A question of capacity: the case of Justice Bruce

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Australian judges recently had a reminder, if they needed it, that the little-used power to dismiss them is a very real one. Judges of superior courts hold their appointments until retirement age, but parliament and government acting together can dismiss them. Putting aside an unlikely scenario based on old English legislation, the removal of a superior court judge requires a request (or ‘address’) from both houses of parliament to the Governor or the Governor-General, who can then terminate the judge’s commission. The details vary from one jurisdiction to another.¹

For generations, the process for handling complaints about judges was informal, unless it went as far as dismissal or suspension. Chief Justices and Attorneys-General evaluated complaints for themselves and took whatever action they thought appropriate. In 1986, New South Wales made a new departure. One of the functions of the Judicial Commission created by the Judicial Officers Act 1986 (NSW) is the investigation of complaints against judges. If the Commission’s Conduct Division finds a complaint substantiated and forms an opinion that it could justify parliamentary consideration of the judge’s removal from office, the Attorney-General must present its report to parliament.² The Conduct Division is a panel of three judicial officers (one may be retired), appointed by the Commission to deal with a complaint.

Some complaints against judges could come within the investigatory powers of the New South Wales Independent Commission Against Corruption (where so-called ‘corrupt conduct’ is involved). In the Australian Capital Territory, the Attorney-General or the Legislative Assembly can instigate an investigation of a complaint against a judge by a temporary judicial commission appointed for the purpose. Its report is a prerequisite for removal.³ In Queensland, the Criminal Justice Commission has power to investigate official misconduct by judges, but a Commission report by itself is insufficient ground for dismissal.⁴

The New South Wales Judicial Officers Act included protection of judicial tenure as a counterpart to its complaints procedure. Later amendments, approved by referendum in 1995, substituted entrenched provisions in Part 9 of the Constitution Act 1902 (NSW), under which holders of judicial office can be removed only on an address to the Governor by both houses of parliament. The Constitution Act adds that other legislation may set out further requirements; under a complementary provision in the Judicial Officers Act, s 41, a judicial officer cannot be removed without a report from the Conduct Division stating its opinion that the matters referred to in the report could justify parliamentary consideration of removal on
the grounds of proved misbehaviour or incapacity. ‘Judicial officers’ are State judges, magistrates, masters of the Supreme Court and members of the (State) Industrial Relations Commission.

Like s 72(ii) of the Commonwealth Constitution, s 53(2) of the Constitution Act specifies the grounds on which parliament can request removal of a judge: ‘proved misbehaviour or incapacity’. Other jurisdictions, other than the Australian Capital Territory, leave the reasons for removal open, although misbehaviour and incapacity are the only grounds on which parliament is likely to act.

Dismissal has been very rare. Two Supreme Court judges were removed between the opening of fully professional courts in 1824 and the introduction of new judicial tenure in eastern Australia in the 1850s: John Walpole Willis (Supreme Court of New South Wales at Melbourne, 1842), and Algernon Montagu (Van Diemen’s Land, 1847). Another, Benjamin Boothby, followed in South Australia in 1867. The next, and most recent, dismissal was more than a century later (Angelo Vasta, Queensland, 1989), although the ‘Black Wednesday’ public service dismissals in Victoria in 1878 included County Court judges, and there may be other examples of removal from lower courts. No High Court judges have been removed, although an investigation of possible grounds for removal of Lionel Murphy ceased when he became seriously ill and died in office in 1986.

Complaints against Justice Bruce

Between 1995 and 1997, the Judicial Commission and the Chief Judge at Common Law received a number of complaints about Justice Vince Bruce of the New South Wales Supreme Court. Complaints to the Commission cover a range of issues—most are objections to decisions made by judges—but in the case of Justice Bruce the only problem was the time he took to hand down judgments. That problem, though, was plainly serious.

The complaints disclosed a record of delays and broken promises. Justice Bruce had failed to deliver judgments, failed to perform a series of undertakings and failed to respond to a number of requests for information from the Judicial Commission. By April 1998, the Commission’s Conduct Division was considering 29 cases of alleged delay by the judge. He had taken at least twelve months to deliver judgment in sixteen of those cases; the delay in one case was at least 36 months. The Conduct Division found that between at least early 1995 and February 1998, Justice Bruce was unable properly to perform his judicial duties.

But the record of delay was not the whole story. During at least some of his time on the bench—perhaps all of it—Justice Bruce suffered from depression. Precisely when it began and when it deepened was unclear, but the judge was seriously ill by the end of 1997. Treatment greatly improved his condition by February 1998, and in March a psychologist reported that he was no longer clinically depressed.

This recovery took place as the Conduct Division was dealing with the complaints against him. To clear the backlog, the judge proposed a schedule for delivery of outstanding judgments and was excused from some of his sitting commitments. Some new health problems arose. By early May, he had delivered 20 out of the 22 scheduled judgments—but most of them were days or weeks behind the promised dates.

This was the situation that confronted the Conduct Division when it made its final decision in May. The judge had been incapacitated, as all sides agreed. He was now confident of his capacity to work, but some delays persisted.
Two of the three members of the Conduct Division concluded that his incapacity continued despite his recovery from depression, and that the complaints against him could justify parliamentary consideration of his removal from office.\(^5\) They and Justice Bruce’s lawyers drew very different conclusions from his recent work. The Division saw continuing delays; the lawyers said the judge was performing above expectations, when promised dates were adjusted for new causes of delay that were outside his control.\(^6\) None of the members found proven misbehaviour by the judge. Incapacity was the only potential ground of removal upheld.

Justice Bruce thought at first that the Division’s report was unanimous, since all three members signed it. Later he discovered that one member had disagreed, but that the Division thought it should not report a dissenting opinion. Given the importance of the members’ opinions for the judge and for parliament, this was unfortunate, to say the least. After some delay, however, the judge obtained the reasons of the third member of the Division, Dennis Mahoney, former President of the Court of Appeal. He had concluded that the judge was now able to discharge his judicial duties, and that parliamentary consideration of his removal was not justified.\(^7\)

‘Procrastination’ became the most common summary of the Conduct Division’s findings against the judge. In fact, its conclusions did not use the word, but its reasons named procrastination as a ‘significant factor’, and overall its report implied that it was a substantial cause of the judge’s incapacity, as the Court of Appeal pointed out.\(^8\)

The dismissal debate

The Conduct Division’s report placed the judge’s future in the hands of Parliament. The Judicial Officers Act obliged the Attorney-General to table the report (he did so along with a written response from the judge), but it said nothing about what would happen next. Both houses would have had to vote before the judge could be removed, and it was the Legislative Council, where the Attorney-General sat, that took up the case.

On the motion of the Attorney-General, the Council called on Justice Bruce to address it and show cause why he should not be removed; he put his case to the assembled members on 16 June. In the mean time, he launched an unsuccessful Court of Appeal challenge to the Conduct Division’s report\(^9\) and a high-profile defence in the media, which had been reporting since at least October 1996 on the so-called log-jam in his court.

The gist of the judge’s defence was that his delays—the only complaint against him—were caused wholly by his health problems, and mainly by his depression.

I believe that my removal would send a message to the people of Australia that if you have an illness from which you recover, especially an illness about which there is widespread misinformation and public ignorance, then you are unemployable.\(^10\)

The final phase came nine days later, when, ‘in pursuance of public duty’, the Attorney-General moved a motion in the Legislative Council calling for the judge’s removal.\(^11\) He did so, he said, with ‘reluctance and sadness’, in order to allow the house to ‘formulate an opinion’ on the Conduct Division’s report. Justice Bruce’s statement about depression was ‘both wrong and irrelevant’, he said.\(^12\) ‘The issue is whether there is incapacity due to procrastination.’\(^13\) The Conduct Division had found that the delays continued; its report emphasised the hardship this caused for litigants. He concluded a measured and impressive review of the case by saying that the judge should be dismissed. Some members agreed, including the leader of the opposition in the upper house, who, as Attorney-General, had
recommended Justice Bruce’s appointment in 1994. But, in a free vote, the motion failed, by a majority of 24 to 16.

If delays caused by depression and other health problems were left out of account, now that the judge had recovered, was his record bad enough to justify removal? Lawyers and even other judges gave members of the Legislative Council details of delays in other cases. According to a petition to parliament signed by some three hundred barristers, dismissal

—is out of all proportion to the complaints made against His Honour,

—pays insufficient regard to His Honour’s efforts to remedy his delays, his undoubted integrity and goodwill and his desire to continue to serve the community—

—having regard to the delays in delivering judgments which have been and are experienced with other judges, is unfairly discriminatory…

For some members of the Legislative Council, the judge’s failings were not serious enough. ‘I assumed “incapacity” would relate to insanity, complete mental inability to operate as a judge or physical collapse rendering one unable to sit as a judge in a court’, said Fred Nile. Others wanted stronger evidence.

For myself, sufficient questions have been raised merely by the existence of a dissent report in which honourable members are presented with a 2:1 majority on the matter, let alone the fact that it was produced by someone of the eminence of Justice Mahoney.

MPs knew that among Justice Bruce’s recently reserved judgments were the so-called ‘Nutrasweet’ cases involving the ‘Copper 7’ IUD, some of the most complex product liability litigation heard in an Australian court. Dismissal would mean a new trial, but if the judge’s problems continued, judgment might be badly delayed.

Hanging over the debate was a distinct uneasiness about sitting in judgement on a judge at all. Some members preferred to see themselves more as a court of appeal, inclined to accept the findings of the Judicial Commission unless they were manifestly wrong. Most, though, accepted the Attorney-General’s description of them as a jury, bound to make up their own minds about the grounds for removal. This is consistent with the scheme of the Judicial Officers Act. The Conduct Division’s report informs Parliament, which makes a judgement with the benefit of its opinion, but the final decision is Parliament’s, not the Division’s.

This may not be the last time that judges pick over Justice Bruce’s record, although he could at least hope that he will be spared minute public examination of his state of health in future. Delay in delivering judgment can lead an appeal court to look with ‘especial care’ at findings of fact made by a trial judge. This principle is an open invitation to raise the question of delay in any future appeals against Justice Bruce’s decisions.

Conclusion

Some might have expected the proceedings against Justice Bruce to revive the controversy that surrounded the Judicial Officers Act when it was introduced. Then and later, judges and others directed some strong criticisms at the Act. Yet the Act itself received only glancing attention at the time of the Conduct Division report and the parliamentary debate. Those who saw wider causes or consequences tended to look instead to the administration of the courts. After the vote in the Legislative Council, the Attorney-General announced that the Chief Justice of the Supreme Court was reviewing court practice in relation to reserved judgments.
Perhaps this reflects a sense that the system worked well enough. Serious problems arose for litigants; the Conduct Division investigated; the judge argued that he had remedied the problems; and in the end one house of Parliament, at least, concluded that dismissal was not justified. The parliamentary debate was fair and cogent, notwithstanding the occasional spat over references to the Council’s last dismissal motion—the unsuccessful attempt to expel one of its own members, Franca Arena. None of the speakers took their decision lightly. The case was largely free from the problems of definition that bedevil removal on grounds of misconduct.

There is something inexorable about the Judicial Officers Act system. The Judicial Commission receives an increasing number of complaints (138 in 1996–7), although the number classified as ‘serious’ remains very small (none in 1996–7). Some investigations have led to a resignation rather than a final report, but if the Commission upholds a ‘serious’ complaint, a report to Parliament must follow, and a debate on dismissal is then virtually inevitable. This follows even though a ‘serious’ complaint is merely one that could justify parliamentary consideration of removal. The Conduct Division need not report that the complaint does justify removal. Following the statutory reporting formula, it did not do so in Justice Bruce’s case, although it did conclude unconditionally that incapacity to perform judicial duties had been proved. As the court system grows and complaints rise, New South Wales judges and MPs have reason to wonder when parliament will next have to debate a motion for dismissal.

1 Commonwealth Constitution s 72(ii), Constitution Act 1867 (Qld) s 16, Constitution Act 1934 (SA) s 75, Supreme Court (Judges’ Independence) Act 1857 (Tas) s 1, Constitution Act 1975 (Vic) s 77(1), Constitution Act 1889 (WA) s 55; Waugh, ‘The Victorian Government and the Jurisdiction of the Supreme Court’ (1996) 19 UNSWLJ 409, 412–13. Thanks to s 7(2) of the Australia Act 1986 (Cth & UK), powers given to the Queen by some of these provisions can be exercised only by the Governor, unless the Queen is visiting the State. Similar provisions apply to judges of District Courts and the Victorian County Court.

2 Judicial Officers Act 1986 (NSW) s 28
3 Judicial Commissions Act 1994 (ACT) s 5, 16, 18
4 Criminal Justice Act 1989 (Qld) s 28, 29
5 Judicial Commission of New South Wales, Conduct Division, Report of the Conduct Division to the Governor regarding complaints against the Honourable Justice Vince Bruce, 15 May 1998, p 48
6 Holman Webb, Solicitors, Judicial Commission, Conduct Division, Report Regarding the Honourable Justice Vince Bruce, Response, 26 May 1998
7 Judicial Commission of New South Wales, Conduct Division, Reasons of the Honourable D L Mahoney AO QC re: The Honourable Justice Bruce, 14 May 1998, p 6
8 Judicial Commission, op cit n 5, p 46; Bruce v Cole [1998] NSWSC 260, per Spigelman CJ, Mason P, Sheller and Powell JJA conc
9 Bruce v Cole [1998] NSWSC 260
10 New South Wales, Parliamentary Debates, LC, 16 June 1998, p 5863
12 Ibid, p 6531
13 Ibid, p 6530
14 Eg ibid, p 6550
15 Ibid, p 6552
16 Ibid, p 6540
17 Corbett, ibid, 27 May 1998, p 5208
18 Eg Hannaford, ibid, 25 June 1998, p 6539; Moppett, ibid, p 6582
19 Ibid, p 6525
20 Goose v Wilson Sandford and Co, unreported, UK Court of Appeal (Civil Division), Peter Gibson, Brooke, Mummery LJJ, 13 February 1998, para 113
22 Damien Murphy, ‘Supreme Court shake-up after judge survives vote’, *Sydney Morning Herald*, 27 June 1998, p 7
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