REMOVAL OF JUDGES

THE HONOURABLE L J KING AC QC†

I INTRODUCTION

Public, political and professional interest in this topic has been stimulated in recent years by two causes. The first is the spate of cases in which proceedings have been taken or contemplated for the removal of a judge. These cases came as quite a shock to the legal, political and general community. There had been no such case for so long that occasion for the removal of a judge had come to be considered as unthinkable. Any attempt to raise for discussion the adequacy of existing laws and procedures on the topic had been dismissed on the ground that such discussion was unnecessary and might be mischievous. The second cause of the current interest in the topic is the criticism, at times severe criticism, of judges by politicians and sections of the media, accompanied by suggestions that judges are frustrating publicly endorsed government action or even placing themselves above the Parliament. This has led some to ask how to get rid of judges that are thought to be frustrating the democratic will.

Much has been written on the topic but the current interest, together with developments in the last decade or so, render it opportune to look at the subject again. My purpose is to reconsider the principles governing the removal of judges, to examine the practices and procedures that have been adopted in the recent cases and to determine whether reforms are required to improve the adequacy of the existing laws, practices and procedures.

II INDEPENDENCE OF THE JUDICIARY AND THE NEED FOR REMOVAL PROVISIONS

It is trite to say that an independent judiciary is an indispensable feature of a free and lawful society. Without an independent judiciary there is no security for the rights and liberties of the citizens and no assurance of fair and impartial justice.

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† Former Chief Justice of South Australia.

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The independence of the judiciary is protected in a number of ways but most important of them is security of tenure. To ensure their independence, judges must be appointed for life or until a stipulated age of retirement and must be removable only upon grounds, clearly stated and proved, which justify removal. A judge who is vulnerable to removal may be subject to influence, resulting from fear of removal, deflecting him or her from the delivery of impartial justice. It is vitally important in the interest of the community, therefore, that judges be protected from influence resulting from the threat of removal. But the interests of the community also require that judges be accountable for their conduct and that the community be capable of ridding itself of judges who have proved themselves unfit to exercise the responsibilities of their high office. Clearly there must be mechanisms for the removal of judges who are unfit for office by reason of character or incapacity. Those mechanisms, however, must ensure justice to judges whose character or capacity is complained of and must protect the community against the danger of improper pressure or influence upon the judges.

III TENURE OF JUDGES

Historically, in England, the judicial office was precarious and attended by many dangers. In medieval times judges were variously appointed during the King's pleasure or during good behaviour. If the appointment was during pleasure, the judge could be dismissed from office by an executive act of the Crown. If the appointment was during good behaviour, the dismissal required legal proceedings on the part of the Crown commenced by a writ of *scire facias* or by criminal information. In such cases the dismissal was effected by a decision of the court forfeiting the tenure of office and declaring the office vacant for non-performance of the condition of good behaviour.[1]

Not only were judges at peril from actions of the Crown, but they were also at peril from the action of the Parliament. Judges were subject to considerable parliamentary control enforced ultimately by impeachment and punishment. Some courage was required of judges if they were to conscientiously discharge their responsibilities because they could experience removal in its most extreme form. In 1388 King Richard II apprehended that a parliamentary commission established by the Parliament made inroads into the royal prerogatives. He obtained the opinions of the Chief Justice of the King's Bench, Tresillian; the Chief Justice of the Common Pleas, Sir Robert Belknap; and four other judges including the Chief Baron of the Exchequer. They advised that the proposals of Parliament were not only invalid as infringing the royal prerogative, but were treasonous. Parliament impeached the judges and convicted them for giving false answers to the King on

1 Shimon Shetreet, *Judges On Trial: A Study of the Appointment and Accountability of the English Judiciary* (1976) 152.

the law of treason and ruled that those answers were themselves treasonable.[2] Parliament sentenced the judges to be hanged, drawn and quartered as traitors. Although Professor Shetreet indicates that their lives were spared,[3] Lord Justice Brooke reports that the sentence was carried out on Tresillian (CJKB), and that the others were banished to various parts of Ireland, a fate which in the eyes of many Englishmen of their time might have been perceived as a fate worse than death.[4]

During the succeeding centuries royal influence over the judges continued to be exerted by means of the threat of removal. It reached its apex during the period of the Stuart kings. In 1669, Charles II substituted 'during pleasure' for 'during good behaviour' in the judges' patents and James II followed his example.[5] They frequently exercised their power to dismiss judges whose decisions displeased them. In the struggle between Parliament and the Stuart kings, Parliament resorted to impeachment — or the threat of impeachment — to intimidate the judges.[6]

Following the revolution of 1688, security of judicial tenure was established in 1700 by the *Act of Settlement 1700*. This provided that 'judges' commissions be made [during good behaviour] and their salaries be ascertained and established, but upon the address of both Houses of Parliament it maybe lawful to remove them. As Australian judges (except federal judges and state judges in New South Wales where different statutory provisions apply) are appointed on *Act of Settlement* terms, it is necessary to consider the effect of the *Act of Settlement* provisions.

IV *ACT OF SETTLEMENT 1700* PROVISIONS

The distinguished retired judges who comprised the Parliamentary Commission of Inquiry considered these provisions in relation to the Honourable Justice Murphy of the High Court of Australia in 1986. In the special report entitled 'Ruling on Meaning of "Misbehaviour"'[7] the Honourable Sir George Lush said that the *Act of Settlement* 'has been treated by legal writers as creating two separate modes of dismissal — for breach of the condition of good behaviour, by the executive, and without cause shown by Parliament.'[8] As to removal by the executive, the Honourable Sir Richard Blackburn in the same report said:

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2 Ibid 126.

3 Shetreet, above n 1, 126 citing Howell, *State Trials*, 120.

4 L J Brooke, 'Judicial Independence — Its History In England and Wales' in Helen Cunningham (ed), *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (1997).

5 Shetreet, above n 1, 9.

6 Shetreet, above n 1, ch 1.

7 Referred to hereafter the 'Murphy report'.

8 Sir George Lush, Sir Richard Blackburn and Andrew Wells, 'Parliamentary Commission of Inquiry Re The Honourable Mr Justice Murphy: Ruling on Meaning of "Misbehaviour"' (1986) 2 *Australian Bar Review* 203, 205.

> [S]ince the end of the 16th century no judge holding office simply during good behaviour, or on "Act of Settlement" terms, has been removed by the Crown without address from Parliament, under the supposed power to do so, and in view of the existence of the procedure by address, and the predominance of the power of Parliament over that of the Executive, it seems almost unimaginable that any such case will ever occur.[9]

Although the ancient power of the Crown in its executive capacity to remove a judge for breach of the condition of good behaviour should, therefore, be regarded as obsolete, the power of the Houses of Parliament to address for removal on grounds more extensive than breach of the condition of good behaviour remains. Of this power the authoritative writer on the subject, Dr Alpheus Todd in his work 'Parliamentary Government in England' wrote:

> [T]he constitution has appropriately conferred upon the two Houses of Parliament ... a right to appeal to the crown for the removal of a judge who has, in their opinion, proved himself unfit for the proper exercise of [the] judicial office. This power is not, in the strict sense, judicial; it maybe invoked upon occasions when the misbehaviour complained of would not constitute a legal breach of the condition on which the office is held. The liability of this kind of removal is, in fact, a qualification of, or exception from, the words creating a tenure during good behaviour, and not an incident or legal consequence thereof.[10]

The Honourable George Lush quoted this passage as authoritative law in the Murphy report.[11] The Honourable Sir Richard Blackburn put the position in this way:

> Since the Act of Settlement, English judges, Irish judges (until Irish independence) and later the judges of the self-governing parts of the Crown's dominions such as the Australian States, held office under "Act of Settlement" terms, that is during good behaviour but with the liability of removal by address of both Houses.[12]

It is plain from the authorities which I have cited that the accepted view of the effect of the *Act of Settlement 1700* provisions is that they empower the Houses of Parliament to address for the removal of a judge on grounds that go beyond breach of the condition of good behaviour during office. That is not to say that there are no constraints upon the proper exercise of the powers of the Houses of Parliament. The principal constraint arises from the fundamental constitutional principle of the independence of the judiciary. The removal of a judge is a step of the utmost gravity having serious constitutional ramifications. It is an extremely rare occurrence for that reason. To my knowledge, only one Australian judge has been removed in modern times.

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9 Sir Richard Blackburn, above n 9, 213.

10 Alpheus Todd, *Parliamentary Government In England: Its Origin, Development, and Practical Operation* (1892) vol 1, 193.

11 Above n 9, 207.

12 Ibid 217.

V RELATIONSHIP OF JUDICIAL INDEPENDENCE TO PARLIAMENTARY POWER OF REMOVAL

The independence of the judiciary is one of the foundation stones of a free society existing under the rule of law. It entails that judges must be free to do justice without fear of adverse consequences and without expectation of favour in consequence of their decisions. Judicial independence is protected by surrounding the judiciary with safeguards against temptation or pressure to depart from the obligation to do fair and impartial justice. The principal safeguard is security of tenure. Judges must be secure in the knowledge that their tenure of office will be unaffected by the decisions that they make.

Judges have the imperfections, faults and failings which are common to human beings. They must be able to adjudicate upon the cases before them without fear that Members of Parliament or those with influence on Members of Parliament, who may be displeased with decisions, may comb through their lives for faults which, although not generally effecting their fitness for judicial office, might be seized upon as a ground for removal. Respect for judicial independence demands that Houses of Parliament resort to removal proceedings only in cases of genuine gravity. 'Judges', as the Honourable George Lush observed, 'must be safe from the possibility of removal because their decisions are adverse to the wishes of the government of the day.'[13] The Honourable Richard Blackburn indicated that even where there is proven misbehaviour, as required in the case of Federal judges by section 72 of the Commonwealth Constitution, the 'Parliament must decide ... whether bearing in mind the great importance, implied in the Constitution, of the independence of the judges, it should address for the removal of the judge.'[14]

The Parliamentary Judges Commission of Inquiry established by the Queensland Parliament into the conduct of Supreme Court Justice Angelo Vasta, which consisted of the distinguished retired judges Right Honourable Harry Gibbs, Honourable George Lush and Honourable Michael Helsham stated:

> In making a decision to address the crown for removal of a judge, the members of the legislature must bear in mind that the independence of the judiciary is a fundamental principle of government in this state and in Australia generally. The power given to the legislature should never be exercised to remove a judge because of political, religious or racial antagonism, or because he is unpopular, or because the media generally, or some pressure group, have launched attacks upon him. The only ground for the exercise of the power is that the legislature has formed a collective opinion that the judge is not fit to remain in office.[15]

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13 Ibid 209–210.

14 Ibid 221.

15 Sir Harry Gibbs, Sir George Lush and Michael Helsham, *Parliamentary Judges Commission of Inquiry*, para 1.5.13.

VI EFFECT OF *ACT OF SETTLEMENT 1700* PROVISIONS

Certain points as to the operation of the *Act of Settlement* provisions, emerge from the above analysis:

1 Judges in all states except New South Wales are in theory removable by the executive for breach of the good behaviour condition of their appointment. Any alleged breach would of course be justiciable. Nevertheless removal by the executive has fallen into disuse and is now 'unimaginable'. The same can be said of removal under *Burke's Act*,[16] if indeed it is still in force, which conferred power on the Governor–in–Council to remove judges on certain grounds.

2 From a practical point of view, judges are now removable only on an address of both Houses of Parliament. Although the power of Parliament to address for removal is not conditioned upon the existence of any particular ground, it would be highly improper for Parliament to exercise the power for reasons other than the unfitness of the judge for office by reason of incapacity or misbehaviour.

3 The statutes of all the states which follow the *Act of Settlement* provisions confer the power to remove following an address upon the Governor. The actual removal is therefore an executive act and the Governor, in accordance with the principles of constitutional government, is required to act on the advice of the ministers. Although opinions to the contrary have been expressed, I think it follows that the executive government has a discretion to decline to act upon an address of the Houses of Parliament for the removal of a judge. This could be of practical importance where the governing party is without a parliamentary majority in its own right. In the cases of Justice Angelo Vasta and Justice Vincent Bruce, moreover, there was a vote free of party discipline. Such a vote could result in an address for removal contrary to the wishes of the government and the government could decide not to act upon it.

VII COMMONWEALTH AND NEW SOUTH WALES CONSTITUTIONAL SAFEGUARDS

Federal judges are protected from removal by section 72 of the Commonwealth Constitution which provides that they 'shall not be removed except by the Governor-General, on an address of both Houses of Parliament in the same

16 Imp 1782 22 Geo III C.75.

session, praying for such removal on the ground that proved misbehaviour or incapacity'. New South Wales judges and magistrates receive a similar protection under part 9 section 53 of the Constitution Act of that state which was inserted in 1992. This is an exclusive provision for removal, which therefore excludes the *Act of Settlement* and *Burke's Act* provisions, and is entrenched so that it can be amended or repealed only with the approval of the electors at a referendum.

As will be seen from the authorities cited, the restriction on the power of the respective parliaments to address for the removal of Federal and New South Wales judges to cases of incapacity or misbehaviour does not apply to judges of the courts of states other than New South Wales who hold office on *Act of Settlement* terms. The power of Parliament to address for the removal of those judges is, as a matter of law, unrestricted. The power, however, has never been exercised in modern times except for incapacity or misbehaviour and the passages cited above make it clear that there now exists a uniformly observed convention to that effect. Political conventions, of course, as the Australian experience of the last thirty years shows, may be disregarded but if this convention is observed the grounds for removal under *Act of Settlement* provisions are effectively assimilated into those for removal of Federal and New South Wales judges, namely incapacity or misbehaviour.

VIII INCAPACITY AND MISBEHAVIOUR

Incapacity for this purpose has not been judicially defined but it may be taken, I think, to mean such infirmity of mind or body as renders a judge unable to effectively perform the duties of his or her office. Misbehaviour is a more difficult concept.

Professor Shetreet has referred to conduct which would breach the condition of 'good behaviour' and, I suppose, would therefore amount to 'misbehaviour'. As to the concept of 'good behaviour', it has been said that conduct which would offend the requirement would include 'gross and grievous neglect of duty'[17], 'a conscious partiality leading a judge to be disloyal even to his own honest convictions',[18] 'misconduct involving moral turpitude',[19] and 'conduct which is notoriously improper even on matters affecting (a judge's) private character'.[20]

Obviously there could be grounds for removal arising out of wrongdoing or incapacity in relation to the performance of the judge's judicial duties.

Misconduct, other than in the performance of the judicial office, may be a proper matter for the consideration of the Houses of Parliament. This type of

17 Baron Smith's case (1834) 21 Parl Deb, 3rd Ser 774, 974 (Sir Robert Peel).

18 Grantham's case (1906) 160 Parl Deb, 4th Ser 393, 394.

19 Shetreet, above n 1, 272.

20 A M Gleeson, 'Judging the Judges' (1973) 53 *Australian Law Journal*, 345.

misconduct was discussed by the parliamentary commissioners in the Murphy matter.[21] Their comments on the topic are quoted with approval in the report of the commission in the Vasta matter:[22]

(i) Sir George Lush said:

> [J]udges cannot, however, be protected from the public interest which their office tends to attract. If their 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 at judges or the standing of their courts, it may be appropriate to remove them.[23]

(ii) Sir Richard Blackburn said:

> [T]he material available for solving the problem of construction suggests that proved misbehaviour means that 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 of the judge in question.[24]

(iii) Mr Wells said:

> [A]ccordingly the 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.[25]

The above statements were made, of course, in relation to the Commonwealth constitutional requirement of 'proved misbehaviour'. The Vasta Commission considered, however, that they applied also to the issue of removal of a state judge.

The types of conduct which may give rise to parliamentary intervention are illustrated by enquiries which have occurred in recent years. In the Murphy case the primary subject of enquiry was an alleged attempt to pervert the course of justice. The Vasta case concerned miscellaneous instances of alleged misconduct including false evidence in a defamation case, improper professional conduct particularly in relation to a drug trial, improper financial dealings and incorrect taxation returns.

The conduct of Justice Vince Bruce of the Supreme Court of New South Wales which gave rise to a motion in the Legislative Council for an address for his removal, was of a different kind. The motion resulted from a report dated 15 May 1998 of the conduct division of the judicial commission of New South Wales. The report treated persistent failure to deliver judgements within an acceptable time due to procrastination as misbehaviour but in the end confined its findings to incapacity due to psychological problems. The motion in the Legislative Council was defeated.

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21 Sir George Lush, Sir Richard Blackburn and Andrew Wells, above n 9.

22 Above n 15, para 1.5.8.

23 Ibid 18.

24 Ibid 32.

25 Ibid 45.

In the year 2000 the Attorney-General of Victoria instituted an inquiry, conducted by the present writer, to determine whether Parliament should address for the removal of Judge Robert Kent of the County Court of Victoria. The allegations were that Judge Kent had failed to lodge income tax returns for a number of years prior to his appointment as a judge and in consequence owed a large sum of money in unpaid taxes and penalties. The judge resigned before the inquiry was completed.

An issue arose in the Kent case as to whether conduct prior to appointment could amount to a proper ground of removal. The final report of the Constitutional Commission in 1988 characterised conduct warranting removal of a judge not only as misconduct in carrying out the duties of the office but 'any other conduct that according to the standards at the time would tend to impair public confidence in the judge or undermine his or her authority as a judge'.[26] It considered that conduct having that tendency would warrant removal, although occurring prior to appointment. The Commission considered that the expression 'misbehaviour' in section 72 of the Commonwealth Constitution was wide enough to include pre-appointment misbehaviour.

IX PROBLEMS WITH EXISTING REMOVAL PROVISIONS

There is a potential inherent in any power to remove judges, to imperil the independence of the judiciary. Yet a power to remove is necessary. The public is entitled to the assurance that judges who are unfit for office will be removed. In provisions for the removal of judges, a balance is required between the protection of the independence of the judiciary and the need for effective means of removing unfit judges. A consideration of the events of the past three decades indicates the inadequacy of the present provisions to provide effective protection of independence of the judiciary against improper or mistaken use of the power of removal, and the need for a serious attempt to rectify the inadequacy. I now refer to what I see as the principal problem areas.

In all states, other than New South Wales, the removal provisions are identical with or closely analogous to the *Act of Settlement* provisions. The Houses of Parliament may address for removal of a judge without cause. It is said that a convention is now established that Parliament will not so act except on grounds of incapacity or misbehaviour. But political conventions, at least as well established, have been simply disregarded by governments in the last thirty years. Reliance upon observance of a convention which is not legally enforceable is but a weak safeguard of judicial independence. It is not to be assumed that the force of public

26 Constitutional Commission, *Final Report of the Constitutional Commission* (1988).

opinion would ensure observance of the convention. A move in Parliament to remove a judge without justification is most likely to occur in an atmosphere in which the judiciary's adherence to the law and the protection of the legal rights of an unpopular individual or minority has incensed the public. A public opinion inflamed against the judiciary or the individual judge would provide no brake upon political determination to get rid of the judge. The remedy is legislation along the New South Wales lines, providing that a judge may be removed only for incapacity or misbehaviour and entrenching that provision by providing that the provision cannot be amended or repealed except by a law approved at a referendum.

It has come to be accepted that misbehaviour which warrants removal of a judge extends beyond misconduct in the exercise of the judicial office and the commission of crime, to any conduct — whether public or private, and whether before or after appointment — which would demonstrate unfitness for office, destroy public confidence in the judge or undermine the authority of the judge or the standing of his or her court. Professor P H Lane has issued a warning concerning the effect of this wide interpretation. He writes:

> The three Commissioners went into the matter more than most exegetes; their interpretation should be respected. On the other hand, one may insist that the purpose of a provision like s 72 (ii) of the Commonwealth Constitution, as the purpose of the prototype Act of Settlement 1701, is "intended to secure them [the judges] against arbitrary interference by either the executive or the Legislature" (Harrison Moore, "The Constitution of the Commonwealth of Australia", 2nd ed, 1910, 103; *McCawley v R* (1918) 26 CLR 9, 59); and that this objective should be emphasised, rather than emphasise the subsidiary condition in the provision by enlarging the condition beyond what seems to have been its traditional content, as expounded by Todd ... and endorsed by Quick and Garran.[27]

These considerations raise the spectre of an *ex post facto* determination that conduct that is not criminal warrants removal, although the judge may have no notion that it could be so regarded. The Vasta Commission resorted to community standards as the determinant of the propriety of judicial conduct. As one who at one time had to grapple with the concept of community standards in relation to censorship issues, I can speak with feeling as to the elusiveness of the concept. It is trite to say that we live in a pluralist society in which standards of morality are diverse and often controversial. Judges differ among themselves as to the activities and lifestyles which are appropriate for a judge. The danger in this is that a government wishing to rid itself of an independent-minded judge and perhaps thereby to intimidate the judiciary into compliance, could induce Parliament to place reliance upon personal conduct which the judge him or herself did not consider to be inappropriate. If non-criminal personal conduct is to be a ground for removal, it is essential the judges know in advance what is forbidden to them. This requires the development of a code of judicial conduct covering forbidden personal as well as official conduct.

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27 P H Lane, 'Constitutional Aspects of Judicial Independence' in Helen Cunningham (ed), *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (1997).

Codes of judicial conduct have been successfully framed in some American jurisdictions and elsewhere. There being no such code in Australia, judicial ethics are dealt with by individual authors in books and papers which reflect the particular, sometimes idiosyncratic, views of the authors rather than any consensus in the judiciary as a whole. But because they are in print, they tend to be used as a yardstick by which to judge the conduct of judges. I believe that it has become important to develop a code of conduct which is approved by the judiciary as a whole and can be authoritatively adopted as the norm by which judicial conduct is to be judged. So far as it would deal with non-criminal personal conduct, it should be non-intrusive and non-restrictive, allowing for diversity of lifestyle and moral standards and confined to the strictly essential conditions for retaining public confidence in the judiciary. Some progress in this direction has been made by the publication this year of a 'Guide to Judicial Conduct' by the Australian Institute of Judicial Administration for the Council of Chief Justices of Australia. The Chief Justices' guidelines, however, do not purport to be a binding code of conduct and in relation to extra-judicial conduct in personal relationships, social contacts and activities, are expressed in general and non-specific terms. If judges are to be condemned for non-criminal personal conduct, it should be done according to objective norms established and published in advance and not according to a subjective judgement made after the event in purported accordance with uncertain criteria such as community standards.

A further serious weakness exposed by the modern Australian experience is the lack of established and recognised machinery for the determination of the guilt of a judge charged with misbehaviour or incapacity. It has been necessary to resort to adhoc procedures which themselves might be controversial. In the Murphy case the initial inquiry was by a parliamentary select committee, and Parliament thereafter established a commission of three retired judges with what amounted to a roving commission to investigate any wrongdoing on the part of the judge.

In the Vasta case, the Queensland Parliament established a commission of three retired judges by Act of Parliament to consider specific allegations and to report as to whether they warranted removal. In the Bruce case, there was a report by the Conduct Division of the Judicial Commission, a permanent body established by Act of Parliament to deal with judicial misconduct. In the Kent case the Victorian government, because the essential facts were not in contention, established a less formal inquiry by a retired judge. Sir Anthony Mason, former Chief Justice of Australia, has written:

> Recent experiences of allegations of misconduct on the part of judges — I refer specifically to those concerning Justice Murphy of the High Court of Australia and Mr Justice Vasta of the Supreme Court of Queensland — demonstrated the inadequacy of the existing arrangements. In each instance it was necessary to set up an ad hoc tribunal in circumstances of controversy. It would be preferable, as the Australia Bar Association has suggested, to establish in advance the appropriate machinery and the principles on which it is to operate. Legislation might provide for a special tribunal (consisting of three superior court judges or retired judges) to determine whether a complaint of judicial misconduct or incapacity is substantiated and could justify removal. But the tribunal should only

> be called upon to determine a substantial complaint, that is, one which, if made out, would appear to warrant dismissal. Otherwise the procedure could be used to harass judges. As the Australian Bar Association stated: "proper vetting processes must be introduced to guard against action upon unjustifiable complaints from disgruntled litigants. These complaints, to the extent that they are baseless, constitute a threat to the independence of the judiciary". For a similar reason, [an enquiry by the tribunal] should be confined to specific allegations. It would be unfair to a judge to be subjected to a roving [enquiry to matters which might be thought to indicate] unfitness. The point was strongly made by the commission of enquiry into the conduct of Mr Justice Vasta.[28]

Mr Justice M H McLelland of the Supreme Court of New South Wales has made concrete suggestions as to the nature and composition of such a tribunal.[29]

My proposal would be that an Act of Parliament in each jurisdiction should establish a judicial conduct tribunal comprised of three members who are or have been judges of an Australian superior court. The function of the tribunal would be to consider any charge of incapacity of misbehaviour of a judge alleged by the Attorney-General or his or her delegate to warrant removal of the judge and to make a finding as to whether the alleged incapacity or misbehaviour is proved or whether it warrants removal. The Act should provide that no motion for an address of the Houses of Parliament for removal may be entertained unless based upon a finding of the tribunal that the judge's incapacity or conduct warrants removal. There would then be a pre-ordained procedure and tribunal for dealing with such matters free of any suspicion of having been devised to produce a desired result in a particular case. The requirement that the proceedings be initiated by the Attorney-General and be confined to specific serious allegations would protect the judiciary from harassment and the fear of harassment.

X ABOLITION OF COURTS

The other grave problem exposed by the experience of recent times is the effective removal of judges by the abolition of the courts in which they sit. The reorganisation of the court system, including the abolition of existing courts, is undoubtedly a legitimate exercise of legislative power. If, however, a government initiates such measures not for the genuine purpose of improving the machinery of justice, but for the purpose of disposing of judges whose decisions have proved inconvenient to it, or who are otherwise out of favour with it, there is a serious threat to judicial independence. That this is no mere theoretical threat is demonstrated by the unhappy history of recent events in this country.

Internationally recognised principles of judicial independence affirm that when a court is abolished, the judges of that court must be offered an appointment

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28 Sir Anthony Mason, 'The Appointment and Removal of Judges' in Helen Cunningham (ed), *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (1997).

29 M H McLelland J, 'Disciplining Australian Judges' (1990) 64 *Australian Law Journal* 388, 402.

on its replacement or be appointed to another judicial office of equivalent status. The *Beijing Statement of Principles of the Independence of the Judiciary in the Law Asia Region* which includes Australia, affirmed by the Chief Justices of the region, provide:

> The abolition of the court of which a judge is a member must not be accepted as a reason or an occasion for the removal of a judge. Where a court is abolished or restructured, all existing members of the court must be reappointed to its replacement or appointed to another judicial office of equivalent status or tenure. Members of the court for whom no alternative position can be found must be fully compensated.[30]

The *Minimum Standards of Judicial Independence* adopted by the International Bar Association are to like effect.

The flagrant disregard of this principle in recent Australian history is recounted and documented by Justice Kirby of the High Court of Australia in an article entitled 'Abolition of Courts and Non-Reappointment of Judicial Officers'.[31] It disclosed what Justice Kirby justly describes as 'shocking developments in Australia'.

The most flagrant instances occurred as the result of Kennett government initiatives in Victoria.[32] Both the *Employee Relations Act 1992* (Vic) and the *Accident Compensation (WorkCover) Act 1992* (Vic) abolished courts without provision for the reappointment of the judges. The latter Act abolished the Accident Compensation Tribunal[33] which was established by the *Accident Compensation Act 1985* as a court whose members were 'given the rank, status and precedence of a judge of the Country Court'[34] with the same retiring age and security of tenure of other judges.[35] Despite the word 'tribunal' in its title, this body was a court according to the terms of the statute establishing it with members who were in all respect judges. As the 1992 Act made no provision for the reappointment of the judges, all the judges who were not appointed to some equivalent office were effectively removed from office.[36] A storm of protest from members of the judiciary around Australia was unavailing.[37]

Protest had more effect in South Australia in 1994 when *the Industrial and Employees' Relations Bill* provided for the abolition of the South Australian Industrial Court and the Industrial Commission.[38] They were to be replaced by a new Industrial Court and Industrial Commission. The registrar and staff were to be automatically transferred but the judicial officers were to be transferred only if the

30 *Beijing Statement of Principles of the Independence of the Judiciary in the Law Asia Region* (1995) art 29.

31 Michael Kirby J, 'Abolition of Courts and Non-reappointment of Judicial Officers' (1995) 12 *Australian Bar Review* 181.

32 Ibid 194.

33 *Accident Compensation (WorkCover) Act 1992* (Vic) s10.

34 Michael Kirby J, above n 31, 199.

35 Ibid.

36 Ibid 197–198.

37 Ibid 199.

38 Ibid 202.

Governor did not otherwise determine.[39] There appeared to be no purpose in replacing the existing court and commission with another court and commission other than to use it as a device to get rid of existing judges and to replace them with others who might be thought to be in sympathy with the government's industrial aims. The judges of the Supreme Court and the Law Society protested vigorously and the plan to abolish the court and commission was abandoned. The government then sought to alter the composition of the court by offering attractive retirement packages.[40] If this practice were to become an acceptable precedent, governments could seek to rid themselves of judges whose views, perhaps of constitutional law, were an impediment to the implementation of government policy, by the offer of irresistible packages. The judges of the Supreme Court stipulated that the only legitimate role for retirement packages was to reduce the numbers of judges on a court where the government made a bona fide judgement that there was need for a reduction in the number of judges. The Supreme Court judges insisted that in such a case the package should be offered to the members of the court concerned in order of seniority to avoid any suggestion that the government was targeting particular judges whom it wished to remove. The government accepted this point, but refused to budge from a provision substituting for the previous tenure until the statutory retiring age for judges, a term of six years.

XI REFORM PROPOSALS

My conclusion is that the existing provisions for the removal of judges have significant weaknesses with serious potential implications for the independence of the judiciary and for the effectiveness of removal procedures to protect the community. I make the following suggestions for reform:

1 The inclusion by all states in their constitutions of entrenched provisions of the kind which exist in the New South Wales constitution. I would include in the entrenched provisions, a provision along the line of article 29 of the Beijing Principles quoted above.

2 The adoption by all jurisdictions of a code of judicial behaviour, developed and approved by the whole national judiciary, by which the conduct of judges would be judged in any proceedings for removal.

3 The establishment of statutory tribunals in all jurisdictions along the lines suggested above, to consider allegations referred to them and to make recommendations for the consideration of parliament as to the removal of a judge.

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39 *Industrial and Employees Relations Bill 1994* (SA) sch 9.

40 Michael Kirby J, above n 31, 202.

4 There should be appropriate provision in all jurisdictions for the removal of magistrates for incapacity or misbehaviour. It is generally thought not to be necessary to require an address of the Houses of Parliament for the removal of magistrates, but the provisions should have full regard to their status as members of the independent judiciary. The provisions in the *Magistrates' Act 1983* of South Australia could serve as a model.

XII CONCLUSION

My plea in conclusion is that these issues should not be put aside until another crisis occurs. The best time for reform is when there is no existing crisis and the issues can be considered and resolved calmly and in an atmosphere free from partisanship and controversy.