

## Chapter 33 Removal of Judicial Officers and Independent Statutory Officers

### 33.1 Removal of Judicial Officers

Under section 53(2) of the *Constitution Act 1902*, the holder of a judicial office may be removed from the office by the Governor, following an address from both Houses of Parliament in the same session. A judicial officer may be removed on the ground of proved misbehaviour or incapacity. In addition to the provisions of section 53, section 41(1) of the *Judicial Officers Act 1986*, also requires that a judicial officer may not be removed from office in the absence of a report addressed to the Governor from a Conduct Division of the Judicial Commission. The report must set out the Division's opinion as to whether 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. Such reports and related documents are tabled in Parliament in accordance with section 29 of the *Judicial Officers Act 1986*. The Parliament is not bound by any decision of a Conduct Division.

Neither the *Constitution Act 1902* nor the *Judicial Officers Act 1986* set out procedures as to how the two Houses are to adopt an address to the Governor removing a judicial officer. However, the procedure that has been followed in the cases that the Parliament has considered is for the judicial officer to appear before the Bar of the House, initially in the Legislative Council, and address the Members of the Legislative Council.<sup>1</sup> After the judicial officer has addressed the Council, a motion is moved to adopt an Address to the Governor seeking the removal of the Officer under section 53 of the Constitution Act. If agreed to a message would be sent to the Assembly seeking concurrence with the motion in the same way that a bill is sent to the other House for concurrence. The Assembly would then be able to call the Judge to address members of the Legislative Assembly and if the Address was agreed to by the Assembly in the same form as the Council it would then be forwarded to the Governor.<sup>2</sup>

There have been a number of cases where the Parliament has considered whether a judicial officer should be removed from office.

The first of these cases was in 1998 when Justice Vince Bruce was ordered to appear before the Bar of the House of the Legislative Council following a report of a Conduct Division, dated 15 May 1998. Justice Bruce subsequently appeared on 16 June 1998 and addressed members of the Legislative Council in relation to the report of the Conduct Division and to show cause why he should not be removed from office.<sup>3</sup>

A motion was subsequently moved in the Council: That (a) an address be adopted and presented to His Excellency the Governor seeking the removal of a judge of the Supreme Court under section 53 of the Constitution Act; and (b) a message be sent

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<sup>1</sup> The resolutions of the Legislative Council have not permitted members to ask the judicial officer questions. See for example, comments of President Harwin, PD 15/06/2011, p. 2305 and PD 21/06/2011, p. 2897.

<sup>2</sup> Either House could initiate the procedure. However, it has been the practice for the motion to be moved initially in the Legislative Council. It should be noted that members of the Legislative Council have been afforded a conscience vote on such matters.

<sup>3</sup> Legislative Council PD 27/05/1998, pp. 5207-8; PD 16/06/1998, pp. 5865-6.

to the Legislative Assembly requesting that they adopt an address in similar terms. However, the motion was resolved in the negative<sup>4</sup> and accordingly no message was sent to the Legislative Assembly.

More recently, in 2011 two magistrates were separately called to address Members of the Legislative Council from the Bar of the House in relation to their conduct as judicial officers following reports of a Conduct Division of the Judicial Commission.

On 15 June 2011, Magistrate Jennifer Betts appeared before the Bar of the Legislative Council to deliver an address in relation to her conduct.<sup>5</sup> The same procedure to that which applied in Justice Bruce's case was followed and accordingly a motion was moved after Magistrate Betts had addressed the Council for an Address to be sent to the Governor for the removal of Magistrate Betts on the grounds of incapacity. The motion was negated.<sup>6</sup>

Similarly, on 21 June 2011, Magistrate Brian Maloney appeared before the Bar of the Legislative Council to deliver an address in relation to his conduct.<sup>7</sup> A motion was subsequently moved following his address for an Address to be sent to the Governor for the removal of Magistrate Maloney on the grounds of incapacity.<sup>8</sup> Debate on the motion was adjourned as the Judicial Commission had informed the House it was considering a number of further complaints about Magistrate Maloney. The Legislative Council adjourned the debate on the motion to provide Magistrate Maloney the opportunity to address the new evidence.<sup>9</sup> The President reported receipt of a further submission from Mr Maloney on 17 August 2012.<sup>10</sup> The motion to send an Address to the Governor for the removal of Magistrate Maloney was subsequently negated on 13 October 2011.<sup>11</sup>

### **33.2 Removal of Independent Statutory Officers**

A number of holders of independent statutory offices are able to be removed by the Governor following an address from both Houses.<sup>12</sup> These include:

- The Electoral Commissioner;
- The Ombudsman;
- The Auditor-General;
- The Commissioner of the Independent Commission Against Corruption;
- The Inspector of the Independent Commission Against Corruption;
- The Commissioner of the Police Integrity Commission; and
- The Inspector of the Police Integrity Commission.

The conduct for which such officers may be removed is usually noted in the legislation establishing the office and includes incapacity, incompetence and

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<sup>4</sup> Minutes of the Proceedings of the Legislative Council, 25/06/1998, pp. 601-2.

<sup>5</sup> Legislative Council PD 15/06/2011, pp. 2305-2314.

<sup>6</sup> Minutes of the Proceedings of the Legislative Council, 16/06/2011, p. 210.

<sup>7</sup> Legislative Council PD 21/06/2011, pp. 2897-2905.

<sup>8</sup> Minutes of Proceedings of the Legislative Council, 22/06/2011, pp. 254-5.

<sup>9</sup> *Ibid.*

<sup>10</sup> Minutes of Proceedings of the Legislative Council, 17/08/2011, p. 353.

<sup>11</sup> Minutes of Proceedings of the Legislative Council, 13/10/2011, pp. 495-7.

<sup>12</sup> Other independent statutory officers can be removed by the Governor without any involvement from the Parliament.

misbehaviour.

There have not been any occasions where an independent statutory officer has been removed by the Governor following an address of both Houses. However, if the occasion should arise it is important that the House ensure procedural fairness is given to an independent statutory officer before a resolution is passed by the House to remove that officer. This would involve for example inviting the officer to address the House or both Houses to answer questions.<sup>13</sup>

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<sup>13</sup> See *Annetts v McCann* (1990) 170 CLR 596 where the High Court emphasised that where a statute confers on a person a power or authority to make decisions or "findings" in an inquiry which may affect an individual's rights, interest or reputation, the rules of natural justice regulate the exercise of that power.