CHAPTER 20

RELATIONS WITH THE JUDICIARY

While there is no express separation of judicial and legislative functions under the New South Wales *Constitution Act 1902*, the Parliament has a key role to play in ensuring the independence of the judiciary. In this regard, one of the key functions of Parliament is in safeguarding the tenure of judges, coupled with the requirement for parliamentary action before a judge can be removed from office.

THE SEPARATION OF POWERS

The *Constitution Act 1902*, unlike the Commonwealth Constitution, does not impose any formal separation of legislative and judicial powers or functions. Although section 5 of the Act confers a legislative power on the Parliament, there is no express provision which vests (exclusively or otherwise) executive power on the executive government or judicial power on the judiciary.

As a result, in New South Wales the doctrine of the separation of powers does not operate so as to prevent the Parliament from enacting legislation to adjudicate between parties to a dispute,[1] to direct the outcome of pending litigation,[2] or to confer power on non-judicial tribunals to adjudicate in particular types of situations.[3] The Parliament has judicial power, and has exercised that power, consistent with the convention that it is for the Parliament to make the laws and for the judiciary to interpret them.[4]

However, there are limitations on the Parliament's right to interfere with judicial proceedings. In *Building Construction Employees and Builders' Labourers Federation of NSW v Minister for Industrial Relations*, Street CJ took the view that legislation which interfered with the judicial process in a particular case pending before a court would be 'contrary to modern constitutional convention, and to the public

1 *Clyne v East* (1967) 68 SR (NSW) 385.

2 *Building Construction Employees and Builders' Labourers Federation of NSW v Minister for Industrial Relations* (1986) 7 NSWLR 372.

3 *Ibid* at 381 per Street CJ.

4 *Ibid*.

interest in the due administration of justice'.[5] In *Bachrach Pty Ltd v Queensland*, it was suggested that there may be circumstances in which legislation will be found to be invalid on the ground that it involves a usurpation of or interference with judicial power or impermissible interference with the exercise of judicial power,[6] and that a State Parliament may be prevented from interfering with the exclusive exercise of judicial power such as in relation to the guilt of a person charged with a criminal offence.[7]

Other restrictions may arise from the decision in *Kable v Director of Public Prosecutions*, where the High Court held that a State Parliament may not legislate to confer functions on State courts which are repugnant to or incompatible with their exercise of federal judicial power.[8] In *Bruce v Cole*, Spigelman CJ considered that the reasoning in *Kable* 'indicates that the legislative power of the State may not be used to fundamentally alter the independence of a Supreme Court judge, or the integrity of the State judicial system'.[9] Legislation requiring a court to reach certain conclusions undermines the independence of the judiciary and thus requires the court to act in a manner incompatible with the exercise of federal judicial power.[10]

Accordingly, in New South Wales, as in comparable jurisdictions with the same constitutional heritage, while Parliament is supreme in the legislative capacity as the elected body representing the people, the courts are the final arbiters of the interpretation and application of the law.

THE INDEPENDENCE OF THE JUDICIARY

The ability of the courts to perform their role as the final arbiters of the interpretation and application of the law is protected by the independence of the judiciary, which encompasses freedom from direction or control by the legislative or executive branches of government. Such independence ensures that judges can exercise their functions impartially, according to the evidence, the legal arguments and the law. This is important not only to the extent that judicial decisions determine the rights of individuals, but also to the extent that they determine the lawfulness of actions by the other two branches of government, which like individuals are subject to the rule of law. As such, judicial independence and the resulting capacity for impartiality is a fundamental precept for democratic governance, a vital element of the matrix of checks and balances underpinning the system of government as a whole.

5 *Ibid* at 381.
6 (1998) 195 CLR 547 at [15].
7 *Ibid* at [18].
8 (1998) 195 CLR 547.
9 (1998) 45 NSWLR 163 at 167.
10 Twomey A, *The Constitution of New South Wales*, The Federation Press, Sydney, 2004, p 758.

The independence of the judiciary is protected in various ways in New South Wales, including through provision for security of tenure and financial security for judicial officers.[11] One of the most important protections, however, is the requirement for parliamentary action before a judicial officer can be removed from office. This provides a significant safeguard to judicial officers against interference or undue influence from the executive.

REMOVAL OF JUDICIAL OFFICERS

The executive government – the Governor, on the recommendation of the Executive Council – is responsible for the appointment of judicial officers.[12] This reflects the practice in Britain, where judges have traditionally been appointed by the Crown.

The removal of judicial officers, however, is a matter for the Parliament as well as the executive. This procedure has its origins in British law, and is now governed by Part 9 of the *Constitution Act 1902* and the *Judicial Officers Act 1986*, as discussed below.

Historical development

Until the end of the 17th century, English judges could be appointed and dismissed at the pleasure of the Crown.[13] The Stuarts made wide use of these prerogatives: King Charles II dismissed 11 judges during the last 11 years of his reign, King James II dismissed 12 in three years.[14]

Following the constitutional struggles between Crown and Parliament of the period, judicial tenure was placed on a more secure footing with the enactment of the *Act of Settlement 1701*. Under that Act, judges held office during 'good behaviour', but could be removed from office on the address of both Houses of Parliament.[15] The effect of this provision appears to have been to supplement two other removal mechanisms which continued to exist: impeachment by Parliament;

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11 A judicial officer includes all judges and magistrates in New South Wales. A full definition is provided in section 52 of the *Constitution Act 1902*.

12 See, for example, the *Supreme Court Act 1970*, s 26; the *District Court Act 1973*, s 13; the *Land and Environment Court Act 1979*, s 8; the *Local Courts Act 1982*, s 12; the *Industrial Relations Act 1996*, s 148; and the *Administrative Decisions Tribunal Act 1997*, s 13.

13 Crawford J and Opeskin B, *Australian Courts of Law*, 4th edn, Oxford University Press, Melbourne, 2004, p 65; see also Holdsworth W, *A History of English Law*, Vol 1, 7th edn, Methuen & Co Ltd, London, 1956, p 195.

14 Brooke Lord Justice, 'Judicial Independence – Its history in England and Wales', in Judicial Commission of New South Wales, *Fragile Bastion Judicial Independence in the Nineties and Beyond*, Judicial Commission of New South Wales, 1997, p 97.

15 Article III stated in part that 'judges' commissions be made *quamdiu se bene gesserint* [during good behaviour] … but upon the address of both Houses of Parliament it may be lawful to remove them'.

and removal for misbehaviour in appropriate legal proceedings.[16] In practice, however, an address from both Houses became the only method of removal.[17]

The *Act of Settlement 1701* was not received as part of the law when the Australian colonies were established.[18] Rather, the *New South Wales Act* of 1823[19] provided that Supreme Court judges could be appointed and removed by His Majesty,[20] with no reason required. Judges were also subject to the *Colonial Leave of Absence Act 1782*, which provided for removal (or 'amotion' as the process was termed) by the Governor and Council, on the ground of either wilful absence, neglect of duty or misbehaviour.[21] The latter procedure was applied in New South Wales in 1843, when Justice Willis of the Supreme Court was 'amoved' for misbehaviour, although the motion was later reversed by the Privy Council on the ground that the judge had not been given an opportunity to be heard in his defence.[22]

Greater security of judicial tenure was only provided with the establishment of responsible government in New South Wales under the *Constitution Act 1855*. Section 38 of that Act provided that Supreme Court judges held office during 'good behaviour'. Section 39 provided that they could be removed from office on an address from both Houses, thus importing the procedure established in Britain in 1701.[23] These sections were later incorporated in the *Supreme Court and Circuit Courts Act 1900*,[24] and eventually the *Supreme Court Act 1970*.[25] However, lower court judges and magistrates remained subject to removal by the Governor in Council, with no involvement by Parliament.[26]

Part 9 of the *Constitution Act 1902*

In 1992 the *Constitution Act 1902* was amended by the insertion of Part 9 ('The Judiciary') to 'secure the independence of the judiciary'[27] and to implement mea-

16 Crawford and Opeskin, above n 13, p 65.

17 *Ibid*.

18 *Ibid*.

19 4 Geo IV, c 96 (1823) (Imp).

20 *Ibid*, s 1. See also *Australian Courts Act 1828* (Imp), 9 Geo IV, c 83.

21 See Twomey, above n 10, pp 730-731.

22 *Ibid*, p 731.

23 While there is no recorded case of this provision being used in New South Wales, in 1866 a similar provision was applied when an address from both Houses of the South Australian Parliament was presented to Her Majesty for the removal of Justice Boothby. In that case, the matter was referred to the Judicial Committee of the Privy Council, which proposed to hold a hearing at which the parties would be represented and make their cases. Subsequently, however, the Governor initiated the alternative removal procedure under the *Colonial Leave of Absence Act 1782*, which eventually led to the judge's 'amotion' for misbehaviour, following an inquiry at which the judge gave evidence in his defence. See Twomey, above n 10, p 732.

24 *Supreme Court and Circuit Courts Act 1900*, s 10.

25 *Supreme Court Act 1970*, s 27(2), provided that judges could be removed by the Governor on the address of both Houses.

26 See, for example, the *District Court Act 1973*, s 14; and the *Local Courts Act 1982*, s 18.

27 *Constitution (Amendment) Act 1992*.

sures agreed to in a memorandum of understanding, commonly known as the Charter of Reform, which was signed on 31 October 1991 by Premier Greiner and three non-aligned independents in the Assembly.[28] Part 9 includes provisions for removal of judicial officers from office (section 53), suspension and retirement from office (sections 54 and 55), and abolition of a judicial office (section 56). With respect to removal, the major innovation was to require that a judicial officer can only be removed on the grounds of 'proved misbehaviour or incapacity' (see below).

At the same time as Part 9 was enacted, provision was made for its entrenchment within the *Constitution Act 1902*.[29] This was achieved by amending section 7B of that Act to include Part 9 within the list of provisions which cannot be repealed or amended without approval at a referendum.[30] The amendment of section 7B itself required approval at a referendum, which occurred on 25 March 1995. The validity of the entrenchment of Part 9 has been questioned,[31] including on the basis that a law amending Part 9 is unlikely to be a law respecting the 'constitution, powers or procedure' of the Parliament within the meaning of section 6 of the *Australia Act 1986*.[32] Nevertheless, the entrenchment of its provisions within the scheme provided by section 7B is a statement of the importance with which judicial independence is viewed in New South Wales.[33]

Section 53 of the *Constitution Act 1902* provides:

> (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.
>
> (4) This section extends to term appointments to a judicial office, but does not apply to the holder of the office at the expiry of such a term.

28 *LA Debates* (31/10/1991) 4004-4038 contain a copy of the Memorandum of Understanding.

29 *Constitution (Entrenchment) Amendment Act 1992*.

30 However, a referendum is not required to amend s 52 of the *Constitution Act 1902* (which is within Part 9), for the purpose of extending the application of Part 9 to additional judicial offices or classes of judicial offices: s 7B(8).

31 See Twomey, above n 10, pp 736-737; see also Mullen V and Griffith G, 'The Independence of the Judiciary: Commentary on the Proposal to Amend the NSW Constitution', Briefing Paper No 009, New South Wales Parliamentary Library Research Service, 1995.

32 Section 6 provides that a law passed by a State Parliament respecting the constitution, powers or procedure of the Parliament shall be of no force or effect unless it is made in such manner and form as may from time to time be required by a law made by that Parliament.

33 See *Bruce v Cole* (1998) 45 NSWLR 163 at 166 per Spigelman CJ and at 203 per Priestley JA.

> (5) This section extends to acting appointments to a judicial office, whether made with or without a specific term.

The expression 'proved misbehaviour or incapacity' derives from section 72 of the Commonwealth Constitution, which qualifies the power of the Governor-General in Council to remove a federal judge on an address from both Houses of the Commonwealth Parliament. According to *Odgers*, in adopting such a provision, the framers of the Commonwealth Constitution 'deliberately sought to depart from the *Act of Settlement* and to provide greater security of tenure for judges, by restricting the method and ground of removal'.[34]

Similarly, the adoption of the requirement in section 53 represented a significant departure from the previous law in New South Wales, where there was previously no provision regarding the grounds on which a judge could be removed.

The meaning of 'misbehaviour' in section 72 of the Commonwealth Constitution was addressed during the parliamentary commission of inquiry[35] appointed in 1986 to investigate the conduct of Justice Murphy of the High Court. In that case, as discussed in *Odgers*, two conflicting interpretations of the expression were advanced. On the one hand, the Commonwealth Solicitor General advised that the expression is confined to misbehaviour in the performance of judicial duties or conviction for a criminal offence. On the other hand, the members of the parliamentary commission took the view that it consists of conduct which in the judgment of the Houses indicates unfitness of the judge to continue in office and is not confined to conduct in office or a criminal offence. In the end, the matter was not resolved, as Justice Murphy died before the commission could present a final report. However, it is argued in *Odgers* that the parliamentary commission is likely to be looked at as a precedent in any future deliberations concerning section 72.[36]

The *Judicial Officers Act 1986*

As noted above, section 53(3) of the *Constitution Act 1902* provides that legislation may lay down additional procedures and requirements to be complied with before a judicial officer may be removed from office. Such additional requirements are set out in the *Judicial Officers Act 1986*.

The *Judicial Officers Act 1986* was enacted following a series of incidents in the early to mid 1980s involving judicial officers. These included the prosecution of a High Court judge, a District Court judge and a former Chief Stipendiary Magistrate, on

34 Evans H (ed), *Odgers' Australian Senate Practice*, 11th edn, Department of the Senate, Canberra, 2004, p 508.

35 That is, a commission operating similarly to a royal commission but established by statute and reporting to the two Houses of Parliament.

36 *Odgers*, 11th edn, pp 530-531. See also pp 509-510 concerning UK and US authorities relating to 'misbehaviour'.

charges of perverting the course of justice.[37] Such incidents gave rise to concerns that public confidence in the administration of justice was being undermined.[38]

The Conduct Division of the Judicial Commission

The *Judicial Officers Act 1986* establishes a uniform framework for the discipline and tenure of judicial officers at all levels, including a common procedure for their removal. Section 5(3) and (4) of the Act established the Judicial Commission, consisting principally of the heads of jurisdiction. The function of the Commission is to receive complaints about judicial officers.[39]

Section 13(3) in turn establishes the Conduct Division of the Judicial Commission. Under section 22, the Conduct Division consists of two judicial officers and one community representative nominated by the Parliament in accordance with Schedule 2A to the Act.[40] The Conduct Division examines complaints referred to it by the Commission.[41] In performing this task, the Conduct Division has significant powers including the powers and immunities of a royal commission in relation to the holding of hearings.[42]

The role of the Conduct Division is integral to the process of removal of a judicial officer. Under section 28, if the Conduct Division decides that a complaint is wholly or partly substantiated, it may form an opinion that the matter could justify parliamentary consideration of the removal of the officer. Under section 29, a report from the Conduct Division to that effect must be provided to the Governor, with a copy provided to the responsible minister, and must be tabled in both Houses of Parliament. Under section 41, the exercise of the Governor's constitutional power of removal is dependent on receipt of the Conduct Division's report:

> (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*.

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37 In 1985 and 1986 Justice Lionel Murphy of the High Court was acquitted of such charges; in October 1985 Judge Foord of the District Court was also acquitted; in March 1985 a former Chief Stipendiary Magistrate, Murray Farquhar, was convicted and sentenced to prison on charges of perverting the course of justice.

38 *LC Debates* (21/10/1986) 4997-4998.

39 *Judicial Officers Act 1986*, s 15.

40 Previously the Conduct Division consisted of three judicial officers, but the *Judicial Officers Amendment Act 2007* amended s 22 to provide for two judicial officers and one community representative nominated by the Parliament, and to insert Schedule 2A in the Act.

41 *Judicial Officers Act 1986*, s 23.

42 *Ibid*, s 25.

A report of the Conduct Division is subject to judicial review on the basis of legal error, but not on the merits.[43] However, the question of whether a judge's removal on an address from Parliament is subject to judicial review has not been tested in Australia. With regard to the equivalent federal provision, section 72 of the Commonwealth Constitution, it has been argued that the section 'strongly indicates that the two Houses are the only judges of misbehaviour and that their address and the action of the Governor General upon it would not be reviewable by the High Court'.[44] Further, there is authority at the federal level that the courts will not interfere with the parliamentary procedure for removal of a judge.[45]

The decision to establish a statutory commission to deal with complaints against judges was implemented in light of the experience of the Commonwealth Parliament in 1986, when it established the parliamentary commission of inquiry to investigate the conduct of Justice Murphy of the High Court.[46] However, the creation of a permanent body for the purpose was unprecedented in Australia, having been influenced by models in the United States and Canada.[47] The specific motivating concerns referred to at the time included creating a system in which the handling of complaints would be removed from the political process[48] and vested in a body with appropriate fact-finding powers.[49]

At the time of its establishment, the relationship between the Conduct Division and the Parliament was the focus of some attention. Originally, the Judicial Officers Bill provided for the Conduct Division to recommend to Parliament that a judicial officer be removed. However, following submissions from members of the judiciary, the bill was changed so that the Conduct Division would be limited to making findings of fact, and reporting an opinion that the matter 'could' justify parliamentary consideration of removal.[50] It was argued that only by this delineation of functions could the primacy of the parliamentary role and the independence of the judiciary be assured.[51]

Parliamentary review of a report of the Conduct Division

Under the *Judicial Officers Act 1986*, the Parliament cannot consider the removal of a judge or magistrate unless the Conduct Division has first provided a report expressing the opinion that the matter could justify parliamentary consideration. Once such a report has been provided, however, it is a matter for each House to determine what action it will take. There is no requirement for either House to

43 *Bruce v Cole* (1998) 45 NSWLR 163 at 183 per Spigelman CJ and at 207 per Priestley JA.

44 *Odgers*, 11th edn, p 510.

45 *Re Reid; Ex parte Bienstien* (2001) 182 ALR 473.

46 *LC Debates* (21/10/1986) 5002.

47 *Ibid*, 4998.

48 *Ibid*.

49 *Ibid*, 5002.

50 *Ibid*, 5004.

51 *Ibid*.

take any action.[52] If action is to be taken, the House is not bound by the opinion of the Conduct Division.

When considering such a matter, the Houses may take into account facts other than those reported by the Conduct Division, including events which have taken place since evidence was given before the Division.[53] Further, the material before one House need not be the same as the material before the other.[54]

The stages involved in proceedings for the removal of a judge are outlined below. It has been assumed for the purpose of the outline that an Address to the Governor is to be adopted by the Council first, although there is nothing to prevent an address being initiated in the Assembly.

1. The responsible minister tables the report of the Conduct Division in both Houses of Parliament.[55] If Parliament is not sitting, the minister may present the report to the Clerks of both Houses. In that case, the report is deemed to have been laid before the Houses, but the minister is still required to table the report as soon as practicable after Parliament resumes.[56] The report may be printed by authority of the Clerk of the House and is deemed to be a document published by order or under the authority of the House.[57]
2. The Council may invite the judge to appear at the Bar of the House, in person or by legal representative, and address the House. In the only case in which removal of a judge has been considered in New South Wales, measures were adopted to ensure that the judge's views could be put to the House.[58]
3. The Council may resolve that an address requesting the judge's removal on grounds of proved misbehaviour or incapacity be adopted and presented to the Governor. The Assembly is requested to adopt a similar address, and a copy of the judge's address to the Council is transmitted to that House.[59]

   If the Assembly agrees to adopt a similar address, the addresses are presented to the Governor consecutively, the address from the Council being presented first as the initiating House.

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52 In *Bruce v Cole* (1998) 45 NSWLR 163 at 207, Priestley JA said: 'The fact of that report having been to the Governor empowers each House to consider whether it will address the Governor. It does not oblige either House to do so'.

53 *Ibid*.

54 *Ibid*.

55 *Judicial Officers Act 1986*, s 29(3).

56 *Ibid*, s 29(4).

57 *Ibid*, s 29(5).

58 This occurred in the case involving Justice Bruce, discussed later in this chapter, which is the House's only precedent and as such is likely to be followed in any future case.

59 The address must be proposed by motion on notice given in the usual manner (SO 120).

If the Assembly fails to adopt a similar address, the Council may request a free conference with the Assembly (SOs 128-132). If the Assembly agrees to such a conference, managers appointed by both Houses meet and report back to each House. If, however, following such conference, the Assembly still refuses to adopt a similar address, the statutory provision for removal of a judge cannot be complied with.

4. The President, or the President accompanied by members of the House depending on the terms of the address, proceeds to Government House. The President reads the address to the Governor (SO 121(3)).

5. The President reports the Governor's answer to the address as soon as possible after receipt (SO 121(4)).

Cases involving the removal of a judicial officer

There have been three cases in which the Conduct Division has reported the opinion that a matter could justify parliamentary consideration of the removal of a judicial officer. Each case involved the ground of incapacity. The first two cases concerned magistrates, while the third concerned a Supreme Court judge.

In the first case in 1992 concerning Magistrate Barry Wooldridge, following receipt of the Conduct Division's report on 17 December 1992,[60] the Clerk of the Parliaments pointed out that, as a consequence of the enactment of Part 9 of the *Constitution Act 1902*, the *Judicial Officers Act 1986* now required that a judicial officer could only be removed on the ground of proved misbehaviour or incapacity. The matter was then referred back to the Conduct Division for a further report, which was delivered on 10 March 1993. The further report included the opinion that the matters referred to could justify the magistrate's removal on the ground of incapacity.[61] Subsequently, it was reported that the magistrate had retired.[62]

In the second case in 1998 concerning Magistrate Ian McDougall,[63] before the Conduct Division had completed its examination, the magistrate tendered a letter of resignation to the Governor, on medical grounds.[64] However, the resignation was not accepted on advice from the Attorney General, as the Conduct Division's examination was still continuing.[65] The magistrate then tendered a second letter of resignation, once again while the Conduct Division's proceedings were in hand.

60 Judicial Commission of New South Wales, Conduct Division, 'Report concerning Barry John Wooldridge', 17 December 1992.

61 Judicial Commission of New South Wales, Conduct Division, 'Further report concerning Barry John Wooldridge', 10 March 1993.

62 'Magistrate retires unfit', *Sydney Morning Herald*, 15 September 1993, p 2.

63 Judicial Commission of New South Wales, Conduct Division, 'Report concerning Ian Lanham Ross McDougall', 1 May 1998.

64 *LC Debates* (26/5/1998) 5095.

65 *Ibid*.

That resignation was eventually accepted after the Conduct Division report had been tabled in Parliament, the Attorney General having indicated that parliamentary action for removal was 'neither appropriate nor necessary' in the circumstances as the same result could be achieved by accepting that resignation.[66]

The third case, which is the only instance in which the removal of a judge has been considered by either House in New South Wales, is outlined below.

Justice Vince Bruce

On 15 May 1998 the Conduct Division provided a report concerning Justice Vince Bruce of the Supreme Court. The report included a finding of incapacity to perform judicial duties, based on circumstances involving unreasonable delay in the provision of judgments. It also contained the opinion that the matters referred to could warrant parliamentary consideration of the judge's removal.

On 26 May 1998, the Attorney General, the Hon Jeff Shaw, tabled the Conduct Division's report in the Council. He also tabled a statement of the reasons of the minority member of the Conduct Division, who had found that the relevant incapacity was no longer present and that the matter could not justify parliamentary consideration for removal. He further tabled a response to the Conduct Division's report, prepared by Justice Bruce at the Attorney General's invitation.[67]

On 27 May 1998 the Attorney General moved a motion in the Council proposing that, in view of the Conduct Division's report, Justice Bruce appear at the Bar of the House on 3 June 1998 and show cause why he should not be removed from office. The motion also proposed that Justice Bruce be granted leave to attend in person or by his legal representative and address the House for a specified time, and that the President seek a reply as to whether or not Justice Bruce would attend.[68] In support of the motion, the Attorney General argued that it was 'essential' that the House extend to the judge the opportunity to make an address and 'as a matter of procedural fairness' allow him to state his case or have his case presented. He also pointed out that it was 'entirely a matter for Justice Bruce' as to whether or not he wished to accept the 'invitation' of the House.[69] The House agreed to the motion.

On 2 June 1998 the President reported receipt of a letter from Justice Bruce's solicitors advising that a challenge to the validity of the Conduct Division's report had been commenced. The letter also requested that the judge's leave to appear at the Bar be deferred pending determination of the appeal proceedings.[70]

Later the same day, the Attorney General moved a motion to amend the House's earlier resolution to provide for Justice Bruce's attendance on 16 June, instead of 3

66 *Ibid.*
67 *LC Minutes* (26/5/1998) 461.
68 *LC Minutes* (27/5/1998) 470.
69 *LC Debates* (27/5/1998) 5205- 5206.
70 *LC Minutes* (2/6/1998) 498-499.

June.[71] In support of that motion, the Attorney General argued that deferral of the judge's address was justified as 'the judge could say he needs to be in the precincts of the Court of Appeal during the conduct of his case', which 'would create difficulties in regard to his appearance before this House'. He specified, however, that he did not agree that the House should stay its hand until the appeal had concluded, drawing a distinction between the hearing of the judge's address and the House adjudicating on the judge's conduct.[72] A number of other members took a different view, arguing that the judge's attendance should be deferred until after the court decision,[73] and an amendment to that effect was moved and negatived on division.[74] Ultimately, however, the House agreed to the terms of the motion as moved by the Attorney General.[75]

On 12 June 1998 the Court of Appeal delivered its decision concerning Justice Bruce's challenge to the Conduct Division's report, dismissing the challenge on all grounds.[76]

On 16 June 1998, Justice Bruce attended at the Bar of the House and delivered an address in accordance with the House's resolution.[77] No questions were put during the proceedings as the House's resolution did not provide for questions.[78] After the judge had withdrawn, the Attorney General made a ministerial statement, during which he tabled the transcript of proceedings before the Conduct Division and exhibits tendered in those proceedings, 'so that honourable members of this House might have complete access to the relevant material'.[79] He also addressed a question of procedure, stating that it would not be appropriate to hold a joint sitting of both Houses of Parliament to consider the matter as separate debate and a separate vote by each House is required before any disciplinary action can be taken against a judicial officer.[80]

On 25 June 1998 the Attorney General moved that the House adopt and present an address to the Governor for the removal of Justice Bruce on the ground of incapacity. The motion also proposed that the Assembly be requested to adopt an

71 *LC Minutes* (2/6/1998) 519-521.

72 *LC Debates* (2/6/1998) 5501.

73 *LC Debates* (2/6/1998) 5501 per the Hon Richard Jones, 5502 per the Hon Franca Arena, 5504 per Revd the Hon Fred Nile.

74 *LC Debates* (2/6/1998) 5503.

75 *LC Debates* (2/6/1998) 5506.

76 The grounds of the challenge were that the Conduct Division's expression of opinion was not unanimous, and certain administrative law grounds: *Bruce v Cole* (1998) 45 NSWLR 163 at 168.

77 *LC Minutes* (16/6/1998) 553, 557.

78 *LC Debates* (16/6/1998) 5862 per statement by the President.

79 *LC Debates* (16/6/1998) 5870.

80 *Ibid*. There is no express provision in the *Constitution Act 1902* for a joint sitting to consider removal of a judge. Further, s 5 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* only authorises publication of documents ordered to be printed by a joint sitting convened under ss 5 or 22D of the *Constitution Act 1902* or s 15 of the Commonwealth Constitution, as noted by Twomey, above n 10, p 739.

address in similar terms and that a copy of Justice Bruce's address be transmitted to that House.[81] After a lengthy debate on the motion, members were allowed a conscience vote by their parties. The question was resolved in the negative, by 24 votes to 16.[82]

Later the same day during the adjournment debate, the Hon John Hannaford, Leader of the Opposition in the Council, argued that a motion for the adoption of an address should now be moved in the Assembly and that, if that House took a view contrary to the Council the motion should be returned to the Council for further consideration.[83] The Government decided, however, that it would not be appropriate for such a motion to be moved in the Assembly as it had already failed in the Council. On 22 February 1999, eight months after the debate in the House, Justice Bruce announced his resignation.[84]

Removal of judges in other Australian jurisdictions

In the Commonwealth Parliament, as noted, the procedure for the removal of judges is governed by section 72 of the Commonwealth Constitution. There is no permanent body for receiving or handling complaints about judges. However, as noted previously, in 1986, following inquiries by two Senate select committees, a parliamentary commission of inquiry was established consisting of three former judges to investigate whether Justice Murphy of the High Court had been guilty of misbehaviour under section 72.[85]

In South Australia, Western Australia and Tasmania, judges may be removed on the address of both Houses of Parliament, but the grounds for removal are not specified.[86]

In Queensland, since 2001, an address for removal by Parliament may only seek removal on the ground of misbehaviour or incapacity, which must be proved on the balance of probabilities before a tribunal established for that purpose by legislation.[87] In 1989, before the introduction of the current procedure, a judge of the Supreme Court of Queensland was removed from office on an address of the Legislative Assembly,[88] the only occasion on which a judge has been removed in Australia since federation. In that case, following allegations against the judge, a

81 *LC Minutes* (25/6/1998) 597-598.

82 *LC Debates* (25/6/1998) 6525; *LC Minutes* (25/6/1998) 601-602.

83 *LC Debates* (25/6/1998) 6587-6588.

84 Murphy D, 'Judge jumps before Parliament pushes', *Sydney Morning Herald*, 23 February 1999, p 4.

85 See the account in *Odgers*, 11th edn, pp 530-531.

86 See the *Constitution Act 1934* (SA), ss 74 and 75; the *Constitution Act 1889* (WA), ss 54 and 55; the *Supreme Court (Judges' Independence) Act 1857* (Tas), s 1.

87 *Constitution of Queensland 2001* (Qld), s 61.

88 Woodward A, 'Queensland – Removal of a Supreme Court Judge', *The Parliamentarian*, July 1990, pp 212-215.

statutory commission was established along the lines of the federal parliamentary commission of inquiry of 1986, to advise the Legislative Assembly whether any behaviour of the judge since his appointment warranted removal from office. The commission reported that the judge's removal was warranted on various grounds, none of which related to his conduct as a judge. The judge was later permitted to address the Assembly to show cause why he should not be removed. Following the address, however, the Assembly resolved to adopt an address to the Governor requesting the judge's removal on grounds identified by the commission.

In Victoria, since 2005, judges may only be removed on an address from both Houses on the ground of proved misbehaviour or incapacity.[89] The address must be agreed to by a special majority of three-fifths of the members of the Legislative Council and Legislative Assembly respectively.[90] However, a resolution of either House or both Houses seeking removal is void unless an 'investigating committee' has concluded that facts exist that could amount to proved misbehaviour or incapacity such as to warrant the removal of that office holder from office.[91] The investigating committee is to consist of three members appointed by the Attorney General from a 'judicial panel'.[92]

PARLIAMENTARY SCRUTINY OF JUDICIAL ADMINISTRATION

The Parliament also plays a role in the scrutiny of some aspects of judicial administration.

Rules of court, which are made by a court under the authority of an Act,[93] must be tabled in Parliament[94] and are subject to disallowance by either House.[95] They are also considered by the Legislation Review Committee.[96] Similarly, practice notes issued by or on behalf of a court under the authority of an Act are tabled in Parliament and may be disallowed by either House.[97] Thus, just as Parliament has supervision of and ultimate veto over legislative instruments made by the executive (see Chapter 14, Delegated Legislation), it also has that role with respect to legislative instruments made by the judiciary.

Legislative instruments made by the courts are distinguished from instruments made by the executive which relate to the courts. These include regulations

89 *Constitution Act 1975* (Vic), s 87AAB(1).

90 *Ibid*, ss 87AAA, 87AAB(1).

91 *Ibid*, s 87AAB(2).

92 *Ibid*, ss 87AAC and 87AAD.

93 See, for example, the *Supreme Court Act 1970*, Part 9; and the *District Court 1973*, ss 161 and 171.

94 *Interpretation Act 1987*, ss 21 (definition of 'statutory rule') and 40.

95 *Ibid*, s 41.

96 *Legislation Review Act 1987*, ss 3 and 9.

97 See, for example, the *Supreme Court Act 1970*, s 124(11); the *District Court 1973*, s 161(7); and the *Interpretation Act 1987*, ss 40 and 41.

determining the amount of court fees,[98] which have been the focus of considerable attention in the Council over recent years. Since 1988, of the 70 motions for disallowance of legislative instruments which have been moved in the House, 12 have concerned court fees,[99] although of those only one disallowance motion has been passed.[100]

The annual estimates process includes parliamentary scrutiny of allocations to and by the Attorney General's Department, which has administrative responsibility for the State's courts. Further, the annual report of that Department is tabled in Parliament. The Council does not have a standing order referring annual reports to its committees, although the standing committees have power to inquire into matters in an annual report tabled in the House.[101]

PRODUCTION OF DOCUMENTS CONCERNING THE ADMINISTRATION OF JUSTICE

The production of documents concerning the administration of justice occurs through a special process set out in standing order 53, which differs from the general order for papers procedure as set out in standing order 52, as discussed in Chapter 17 (Documents). Under standing order 53, documents relating to the administration of justice must be requested through an address to the Governor.

The predecessor to standing order 53, former standing order 19, was included in the standing orders of the Council approved by the Governor in 1895. Before adoption of standing order 19 in 1895, there were 135 instances of addresses from the Council to the Governor seeking the production of documents concerning the administration of justice,[102] with eight further instances up to 1899.[103] During the 20th century, however, there were only three such addresses, in 1900,[104] 1903[105] and 1948,[106] and an unsuccessful motion for an address in 1987.[107]

98 See, for example, the *Supreme Court Act 1970*, s 130; and the *District Court 1973*, s 150.

99 *LC Minutes* (30/5/1990) 260-261, (21/4/1993) 98-100, (16/5/1996) 144-145, (23/11/1999) 255-257, (20/11/2003) 448-449.

100 *LC Minutes* (20/11/2003) 448-449 referring to item 18 of Schedule 1[13] to the *District Court Amendment (Court Fees) Regulation 2003*.

101 Resolutions of the House establishing the standing committees commonly include a provision enabling committees to inquire into and report on any annual report relevant to the functions of the committee, which has been laid upon the table of the House.

102 See the *Consolidated Index to the Minutes of Proceedings* (1856-1874) Vol 1, pp 25-27; (1874-1893) Vol 2, pp 20-22; (1894-1913) Vol 3, p 11.

103 See the *Consolidated Index to the Minutes of Proceedings* (1894-1913) Vol 3, pp 11-12.

104 *LC Minutes* (9/8/1900) 68 (concerning the courts and offices in Chancery Square).

105 *LC Minutes* (25/11/1903) 152 (concerning the resignation from the office of President of the Council of the late Sir John Lackey).

106 *LC Minutes* (17/8/1948) 208 (concerning the release of a prisoner after serving part of a commuted sentence).

107 *LC Minutes* (24/3/1987) 705 (concerning a case of child sexual assault).

However, the matter arose again in 2002. In that case, notice of a motion was given under former standing order 18 (now standing order 52) calling for the production of documents concerning matters relating to the conviction and custody of an inmate in a correctional facility. After the notice had been given, the Leader of the Government, the Hon Michael Egan, took a point of order drawing attention to former standing order 19 (now standing order 53). The President reserved her ruling on the matter with a view to taking advice,[108] and subsequently tabled a detailed advice from the Crown Solicitor.[109]

In that advice, the Crown Solicitor considered the origins and rationale for the procedure of obtaining papers by address to the Crown, by reference to a passage from the 4th edition of *Erskine May* (1859). In that passage, it is declared that 'accounts and papers relating to trade, finance, and general or local matters' are obtained by order of the House of Commons, while 'returns of matters connected with the exercise of royal prerogative' are obtained by address. It then stated that, as a general rule:

> [A]ll public departments connected with the collection or management of the revenue, or which are under the control of the Treasury, or are constituted or regulated by statute, may be reached by a direct order from either house of Parliament; but … public officers and departments, subject to her Majesty's secretaries of state, are to receive their orders from the Crown.[110]

Various specific types of documents which must be sought in accordance with each procedure are then described, the administration of justice being among the matters for which an address must be used:

> Thus returns from the Commissioners of Customs and of Inland Revenue, the Post-office, the Board of Trade, and the Treasury, are obtained by order. These include every account that can be rendered of the revenue and expenditure of the country; of commerce and navigation; of salaries and pensions; of general statistics; and of facts connected with the administration of all the revenue departments. Addresses are presented for treaties with foreign powers, for despatches to and from the governors of colonies, and for returns connected with civil government, and the administration of justice.[111]

With regard to these passages, the Crown Solicitor observed that, while the distinction between the two types of procedures is not entirely apparent, it may reflect the distinction between agencies traditionally the direct responsibility of the Sovereign (such as the Chancellor or other Secretaries of State), and agencies which may be seen to have had some independent operation from the Sovereign (such as presumably the Treasury). The Crown Solicitor also advised that the

108 *LC Minutes* (19/3/2002) 69.

109 *LC Minutes* (9/4/2002) 99.

110 Crown Solicitor's Advice, 'Standing order 19: Administration of Justice', 25 March 1948, p 5.

111 *Ibid*.

constitution and operation of courts is a primary function of the Sovereign, which has been protected from interference in various cases.[112]

The Crown Solicitor then turned to consider the scope of the expression 'the administration of justice'. In that regard, he advised that, while the matter does not appear to have been addressed in the context of proceedings in the House, it has been considered by the courts on a number of occasions in relation to the law of contempt and perverting the course of justice. In particular, in *Kalick v The King* in 1920, where the Supreme Court of Canada considered a provision of the Canadian Criminal Code, Brodeur J took the view that:

> '[T]he administration of justice' … should not be restricted to what takes place after an information ha[s] been laid; but it includes the taking of necessary steps to have a person who has committed an offence brought before the proper tribunal, and punished for his offence. It is a very wide term covering the detection, prosecution and punishment of offenders.[113]

Further, in *R v Rogerson*, where the High Court of Australia held that police investigations do not form part of the course of justice, a number of the judges suggested that interference with police investigations could be a perversion of the course of justice, if there is a sufficient relationship between the alleged conduct and pending or possible curial proceedings the course of which it was intended to pervert,[114] or if the interference had a tendency to pervert identifiable judicial proceedings and was committed with that intent.[115]

In light of such authorities the Crown Solicitor concluded his advice in 2002 by indicating that documents have reference to the 'administration of justice' if they contain material touching on or concerning court proceedings or the police investigation leading to the administration of justice. He also advised that documents containing material concerning custody following conviction may have reference to the administration of justice if they have a relationship to the proceedings concerned, and that this will be the case if the material concerns conditions of custody that could be seen as giving effect to, or as closely connected with, the sentence of the court.

Following receipt of this advice and having heard further argument in the House, the President ruled out of order certain paragraphs of the motion relating to the conviction and custody of the inmate, on the basis that they called for the production of documents concerning the administration of justice within the meaning of former standing order 19, that is:

- drug trafficking reports containing material related to prospective court proceedings;

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112 *Ibid.*

113 (1920) 55 SCR 175 at 186, cited in Crown Solicitor's Advice, above n 110, p 6.

114 (1992) 174 CLR 268 at 284, cited in Crown Solicitor's Advice, above n 110, p 6.

115 (1992) 174 CLR 268 at 302-306, cited in Crown Solicitor's Advice, above n 110, pp 7-8.

- the police brief of evidence for a criminal trial;
- records of police interviews for the investigation of a murder;
- police reports concerning an inmate's alleged gang involvement which were related to prospective court proceedings.

Other paragraphs of the motion calling for documents relating to functions at, and visitors to, the correctional facility were allowed to stand as they were not sufficiently connected to the execution of the court's sentence to refer to the administration of justice.[116] In the event, however, the motion was not moved.

The production of documents concerning the administration of justice arose again in 2004 when a motion was moved under standing order 52 calling for the production of 'any advice provided to any minister or government agency by the Solicitor General, Crown Solicitor or the Crown Advocate relating to Operation Auxin', a police operation. The motion was ruled out of order on the basis that it called for papers which related to 'police investigations and prospective court proceedings', and thus fell within the administration of justice under standing order 53.[117]

In 2005 the House adopted and presented an address to the Governor under standing order 53 seeking the production of documents concerning a paroled offender who had been transferred to New South Wales from interstate.[118] The Clerk subsequently tabled correspondence from the Official Secretary to the Governor stating that on the advice of the Executive Council the Governor had declined the request.[119] The grounds for such refusal as reported in the letter concerned the possible impact of disclosure on the future provision of information from other jurisdictions, the possible impact on the victims of the offender in this case, and the possible impact on the likelihood of victims of assault coming forward in future.[120]

Notwithstanding the above two examples, in October and November 2006 the House ordered under standing order 52 the production of reports concerning a riot and subsequent disturbances in the Sydney suburb of Cronulla,[121] and a report on a police operation, 'Operation Retz',[122] without any objection being taken that the documents might concern the administration of justice under standing order 53.

116 *LC Minutes* (10/4/2002) 112; *LC Debates* (10/4/2002) 1194-1195.

117 *LC Minutes* (21/10/2004) 1058.

118 *LC Minutes* (15/9/2005) 1568.

119 *LC Minutes* (11/10/2005) 1611.

120 Correspondence from Brian Davies, Official Secretary to the Governor, to the Clerk of the Parliaments, 4 October 2005.

121 *LC Minutes* (19/10/2006) 282-283, (25/10/2006) 302.

122 *LC Minutes* (23/11/2006) 425.

JUDICIAL AND NON-JUDICIAL FUNCTIONS RELATED TO PARLIAMENT

At the time of the establishment of responsible government in New South Wales in 1856, each judge of the Supreme Court was also a member of the Council. There being no constitutional separation of powers, it was not considered inappropriate for judges to perform non-judicial tasks or offices.[123]

Today, following tradition, the Chief Justice of the Supreme Court holds the office of Lieutenant-Governor in New South Wales, and as such fills the Governor's constitutional role when the Governor is absent from the State.[124] Another non-judicial role fulfilled by judges in New South Wales is participation in the Parliamentary Remuneration Tribunal. Under the *Parliamentary Remuneration Act 1989*, the Tribunal is to consist of a judicial member or retired judicial member of the Industrial Relations Commission, appointed by the President of the Commission on a part-time basis.[125]

The Council has also frequently used retired judges as independent arbiters to review claims of privilege on documents provided to the Council under standing order 52. This is discussed more in Chapter 17 (Documents).

123 As noted in Twomey, above n 10, p 747.

124 *Ibid.*

125 *Parliamentary Remuneration Act 1989*, Sch 2, cl 1(2).