial officer to the Commission and such a reference must be treated as a complaint (s 16).

23. The Commission must conduct a preliminary examination of a complaint (s 18). Following the preliminary examination the Commission must either

- (a) dismiss the complaint;
- (b) classify the complaint as minor; or
- (c) classify the complaint as serious (s 19).

24. The Commission may refer a minor complaint to the relevant head of jurisdiction if it thinks that the complaint does not warrant the attention of the Conduct Division. Otherwise a complaint which is not dismissed must be referred to the Conduct Division (s 21).

25. An undismissed complaint is classified as serious if the grounds of the complaint, if substantiated, could in the Commission's opinion justify parliamentary consideration of the removal of the judicial officer from office. The Conduct Division may itself reclassify a complaint referred to it. If the judicial officer about whom a minor complaint is made refuses to give evidence, the Conduct Division may reclassify the complaint as serious (s 30).

26. The Conduct Division must carry out an examination of a complaint referred to it and may initiate such investigations as it thinks appropriate (s 23). The Conduct Division may hold hearings in connection with the complaint. A hearing of a minor complaint must take place in private. A hearing of a serious complaint must take place in public unless the Division, if satisfied that it is desirable to do so because of the confidential nature of any evidence or other matter or for any other reason, directs that the hearing take place in private (s 24(1) - (3)).

27. At a hearing -

- (a) there may be counsel assisting the Division (s 47);
- (b) the judicial officer complained about may be represented by a legal practitioner;
- (c) the Division may consent to any other person being represented; and
- (d) any witness may, so far as the Division thinks it appropriate, be examined or cross-examined (s 24(6) - (7)).

28. If the Division decides that a minor complaint is wholly or partly substantiated, it must:

- (1) so inform the judicial officer or decide that no action need be taken (s 27);
- (2) furnish a report to the Commission setting out the action taken by the Division (s 29(7)); and
- (3) furnish a copy of the report to the judicial officer concerned (s 29(8)).

29. If the Division decides that a serious complaint is wholly or partly substantiated, it:

- (1) may form an opinion that the matter could justify parliamentary consideration of the removal of the judicial officer from office (s 28);
- (2) must present a report to the Governor setting out its conclusions (s 29(1)); and
- (3) the Minister must lay the report before both Houses of Parliament as soon as practicable after it is presented to the Governor (s 29(4)).

30. The report of the Conduct Division is subject to judicial review (*Bruce v Cole*, Court of Appeal, 12 June 1998, unreported). The *Briginshaw* test, appropriate to the gravity of the consequences which may flow from the formation of the opinion, applies to findings of the Division (*Bruce v Cole*, per Spigelman CJ at 48-50).

31. As I have indicated (in paragraph 17) above, a judicial officer may not be removed from office in the absence of a report of the Conduct Division (s 41). Moreover, Parliament has a residual discretion not to present an address for removal even if proved misbehaviour or incapacity be found.

32. "Misbehaviour" is understood in a wide sense. It need not relate solely to a judge's behaviour in that office. It includes any conduct rendering a judge unfit for office. The meaning of "misbehaviour" in the context of the Federal Constitution was considered by the Parliamentary Commission of Inquiry established to inquire into the conduct of the late Justice Lionel Murphy of the High Court.

33. Sir George Lush said:

"[T]he word 'misbehaviour' in s 72 is used in its ordinary meaning, and not in the restricted sense of 'misconduct in office'. It is not confined, either, to conduct of a criminal nature.

...

If their [judges'] conduct, even in matters remote from their work, is such that it would be judged by the standards of the time to throw doubt on their own suitability to continue in office, or to undermine their authority as judges or the standing of their courts, it may be appropriate to remove them.

...

[I]t is for Parliament to decide what is misbehaviour, a decision which will fall to be made in the light of contemporary values." Australia, Parliament, Parliamentary Commission of Inquiry, *Special report, 5 August 1986 NS Special report Dealing with the Meaning of 'Misbehaviour' for the Purposes of Section 72 of the Constitution, 19 August 1986* (Parliamentary Paper 443/1986, Canberra: Govt Pr, 1987), Sir George Lush at 18-19.

Sir Richard Blackburn said:

" '[P]roved misbehaviour' means such misconduct, whether criminal or not, and whether or not displayed in the actual exercise of judicial functions, as, being morally wrong, demonstrates the unfitness for office of the judge in question." Australia, Parliament, Parliamentary Commission of Inquiry, *Special report, 5 August 1986 NS Special report Dealing with the Meaning of 'Misbehaviour' for the Purposes of Section 72 of the Constitution, 19 August 1986* (Parliamentary Paper 443/1986, Canberra: Govt Pr, 1987), Sir Richard Blackburn at 32.

The Hon Mr Andrew Wells said:

"[T]he word 'misbehaviour' must be held to extend to conduct of the judge in or beyond the execution of his judicial office, that represents so serious a departure from standards of proper behaviour by such a judge that it must be found to have destroyed public confidence that he will continue to do his duty under and pursuant to the constitution." Australia, Parliament, Parliamentary Commission of Inquiry, *Special Report, 5 August 1986 and Special Report Dealing with the Meaning of 'Misbehaviour' for the Purposes of Section 72 of the Constitution, 19 August 1986* (Parliamentary Paper 443/1986, Canberra: Govt Pr, 1987), Mr Andrew Wells at 45.

34. The Queensland Parliamentary Judges' Commission of Inquiry, established to inquire into the conduct of Mr Justice Angelo Vasta found no misconduct in the Judge's carrying out of his judicial duties, but made findings on the Judge's dealings in financial and taxation matters and in defamation proceedings. In so doing it seems that the members of the Commission adopted the definitions of "misbehaviour" described by the members of the Federal Parliamentary Commission of Inquiry.

35. "Incapacity" seems to be a reference to a judge's ability to perform his or her duties of office. In the case of Justice Vince Bruce in New South Wales the issue was the judge's capacity to deliver judgments in a timely fashion - some of his judgments had not been delivered some two and a half to three years after having been reserved.

36. Although the Conduct Division inquiring into the alleged incapacity of Justice Bruce did not specify an appropriate time frame for the delivery of reserved judgments, it adopted what was said by the English Court of Appeal, comprising Lord Justices Peter Gibson, Brooke and Mummery in *Goose v Wilson Sandford & Co* (Court of Appeal, 13 February 1998, unreported). That was a case in which the trial judge, Harman J, had delayed in

handing down a judgment for twenty months after the end of the hearing. The Judge had been seriously ill for part of that time. Lord Justice Peter Gibson said:

"106. There have unhappily been two other occasions in recent years when this court has censured judges for delay in delivering reserved judgments.

107. In Rolled Steel Ltd v British Steel Corporation [1986] Ch. 246 a judge had delayed giving judgment for nearly eight months at the end of a 19-day trial. This delay occasioned the following stricture from Lawton LJ:

[Counsel] submitted that this long and, in my experience, unprecedented delay resulted in the judge making material findings which were not justified by the evidence. I am not satisfied that this was so. But the fact that responsible and experienced counsel, acting for a public corporation, felt it incumbent upon him to make this submissions shows that long delays in delivering judgment can cause disquiet and suspicion amongst litigants who lose - and those who win may feel they have been deprived of justice far too long. Delays of this length should not occur unless there are compelling reasons why they should; and, if there are such reasons, it would be prudent of a judge to refer to them briefly. In this case, for all we know, there may have been such reasons. We have kept in mind that the parties had a most patient hearing and that the judge must have kept a very full note to deliver the judgment he did.'

108. In Bishopsgate Investment Management Ltd v Maxwell [1993] BCC 120 this court criticised a judge for a five-month delay in giving judgment after a five-day hearing. Hoffmann LJ said that the members of the court thought that the time taken to deliver judgment was excessive. He added:

'We do not of course know why it took so long, but the hearing was arranged at fairly short notice to come on before the end of the summer term. The parties are entitled to feel that there was little point in exerting themselves if they were not going to have a decision for five months.'

109. The delays with which the court was concerned in those two cases were substantially shorter than the delay in the present case, even when due allowance is made for the judge's serious illness during 1995. As the judge himself was the first to recognise, a delay of this magnitude was completely inexcusable. The Plaintiff, who was not a young man, was claiming that Mr Wilson's fraudulent conduct had been causative of his financial ruin. Mr Wilson for his part was a professional man charged with serious professional misconduct amounting to fraud. Both parties were entitled to expect to receive judgment before Christmas 1994 at the very latest. The fact that they were obliged to wait another year and a quarter, even allowing for the judge's illness, is wholly unacceptable.

...

112. A judge's tardiness in completing his judicial task after a trial is over denies justice to the winning party during the period of the delay. It also undermines the loser's confidence in the correctness of the decision when it is eventually delivered. Litigation causes quite enough stress, as it is, for people to have to endure while a trial is going on. Compelling them to await judgment for an indefinitely extended period after the trial is over will only serve to prolong their anxiety, and may well increase it. Conduct like this weakens public confidence in the whole judicial process. Left

unchecked it would be ultimately subversive of the rule of law. Delays on this scale cannot and will not be tolerated. A situation like this must never occur again."

37. The Conduct Division inquiring into the capacity of Justice Bruce found that there had been proved incapacity to perform judicial duties by any reasonable standards, which incapacity was found to be continuing. A summons for judicial review of the findings of the Conduct Division was dismissed by the Court of Appeal. Notwithstanding the findings of the Conduct Division the Upper House resolved not to adopt an address to the Governor seeking his removal.

38. The inability of the Parliament in New South Wales to present an address to the Governor for the removal of a judicial officer, in the absence of a report from the Conduct Division justifying such removal, is seen as a valuable protection for judicial officers in that State. It means that no judicial officer can be removed from office unless a panel of his or her peers is of the view, after a hearing, that grounds exist for such removal. For my part, I would rather first be judged by my peers than by politicians, even although politicians have the final word.

39. What of the future? The procedure in New South Wales is now firmly in place. After some initial opposition at the time the *Judicial Officers' Act* was being considered, the Judicial Commission is now generally considered as being a valuable protection for judges in New South Wales. It removes the need for *ad hoc* Parliamentary committees to investigate complaints about the conduct or capacity of serving judges as a preliminary to parliamentary consideration of such matters. It involves an input by fellow judges who are able to apply their own experience and standards to such questions. Both the Commonwealth and other States would be well served by such a system.

40. Finally, it is self-evident that judges should only be removed in the event of either proved misbehaviour or incapacity. Consideration should be given to such a pre-condition in those States where it does not at present exist.
