THE MURPHY PAPERS: THE PARLIAMENTARY COMMISSION OF INQUIRY

THE HONOURABLE STEPHEN CHARLES, AO, QC

It is indeed an honour to be asked to address this conference, and particularly having regard to the purposes of the Samuel Griffith Society and its defence of the 'great virtues of the present *Constitution*'.

After Justice Lionel Murphy was acquitted at his second trial, the public comment about the Judge's actions did not cease. It is necessary to return briefly to the second Senate Committee which on 6 September 1984 reconsidered the Briese allegations. Four senators, Michael Tate, Nick Bolkus, Austin Lewis and Janine Haines were assisted by two Commissioners, both former Judges, John Wickham from Perth and Xavier Connor from the Australian Capital Territory and Melbourne.[1]

After hearing the evidence of Clarrie Briese and others, Commissioner Wickham took the view that the Briese allegation of an attempt to pervert the course of justice was proved beyond a reasonable doubt. Commissioner Connor said that no such proof was possible, and that if 'misbehaviour' in section 72 of the *Constitution* meant criminality, Parliament could not find Justice Murphy guilty of 'misbehaviour'. But Connor observed that:

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[1] The report of the second committee was quoted in a paper given by Justice Roslyn Atkinson of the Queensland Supreme Court, entitled *The Chief Justice and Mr Justice Murphy: Leadership in a Time of Crisis.* The paper is published in the papers of Emmanuel College, University of Queensland, No. 5, June 2008.

> In four years as a bench clerk to Victorian magistrates, in 23 years at the Victorian Bar, in 10 years on the Supreme Court of the ACT, and in six years on the Federal Court of Australia I have not encountered anything comparable (with Murphy's behaviour). It would be unfortunate if Parliament or the public were to gain the impression that it was accepted or normal judicial behaviour.[2]

He said the Judge was 'lending the prestige of his high office to an attempt to gain on behalf of an old friend some information which neither he nor his friend should have had'.

These views are understood to have caused Senator Tate to change his previous view in the first Senate Committee. The result was that Senators Tate, Lewis and Haines and the two Commissioners found that on the balance of probabilities, Justice Murphy could have been guilty of behaviour serious enough to warrant his removal from the High Court. As Professor Blackshield, and one of Murphy's strongest supporters, put it later:

> four of the six participants in the second Senate Committee had found that Murphy could not be guilty of any criminal offence. But five of the six participants had found that he could be guilty of 'misbehaviour' in the constitutional sense: that is that it would be possible for Parliament to take that view.[3]

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2 Ibid.

3 Professor A R Blackshield is the author of the chapter 'The Murphy Affair', contained in J Scutt (ed), *Lionel Murphy - A Radical Judge*, (McCulloch Publishing, 1987), 248.

During the Judge's second trial in April 1985, Justice Murphy did not give sworn evidence, but made an unsworn statement from the floor of the Court. The Judge said that he had never suggested that Mr Briese speak to the magistrate who was hearing Morgan Ryan's case and denied that he had said to Mr Briese: 'What about my little mate?'. He said that he had handled cases for Ryan's firm when he was at the Bar, but he was not indebted to him and they were not close friends.[4]

The Judge's decision not to give evidence on oath, but to speak to the jury from the dock was indeed then his right. But for a High Court judge to do so caused, as Nicholas Cowdery has said, astonishment and outrage among many lawyers, and it was widely assumed that the Judge could not return to the bench. The Judge was, however, acting on legal advice.

Freehills were his solicitors, and Graham Kelly, then a partner, had said to the Judge over lunch:

> I'm telling you absolutely straight, Judge. There are three critical pieces of advice. Mine is: 'Do not give evidence'. Peter's [Peter Perry] is: 'Do not call character witnesses'. And Clarrie's [Sir Clarence Harders] is 'Do not call your wife because she gave evidence in the first trial'. If you don't do those three things, we'll win this case. If you do any one of those, we'll lose.[5]

Such legal advice would be taken by many as a clear admission of guilt, that the Judge's evidence would be destroyed by the prosecutor's cross-examination. And it was thought by many

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4 Justice Murphy's unsworn statement was reported in *The Australian*, 22 April 1986, by Jennifer Falvey.

5 *The History of Freehills*, published 2011, 269.

that Murphy could not, after making an unsworn statement in his defence, resume his place on the bench.

There were other allegations about improper or inappropriate behaviour of the Judge that continued to circulate in the press. There was criticism of the Judge for not calling evidence of good character at the second trial. There were claims that other Judges on the High Court would refuse to sit with Justice Murphy, but he resumed his seat on the bench. In light of the continuing criticisms, the Federal Government decided to set up the Parliamentary Commission to inquire and advise the Parliament whether any conduct of Justice Murphy had been such as to amount in its opinion to proved-misbehaviour within the meaning of section 72 of the *Constitution*.

Section 72(ii) provides that Justices of the High Court shall not be removed except by the Governor-General in Council on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of 'proved misbehaviour or incapacity'. In 1986 there was little or no direct authority on the meaning of these words. The leading authority on parliamentary government at the time was Dr Alpheus Todd, who wrote:

> Before entering upon an examination of the Parliamentary method of procedure for the removal of a judge under the Act of Settlement, it will be necessary to inquire into the precise legal effect of their tenure of office "during good behaviour", and the remedy already existing, and which may be resorted to by the Crown, in the event of misbehaviour on the part of those who hold office by this tenure.
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> The legal effect of the grant of an office during good behaviour is the creation of an estate for life in the

> office. Such an estate is terminable only by the grantee's incapacity from mental or bodily infirmity, or by his breach of good behaviour. But like any other condition or estate, it may be forfeited by a breach of the condition annexed to it. That is to say, by misbehaviour. Behaviour means behaviour in the grantee's official capacity. This behaviour includes, first, the improper exercise of judicial functions; second, wilful neglect of duty, or non-attendance; and, third, a conviction for any infamous offence, by which, although not connected with the duties of his office, the offender is rendered unfit to exercise any office or public franchise. In the case of official misconduct, the decision of the question whether there be misbehaviour rests with the grantor, subject of course, to any proceedings on the part of the removed officer. In the case of misconduct outside the duties of his office, the misbehaviour must be established by a previous conviction by a Jury.[6]

Todd's statement had been in substance repeated and approved in many textbooks (e.g., all editions of Halsbury's *Laws of England*) and Quick and Garran, the principal text on the *Australian Constitution*, also cited and approved it.[7] Such an interpretation was based on the necessity, under the separation of powers, for protecting judges from attack by Parliament.

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6 Alpheus Todd, *Parliamentary Government in England* (1892) 1913.

7 J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 731-3.

The Judge's counsel, David Bennett, QC, had given advice in support of the narrowest view of 'proved-misbehaviour' to the effect that private misconduct falling short of a criminal offence could never amount to 'misbehaviour' and that in addition it could not amount to *proved*-misbehaviour in the absence of a criminal conviction in a court.

The first Senate Committee had also been advised by W. Pincus, QC in terms which supported giving each House of Parliament freedom to decide what private misconduct constituted 'misbehaviour'. And the Attorney-General had been advised by the Solicitor-General, Dr Gavan Griffith, QC that an anterior conviction would suffice, but in addition Parliament could itself find by proof in an appropriate manner, in proceedings where the Judge had been given a proper opportunity to defend himself, that there had been misbehaviour.[8]

Parliament then passed the *Parliamentary Commission of Inquiry Act 1986* (Cth) which set up the Commission. The Act required the Commission to conduct its hearings in private and to report by 30 September 1986.

The Act required the Commission to consider only specific allegations made in precise terms. The Commission was required not to consider the issues dealt with in the trials leading to the acquittal of Justice Murphy and his guilt or innocence of those charges, or whether the conduct to which those charges related was such as to constitute proved-misbehaviour.

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[8] These three opinions were each referred to in a Cabinet-in-Confidence Minute, Appendix 5, sent by the Attorney-General to Cabinet, on 31 August 1984.

The Judge was not to be required to give evidence on a matter unless the Commission had before it evidence of misbehaviour sufficient to require an answer, and the Commission had given the Judge particulars in writing of that evidence. The Commission was given power to summon witnesses, and issue search warrants.

Three Commissioners were appointed, all retired judges: the Honourable Sir George Lush, the Honourable Sir Richard Blackburn and the Honourable Andrew Wells, QC. I was briefed to assist the Commission with Mark Weinberg and Alan Robertson, and Counsel for the Judge were Roger Gyles, QC, Marcus Einfeld, QC, and Dr Annabelle Bennett.[9]

Justice Murphy immediately applied to the High Court seeking an interlocutory injunction to prevent the Commission sitting on the grounds that it did not authorise any investigation to be made of him, and that Mr Wells was disqualified from taking part in the inquiry.[10]

Shortly after *The Age* tapes had been published, the Chairman of the Australian Law Reform Commission, Justice Michael Kirby, had been reported as saying that the discussion between the solicitor and Justice Murphy about the appointment of someone to a high position in the NSW public service and his agreement to lobby the politician who would make the appointment were 'the sort of thing that goes on all the time in judicial circles' and that the intervention of judges in such matters was 'part of the nether world of the legal arena'.

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9 All counsel were later appointed to the Bench, either the Court of Appeal of Victoria, or the Federal Court of Australia.

10 The events that followed are all recorded in the decision of the High Court: *Murphy v Lush* (1986) 65 ALR 651.

Justice Wells was reported to have said in court during an unconnected trial the following day that the article not only imputed corruption to judges but implied that they were from time to time willing to act in flagrant defiance of constitutional principles governing the separation of powers. Justice Murphy's counsel claimed that Mr Wells, now retired, would be unable to bring an impartial and unprejudiced mind to the inquiry.

The High Court immediately on 27 June 1986 rejected the application on this ground. The Court said:

> The remarks made by Mr Wells were made long before the Inquiry was set up and were not made in reference to the plaintiff or his conduct but to rebut the assertions attributed by the writer of the article in the newspaper to Mr Justice Kirby. We, of course, do not know whether Mr Justice Kirby did make remarks to that effect.
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> However, in our experience, it would not be right to say that judges commonly intervene to influence the making of public service appointments or that there is a practice inherited from England whereby judges descend into some shady nether world of dubious behaviour. The remarks of Mr Wells amount to no more than a denial that judges, to his knowledge, engage in conduct of the kind allegedly described by Mr Justice Kirby, conduct of a kind which Mr Wells regarded, understandably, as contrary to accepted standards of judicial behaviour. It would be preposterous to hold that the expression by a judge of generally held views as to the standards of judicial propriety should be thought to disqualify him from acting in a judicial capacity.[11]

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11 *Murphy v Lush* (1986) 65 ALR 651 at 655.

In answer to the claim that the *Parliamentary Commission of Inquiry Act 1986* (Cth) did not authorise investigations to be made, the Court said:

> The mere conduct of private inquiries, in what we must assume would be a responsible manner, is not likely to cause any real damage to the plaintiff's reputation. Further no one requires special authority at law simply to make inquiries. There is no suggestion that the Commission would be considering the holding of a public hearing before this court is asked finally to determine the issues.[12]

The brief given to the three counsel assisting in late June 1986 was unusual, if not unique. We were told that the *Parliamentary Commission of Inquiry Act 1986* (Cth) had been passed, and the Commissioners appointed. We were given very little information other than press cuttings, since we were well aware of the proceedings in the two Senate Committees, and the two trials which Justice Murphy had faced. We were aware that various allegations and rumours surrounded Justice Murphy. We were told that it was our function to investigate, and to inquire into this material. I was quoted in the judgment of the High Court as having said to the Commission in opening that:

> All we are doing is looking at a very substantial volume of material which has been put to us and then sifting or filtering that material, where it is not clear to us whether an allegation is made at all or where it is imprecise or where it has, let us say, not a date attached to it, we are then making inquiries or propose rather to make inquiries of persons outside for the purpose of seeing if that allegation has definition.[13]

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12 Ibid.

13 Ibid 653.

Sir George Lush said, on the following day:

> The Commission's view is that it is entitled to gather information, examine it and conduct investigations, if necessary with the assistance of investigators, including members of the police forces if made available ... to formulate the specific allegations which emerge from materials received.[14]

We then set to work, and by 21 July 1986 we had drafted 15 specific allegations of conduct by Justice Murphy for the Commission to consider. Since the Judge had been acquitted on the charges on which he had been tried, and no other convictions existed, the question immediately arose whether the facts alleged in these documents were capable of constituting misbehaviour. The Commission heard argument on this question for 3 days at the end of July 1986.

Counsel for the Judge argued that the word 'misbehaviour' in section 72 extended only to conduct falling within either or both of two categories: first, misconduct in office, as that expression was understood at common law; and secondly, conduct not pertaining to the holder's office amounting to an infamous crime of which the holder had been convicted. They argued that since none of the allegations asserted a conviction, they could only be supported if the facts asserted amounted to misconduct in office. They argued that all or at least most of the documents would be found to fail to allege facts capable of constituting misbehaviour.

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14 Ibid.

In response we argued that section 72 of the *Constitution* had presented to the Australian nation a provision that was – and was intended to be – a new creature, that the authorities relied upon by counsel for the Judge did not make good the proposition they were said to establish, and that even if they did, the *Constitution* had, by necessary implication, rejected it, and that the word 'misbehaviour' should receive its natural meaning in the legislative and constitutional context in which it appeared.

Each of the three Commissioners' judgments were reported.[15] Each of them rejected the arguments pressed by Justice Murphy's counsel. Sir George Lush said that:

> It is for Parliament to decide what is misbehaviour, a decision which will fall to be made in the light of contemporary values. The decision will involve a concept of what, again in the light of contemporary values are the standards to be expected of the judges of the High Court and other courts created under the Constitution. The present state of Australian jurisprudence suggests that if a matter were to be raised in addresses against a judge which was not on any view capable of being misbehaviour calling for removal, the High Court would have power to intervene if asked to do so.[16]

Sir Richard Blackburn said that:

> The material available for resolving the problem of construction suggests that 'proved misbehaviour' means such conduct, whether criminal or not and whether or not displayed in the actual exercise of

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15 Parliamentary Commission of Inquiry, 'Re The Honourable Mr Justice Murphy - Ruling on Meaning of Misbehaviour' (1986) 2 *Australian Bar Review* 203.

16 Ibid 210.

> judicial functions, as, being morally wrong, demonstrates the unfitness for office of the judge in question.[17]

The Honourable Andrew Wells, QC said:

> The issue raised by section 72 would thus appear to pose questions of fact and degree. Somewhere in the gamut of judicial misconduct or impropriety, a High Court judge's conduct, outside the exercise of his judicial function, that displays unfitness to discharge the duties of his high office can no longer be condoned, and becomes misbehaviour so clear and serious that the judge guilty of it can no longer be trusted to do his duty. What he has done then will have destroyed public confidence in his judicial character, and hence in the guarantee that that character should give that he will do the duty expected of him by the Constitution. At that point section 72 operates.[18]

There were 15 charges that had either been served on Justice Murphy or were prepared at the time the Commission was adjourned.[19] We had considered and rejected many other allegations. Those remaining, included:

1. In December 1979 Lionel Murphy attempted to bribe Commonwealth police officer Donald William Thomas to provide covert information relating to or acquired by the Australian Federal Police ('AFP') to unauthorised persons within the Australian Labor Party.

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17 Ibid 221.

18 Ibid 230.

19 Each of the charges were set out in detail in *The Australian*, Friday 15 September 2017, at page 6.

2. Between April 1980 and July 1981, Murphy agreed with solicitor Morgan Ryan, his long-time friend, to make inquiries with a view to determining whether two AFP officers could be bribed or influenced to act contrary to their duty as police officers.
3. During Murphy's trial in 1985 he knowingly gave false testimony regarding the effort he had made on behalf of Ryan regarding his criminal proceedings.
4. In 1979, Murphy agreed with Ryan to speak to NSW premier Neville Wran for the purpose of procuring the appointment of Wadim Jegorow to the position of deputy chairman of the Ethnic Affairs Commission of New South Wales. He subsequently spoke to Wran and told Ryan that Jegorow would be appointed. Alleged the conduct amounted to misbehaviour by entering into an agreement to influence the making of a public service appointment and actually intervening to achieve that purpose.
5. In 1982, Murphy asked District Court Chief Judge James Staunton to arrange an early trial for Ryan on certain charges pending in the District Court. By doing so, it is alleged, Murphy abused his office as a Justice of the High Court and further, or in the alternative, improperly attempted to influence a judicial officer in the execution of his duties.
6. In June 1985, Murphy while on trial deliberately understated the frequency of his contacts with Ryan and misstated the nature of their association. Alleged this amounted to knowingly giving false testimony and constituted conduct contrary to accepted standards of judicial behaviour.

7. In January 1980, Murphy agreed with Ryan that Murphy would make, or cause to be made, representations on behalf of interests associated with Abe Saffron to persons in a position to influence the awarding of a contract for the remodelling of Sydney's railway station. Murphy did so while knowing Saffron to be a person of ill-repute.

Proof of these matters would have involved calling evidence from Donald Thomas, Morgan Ryan, Abe Saffron, Neville Wran, and Judge James Staunton, as well as Clarrie Briese. We would have had to prove the statements made by Justice Murphy in his trials, and any lack of truth on which we relied.

Would the Commission have found the Judge guilty on any of the charges laid? All involved in the Commission were bound to secrecy by the terms of the legislation which terminated the Commission. It is only the Parliament's recent decision to release the papers of the Commission, including the 15 draft charges, which makes comment on them now possible.

The charges stand as mere allegations, of matters occurring well over 30 years ago. But there were, I think, reasonable prospects of at least some of the charges being made good by evidence. The Judge's counsel would certainly have alleged that charges 3 and 6 involved issues dealt with in the Judge's two trials, but we thought there were proper grounds for pursuing the charges.

If anyone were to describe any of the charges as the sort of thing that goes on all the time in judicial circles (charges 4, 5 and 7), the High Court had already made clear its attitude to such a proposition. If an attempt had been made to ask that Court to hold that the charges were not capable of leading to removal, I think that application would have failed.

The question remains what would have happened if the Commission had reported to Parliament that in its view any of the charges had been proved. Although two of the Commissioners stated their view[20] that the High Court retained a role to intervene to prevent Parliament from removing a judge if the grounds for action were not on any view capable of amounting to misbehaviour, the real question was whether Parliament would have been persuaded to act. The reality was that both Houses of Parliament were then controlled by the Labor Party, and many in that party were furious that the Government had set up the Parliamentary Commission. All that the Commission was entitled to do, under section 5(1) of the *Parliamentary Commission of Inquiry Act 1986* (Cth), was to report to Parliament its view of whether any conduct of the Judge had been such, in its opinion, as to amount to proved-misbehaviour within the meaning of section 72.

After the hearing of argument in the Commission but before the Commissioners' reasons were handed down, Justice Murphy resumed sitting as a judge. However, his counsel informed the Commission that the Judge had an advanced state of cancer in its secondary stages, that there was no cure and no treatment. The hearings of the Commission were then adjourned *sine die*. The Government supported the Judge's right to sit and passed legislation which repealed the Act setting up the Commission of Inquiry and effectively terminated the Commission.[21]

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20 Parliamentary Commission of Inquiry, above n 15, 210, 249.

21 *The Parliamentary Commission of Inquiry (Repeal) Act 1986* (Cth).

As already mentioned, the views of the Commissioners were published in the Australian Bar Review.[22] Since then, those views were adopted by the Parliamentary Judges' Commission of Inquiry conducted in Queensland into the behaviour of Justice Vasta and Judge Pratt which was presided over by Sir Harry Gibbs in 1988 and 1989.[23] They were also considered, and mentioned with approval, by the Honourable Peter Heerey, QC in his report to Parliament concerning the conduct of Vice-President Lawler of the Fair Work Commission.

They also received approving comment from Odgers' Australian Senate Practice which, in a lengthy discussion of the removal of judges under section 72 of the *Constitution*, stated that British and American authorities accept the wider view of the meaning of 'misbehaviour'.[24]

The Parliamentary Commission was terminated before any evidence had been called. Professor Blackshield characterised the charges as containing 'no surprises or fresh revelations' and the thrust of his comments is that the 15 charges would not have led to any action by the Parliament.[25] The fact remains that the comments of the High Court on the application to remove Commissioner Wells for bias show that the six judges dealing with that application plainly shared Mr Wells' views on corruption and the standards of judicial propriety.[26]

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22 Parliamentary Commission of Inquiry, above n 15.

23 Queensland Parliamentary Judges Commission of Inquiry, *First Report of the Parliamentary Judges Commission of Inquiry*, Sir Harry Gibbs, Sir George Lush, and the Hon. Michael Helsham (1989) 910.

24 H Evans and R Laing (ed), *Odgers' Australian Senate Practice* (Department of the Senate, 13th ed, 2012) Ch 20.

25 See Blackshield, above n 3, 256.

26 *Murphy v Lush* (1986) 65 ALR 651 at 655.

After the charges were delivered to the Judge's counsel, lengthy cross-examination of some of the potential witnesses was forecast. The Commission had been required by the Act to conduct its inquiry as quickly as possible and to report by 30 September 1986, unless the date was extended by Parliament. The Commissioners would probably have been forced to fix time limits for cross-examination, which may have led to claims of unfair treatment, and a denial of natural justice.

So far as I am aware, the Commissioners' reasons have not been considered by any appellate court or the High Court. The Judge's counsel made application to the High Court seeking to challenge the validity of the charges, but the court refused to deal with the application and referred it back immediately to the Commission without commenting on the allegations.

The absence of later appellate court consideration leaves untested the Commissioners' reasons relating to the meaning of the words 'misbehaviour' and 'proven' in section 72. Provisions such as section 72 were introduced by the *Act of Settlement* in 1701 as part of the Glorious Revolution, together with the *Bill of Rights* in 1689. The fact that Alpheus Todd's approach to provisions such as section 72 had been almost universally accepted by text writers before the Commissioners reached a different view leaves it as a possibility that the High Court might now disagree with the Commissioners' conclusions.

Another undecided question is what role the High Court can play in the removal of a state or federal judge. Two of the Commissioners thought that the High Court would have jurisdiction to consider the lawfulness of a decision by Parliament to remove a High Court judge.[27] On the other hand,

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[27] Parliamentary Commission of Inquiry, above n 15, 210, 249.

the Supreme Court of the United States in 1993 took the view that the Court did not have such jurisdiction.[28]

The procedure for removal of a federal judge is now covered by the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth).

[28] *Nixon v United States* 506 US 224 (1993).