Who else can judge the judges?: The role of Parliament in the removal of judicial officers from judicial office

Until the end of the 17th century, judges in England were appointed, suspended and dismissed at the pleasure of the Crown.[1] Using these powers, a number of judges were removed by the Stuart monarchs.[2] The *Act of Settlement 1701* established the notion of judicial tenure, whereby judges held office 'during good behaviour' and could only be removed by the Crown on an address by both Houses of Parliament.[3]

Currently in NSW, judicial officers[4] may be removed from office under the provisions of the *Constitution Act 1902* and the *Judicial Officers Act 1986*, by a resolution of both Houses of Parliament, that an address requesting the judicial officer's removal be adopted and presented to the Governor. The removal of judicial officers from office following such an address has rarely occurred in Australia.

However, during the 55th Parliament of NSW, the Legislative Council has considered the removal of a judicial officer on two separate occasions: the first relating to Magistrate Jennifer Betts and the second relating to Magistrate Brian Maloney. Whilst the complaints against these magistrates differed in substance, the examination of each of these matters by the Legislative Council shares several similarities, most notably the role of mental illness as a factor influencing the performance of both magistrates.

The proceedings involving Magistrate Betts and Maloney have stirred questions about the role of parliament in the removal of judicial officers from office. These questions relate to the reasons for which a judicial officer can be removed from office, and the

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[1] J. Crawford and B. Opeskin (2004), *Australian Courts of Law*, Fourth Edition, Oxford University Press, p 65.

[2] Lord Justice Brooke (1997), '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, p 97.
King Charles II dismissed 11 judges in 11 years, while King James II dismissed 12 judges in three years.

[3] Crawford and Opeskin, p 65.

[4] The *Judicial Officers Act 1986* (NSW) defines 'judicial officer' to mean a Judge or associate Judge of the Supreme Court; a member (including a judicial member) of the Industrial Relations Commission; a Judge of the Land and Environment Court; a Judge of the District Court; the President of the Children's Court; a Magistrate; or the President of the Administrative Decisions Tribunal.

potential implications for the judicial system created by the involvement of parliament in the removal process. The particular cases of Magistrates Betts and Maloney have also generated questions about community attitudes towards mental illness, and the ability of judicial officers with mental illness to perform their judicial function in an impartial and independent way. These questions and concerns provide a timely juncture to examine the role of the Houses of Parliament in the removal process.

This paper begins with a brief overview of the current provisions for the removal of judicial officers from judicial office in the various Australian jurisdictions, before outlining the provisions in NSW and the particular circumstances of the matters concerning Magistrates Betts and Maloney. The paper then explores several issues relating to the role of the Parliament in the removal process, including the lack of clarity over the meaning of 'misbehaviour' and 'incapacity'. The evolving perception of mental illness, as well as the potential implications for judicial independence and public confidence in the judicial system generated by the involvement of parliament in the removal mechanism, are also discussed. Two options for reform of the current regime are proposed, that have regard for the sovereignty of the judiciary but also preserve the powers of the Parliament.

Current Australian provisions for the removal of judicial officers

Section 72 of the *Constitution Act 1900* (Cth) provides that Justices of the High Court and of the other courts created by the Parliament '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'.[5]

Since 2005, judicial officers in Victoria can be removed from office, on the grounds of proved misbehaviour or incapacity, following an address by both Houses of Parliament. The address must be agreed to by a special majority of three-fifths of the members of both Houses. Further, an 'investigating committee', comprised of three members appointed by the Attorney General, must have concluded that facts exist so as to prove misbehaviour or incapacity as to warrant removal from office.[6]

[5] *Constitution Act 1900* (Cth) s 72 (ii).
[6] *Constitution Act 1975* (Vic) ss 87AAb(1) and (2), s 87AAA, s 87AAC and s 87 AAD.

In South Australia, Tasmania and Western Australia, judicial officers may be removed from office following an address by both Houses of Parliament. However, the grounds for removal are not specified in the relevant legislation.[7]

In Queensland, a judicial officer may be removed after an address by the Legislative Assembly on the grounds of misbehaviour or incapacity, which must have been proved on the balance of probabilities before a tribunal established for that purpose.[8] Prior to the introduction of this procedure, a judicial officer could be removed by the Governor following an address by the Legislative Assembly.[9] This occurred in 1989 when Justice Angelo Vasta of the Queensland Supreme Court was removed from office.

In this case, a statutory commission was established to advise the Legislative Assembly if any behaviour by Justice Vasta warranted his removal from office. The report of the statutory commission presented adverse findings against Justice Vasta, advising that 'matters … viewed in conjunction with one another, warrant his removal from office as a judge of the Supreme Court'.[10]

Justice Vasta was permitted to address the Legislative Assembly at the Bar of the House to show cause why he should not be removed.[11] The Assembly subsequently agreed to a motion requesting that the Governor remove Justice Vasta from office on the grounds of misbehaviour.[12] On 8 June 1989, the Queensland Government Gazette published a notice that Mr Vasta's appointment had been cancelled.[13]

This is the only occasion since Federation that a judicial officer has been removed from office following an address by any parliament in Australia.[14]

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[7] See the *Constitution Act 1934* (SA) ss 74 and 75; the *Supreme Court (Judges' Independence) Act* 1857(Tas) s 1; and the *Constitution Act 1889* (WA) ss 54 and 55.
[8] *Constitution of Queensland 2001* (Qld) s 61. The Queensland Parliament is a unicameral parliament, consisting only of the Legislative Assembly.
[9] L. Lovelock and J. Evans (2008), *New South Wales Legislative Council Practice*, The Federation Press, pp 589-590.
[10] *First Report of the Parliamentary Judges Commission of Inquiry,* 12 May 1989, p 163.
[11] A. Woodward (1990), 'Queensland – Removal of a Supreme Court Judge', *The Parliamentarian*, July 1990, pp 214-215.
[12] *Queensland Parliamentary Debates*, Vol. No. 16 of 1988-89, pp 5261-5343.
[13] Woodward, p 214.
[14] Lovelock and Evans, p 591.

Current NSW provisions for the removal of judicial officers

In NSW, the removal of judicial officers is governed by the *Constitution Act 1902* in conjunction with the *Judicial Officers Act 1986*.

Section 53 of the *Constitution Act 1902* states that '[t]he holder of a judicial office can be removed from 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'.[15]

Under section 28 of the *Judicial Officers Act 1986*, if the Conduct Division of the Judicial Commission determines that a complaint against a judicial officer is wholly or partly substantiated, the Division may form the opinion that the matter could justify parliamentary consideration of the removal of the judicial officer. Section 29 stipulates that a report from the Conduct Division to that effect must be provided to the Governor, to the relevant Minister and tabled in both Houses of Parliament.

Section 41 of the Act specifies that a judicial officer cannot be removed from office in the absence of a report of the Conduct Division of the Judicial Commission setting out its opinion that the matters referred to in the report could justify parliamentary consideration of the removal of the judicial officer. This is in addition to the requirements of section 53 of the *Constitution Act 1902*. The role of the Conduct Division is therefore critical to the removal process – without a Conduct Division report, the Houses of Parliament are unable to consider removing a judicial officer from office.

Once a report of the Conduct Division has been tabled in Parliament, the judicial officer may be invited to appear at the Bar of the House, either in person or by a legal representative, to address the House. In each of the cases that the NSW Parliament has considered the removal of a judicial officer, the address has commenced in the Legislative Council. There is, however, nothing to prevent an address being initiated by the Legislative Assembly.[16]

Following the appearance of the judicial officer, the Legislative Council may resolve that an address requesting the officer's removal on the grounds of proved misbehaviour or incapacity be adopted and transmitted to the Governor. The Legislative Assembly is

[15] *Constitution Act 1902* (NSW) s 53(2).
[16] Lovelock and Evans, p 587.

requested to adopt a similar address, with a copy of the judicial officer's address to the Legislative Council transmitted to the Legislative Assembly.

If the Legislative Assembly does not adopt a similar address, the Legislative Council may request a free conference with the Legislative Assembly. If, following the conference, the Legislative Assembly still declines to adopt a similar address, the statutory provision for the removal of the judicial officer is not complied with.[17]

If the Legislative Assembly adopts a similar address, both addresses are presented to the Governor. The President of the Legislative Council reports the Governor's answer to the address as soon as possible after its receipt. Odgers' Australian Senate Practice notes that while it is not settled whether the Governor would be bound to act in accordance with an address by both Houses, it is generally accepted that, because the Houses act on proved grounds, their addresses should be binding.[18]

NSW parliamentary involvement in the removal of judicial officers

Until 2011, there had only been three cases in which the Conduct Division had reported that a matter could justify the consideration of the NSW Parliament. The first case occurred in 1992, concerning Magistrate Barry Wooldridge, with the Judicial Commission recommending that Magistrate Wooldridge be removed on the ground of incapacity. Magistrate Wooldridge subsequently retired.[19]

The second case occurred in 1998 and concerned the behaviour of Magistrate Ian McDougall. In this instance, the magistrate retired prior to the completion of the proceedings of the Conduct Division.[20]

The third case involved Justice Vince Bruce of the Supreme Court. On 15 May 1998 the Conduct Division made a finding of incapacity to perform judicial duties, based on circumstances involving unreasonable delays in the provision of judgements.[21] The report found that the matters could justify parliamentary consideration of removal from office.

[17] Lovelock and Evans, p 588.
[18] H. Evans(ed) (2008), *Odgers' Australian Senate Practice*, 12th edition, Department of the Senate, Canberra, p 515.
[19] Lovelock and Evans, p 588.
[20] Lovelock and Evans, pp 588-589.
[21] A. Twomey (2004), *The Constitution of New South Wales*, The Federation Press, pp 738-740; Lovelock and Evans, pp 589-591.

Justice Bruce was invited to appear at the Bar of the House on 3 June 1998 to show cause why he should not be removed.[22]

On 2 June 1998, the President of the Legislative Council reported receipt of correspondence from Justice Bruce's legal representatives advising that a challenge to the validity of the Conduct Divisions' report had commenced. The justice's appearance at the Bar of the House was delayed until the appeal proceedings had been resolved.[23]

On 12 June 1998, the Court of Appeal dismissed the challenge, and on 16 June 1998 Justice Bruce appeared at the Bar of the House. No questions were put during the proceedings as the House's resolution did not provide for questions to be put.[24]

On 25 June 1998 the Attorney General moved that the Legislative Council adopt and present an address to the Governor for the removal of Justice Bruce on the grounds of incapacity.[25] The motion was defeated, with members allowed a conscience vote on the matter. Justice Bruce subsequently resigned from office on 22 February 1999.[26]

There was no further involvement of the NSW Parliament in actions to remove a judicial officer from office until 2011, when proceedings were commenced in relation to two Local Court magistrates: Jennifer Betts and Brian Maloney.

Magistrates Betts and Maloney

Magistrate Betts was the subject of a report by the Conduct Division of the Judicial Commission, following four separate complaints relating to the magistrate's behaviour towards individuals appearing before her.[27]

The Conduct Division report found that in each of the matters the misbehaviour of the magistrate had been proved, and that the gravity of the misbehaviour warranted consideration by Parliament.[28] The report concluded that 'the matters considered herein

[22] *NSW Legislative Council Minutes*, No. 41, 27 May 1998, p 470.
[23] *NSW Legislative Council Minutes*, No. 43, 2 June 1998, pp 520-521.
[24] Lovelock and Evans, p 590.
[25] *NSW Legislative Council Minutes*, No. 50, 25 June 1998, pp 601-602.
[26] Lovelock and Evans, pp 590-591.
[27] *Report of an Inquiry by a Conduct Division of the Judicial Commission of NSW in relation to Magistrate Jennifer Betts*, 21 April 2011, p 16.
[28] *Report in relation to Magistrate Betts*, p 53.

could justify parliamentary consideration of the removal of the magistrate from office on either of the available grounds, that is, proved misbehaviour or incapacity'.[29]

On 15 June 2011, Magistrate Betts attended at the Bar of the House and delivered an address in accordance with the House's resolution. No questions were put during the proceedings as the House's resolution did not provide for questions.[30]

During her appearance at the Bar of the House to show cause why she should not be removed from office, Magistrate Betts accepted responsibility for her actions, noting that her behaviour at the time of the complaints was attributable to mental health issues for which she was now voluntarily receiving ongoing treatment.[31] Magistrate Betts concluded by highlighting that the reasons for her misbehaviour had since been effectively addressed, and requesting that the Parliament 'have regard to the fact that my misconduct does not involve allegations of criminal, corrupt, or even unethical behaviour'.[32]

On 16 June 2011, the Leader of the Government in the Legislative Council moved that the House adopt and present an address to the Governor for the removal of Magistrate Betts on the ground of incapacity. The motion also proposed that the Legislative Assembly be requested to adopt an address in similar terms, and that a copy of Magistrate Betts' address be transmitted to that House.[33] Following debate and a conscience vote on the voices, the question was resolved in the negative.[34] As the Legislative Council did not support the motion, the Legislative Assembly did not consider the matter.

By contrast to the prompt resolution of the Betts matter, proceedings against Magistrate Maloney took three and a half months to be resolved.

The Conduct Division report into Magistrate Maloney also concerned complaints about the magistrate's behaviour towards individuals appearing before him. Similarly to Magistrate Betts, the mental health of Magistrate Maloney was a consideration, most

[29] *Report in relation to Magistrate Betts*, p 73.
[30] *NSW Legislative Council Minutes*, No. 19, 16 June 2011, p 210.
[31] *NSW Legislative Council Parliamentary Debates*, 15 June 2011, p 2306.
[32] *NSW Legislative Council Parliamentary Debates*, 15 June 2011, p 2313.
[33] *NSW Legislative Council Minutes*, No. 19, 16 June 2011, p 210.
[34] *NSW Legislative Council Minutes*, No. 19, 16 June 2011, p 210.

notably his '… capacity to perform the duties of a judicial officer in view of his bipolar 2 disorder'.[35]

A joint report from two medical professionals agreed that Magistrate Maloney was currently stable and fit to perform his judicial duties.[36] However, the Conduct Division expressed concern about the ongoing capacity of Magistrate Maloney, recommending that the matter be considered by Parliament on the grounds of the proved incapacity of Magistrate Maloney to undertake his judicial functions due to his continuing mental health issues.[37]

On 21 June 2011, Magistrate Maloney attended at the Bar of the House to deliver an address in accordance with the House's resolution. As on previous occasions, no questions were put as the House's resolution did not provide for questions.[38]

During his appearance, Magistrate Maloney noted that he had not been charged or found guilty of an offence at law, committed an act that was 'morally reprehensible' or 'brought the judiciary into ill-repute'.[39] He voluntarily undertook to continue treatment for his mental illness.

On 22 June 2011, the Leader of the Government in the Legislative Council moved that the House adopt and present an address to the Governor for the removal of Magistrate Maloney on the ground of incapacity. The motion also proposed that the Legislative Assembly be requested to adopt an address in similar terms, and that a copy of Magistrate Maloney's address be transmitted to that House.[40]

The Leader of the Government also tabled two items of correspondence: a letter from the Attorney General to the Chief Justice of NSW, in his capacity as President of the Judicial Commission, and a reply from the Chief Executive of the Judicial Commission. The correspondence concerned advice in relation to further complaints about Magistrate Maloney. In view of the tabling of this new material, the Leader of the House moved

[35] *Report of an Inquiry by a Conduct Division of the Judicial Commission of NSW in relation to Magistrate Brian Maloney*, 6 May 2011, p 4.
[36] *Report in relation to Magistrate Maloney*, p 125.
[37] *Report in relation to Magistrate Maloney*, p 131.
[38] *NSW Legislative Council Minutes*, No. 22, 21 June 2011, p 237.
[39] *NSW Legislative Council Parliamentary Debates*, 21 June 2011, p 2905.
[40] *NSW Legislative Council Minutes*, No. 23, 22 June 2011, pp 254-255.

that debate on the matter be adjourned to allow Magistrate Maloney an opportunity to respond to the new material, either in writing or in person.[41]

The legal representative of Magistrate Maloney subsequently provided further written material on behalf of Magistrate Maloney to all members of the Legislative Council. The receipt of this correspondence was reported by the President in the House on 23 August 2011 and on 13 October 2011.[42]

Debate on the motion of the Leader of the Government resumed on 13 October 2011, with members were allowed a conscience vote by their parties. The question was resolved in the negative, following a division.[43]

A number of questions have arisen as a consequence of these recent proceedings in the NSW Legislative Council. The remainder of this paper explores several issues relating to the role of parliament in the process to remove a judicial officer. These issues relate to a lack of clarity over the meaning of both 'misbehaviour' and 'incapacity', community standards and the perception of mental illness, and the potential implications for judicial independence and public confidence in the judicial system generated by the involvement of parliament in the removal mechanism. The debate in respect of these issues has generated questions about possible options for reform of the current regime.

What constitutes 'misbehaviour' or 'incapacity'?

A judicial officer may only be removed from office on the grounds of proven misbehaviour or incapacity. However, uncertainty exists as to the definition of 'misbehaviour' or 'incapacity'. Without a strict definition as to what constitutes either misbehaviour or incapacity, there is significant scope for personal interpretations of these terms.

This lack of clarity as to the meaning of 'misbehaviour' or 'incapacity' has been acknowledged by Sir Anthony Mason, former Chief Justice of the High Court of Australia, who noted in a journal article that although the Houses of Parliament can only remove a judicial officer on the grounds of misbehaviour or incapacity, 'there are

[41] *NSW Legislative Council Minutes*, No. 23, 22 June 2011, p 255.
[42] *NSW Legislative Council Minutes*, No. 33, 23 August 2011, p 353 and *NSW Legislative Council Minutes*, No. 47, 13 October 2011, p 494.
[43] *NSW Legislative Council Minutes*, No. 47, 13 October 2011, pp 495-497.

unresolved problems affecting the application of this part of the section. To whose satisfaction is misbehaviour to be proved and according to what standard is it to be proved? Likewise, with incapacity'.[44]

The meaning of 'misbehaviour' in relation to the removal process was explored during a Commonwealth parliamentary commission of inquiry into the conduct of Justice Murphy of the High Court. In this instance, the meaning of 'misbehaviour' was examined with regard to section 72 of the *Constitution Act 1900* (Cth) which, as noted earlier, provides that Justices of the High Court and other courts created by the Commonwealth Parliament may only be removed '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'.[45]

Two interpretations of 'misbehaviour' emerged during the Parliamentary Commission of Inquiry into the conduct of Justice Murphy. The Commonwealth Solicitor General considered that 'misbehaviour' was confined to the performance of judicial duties or conviction for a criminal offence.[46] As outlined in Odgers' Australian Senate Practice, this restricted interpretation of 'misbehaviour' is reflective of a 'line of authoritative statements' which indicate that:

> … under the common law misbehaviour in respect of an office held during good behaviour meant misbehaviour in relation to the performance of the duties of that office, such as neglect or refusal to perform those duties, and conviction for infamous offences not connected with the duties of the office.[47]

However, the Parliamentary Commission of Inquiry considered that the term 'misbehaviour' was:

> … used in its ordinary meaning and was not confined to 'misconduct in office' or conduct of a criminal nature; included conduct, whether or not displayed in office, that was 'morally wrong'; or conduct that was 'so

[44] Sir A. Mason AC KBE (1997), 'The Appointment and Removal of Judges' p 24 in *Fragile Bastion: Judicial Independence in the Nineties and Beyond*, Judicial Commission of NSW.
[45] *Constitution Act 1900* (Cth) s 72 (ii).
[46] Lovelock and Evans, p 584.
[47] *Odgers'*, p 513.

> serious a departure from standards of proper behaviour by such a judge that it must be found to have destroyed public confidence.[48]

In the United Kingdom, where judicial officers may only be removed from office following an address by both Houses on the ground of misbehaviour, a wide definition of misbehaviour is taken. Odgers' notes that in the United Kingdom:

> The established grounds for an address have been stated to include misconduct involving moral turpitude, partisanship and partiality, and misconduct in private life. These grounds have been taken to be no more than different forms of misbehaviour.[49]

In his ruling on the meaning of 'misbehaviour' during the Parliamentary Commission of Inquiry into Justice Murphy, the Hon Sir George Lush posited that ultimately, it was for the Parliament to determine what constitutes misbehaviour, and that such a decision:

> ... 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 expected of judges of the High Court and other courts created by the Constitution.[50]

Speaking on the motion to remove Magistrate Maloney, the Hon Trevor Khan MLC argued that the concepts of misbehaviour or incapacity 'should not be construed narrowly'.[51] Mr Khan continued to note:

> Whilst it may be attractive to suggest that the power of dismissal should be restricted to issues of serious criminal behaviour, I suggest that to do so fails to recognise our obligation to ensure that our courts operate fairly, competently and impartially.[52]

However, if the meaning of 'misbehaviour' and 'incapacity' are to be left to the determination of individual members, it inevitably follows that there is likely to be

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[48] C. Lawson (2009), 'Can the Executive influence the 'independence' of the Auditor General under the Auditor-General Act 1997 (Cth)?', *Australian Journal of Administrative Law* 16, p 95.
[49] *Odgers'*, p 513.
[50] Parliamentary Commission of Inquiry: Re The Honourable Mr Justice Murphy – Ruling on the Meaning of 'Misbehaviour" (1986) 2 *Australian Bar Review* n 51 at 210 per Hon Sir George Lush.
[51] *NSW Legislative Council Parliamentary Debates*, 13 October 2011, p 6152.
[52] *NSW Legislative Council Parliamentary Debates*, 13 October 2011, p 6152.

significant variance in interpretation. This variance was evident in the debate on the removal of the two magistrates where members diverged in opinion as to if either of the magistrates were 'incapacitated' by their respective mental illnesses.

Do mental health issues constitute 'incapacity'?

A core element in the decision to remove a judicial officer from office is an appreciation as to what qualities are necessary in the performance of the judicial function. Sir Anthony Mason explains the key elements necessary as being independence, impartiality and neutral adjudication.[53] Mason further elucidated the qualities that a judicial officer must possess: 'It goes, virtually without saying, that certain personal qualities are indispensible – integrity, impartiality, industry, a strong sense of fairness and a willingness to listen to and understand the viewpoint of others'.[54] In determining whether to remove a judicial officer, members of parliament must consider the ability of the officer in question to exhibit these attributes in the performance of their judicial duties.

In their appearances at the Bar of the House, both Magistrate Betts and Maloney attributed their behaviour to mental health issues for which both magistrates are voluntarily receiving treatment. In making their decisions on the matters, members were therefore required to consider the issue of mental illness, and the ability of judicial officers to perform the judicial function in a considered and impartial manner whilst receiving treatment for mental illness. As members of all parties were allowed a conscience vote on the motions for removal, the personal judgement of each member in relation to mental illness played a critical role in determining the outcome of debate.

Speaking to the motion to remove Magistrate Maloney, Revd the Hon Fred Nile MLC noted community concerns that the magistrate's mental illness may influence the outcome of the motion:

> An issue that has been raised by members in the community – even though it was rejected by an earlier speaker – is whether Mr Maloney is being punished because of his mental condition, which he now has under control through medication.[55]

[53] Mason, p 4.
[54] Mason, p 10.
[55] *NSW Legislative Council Parliamentary Debates*, 13 October 2011, p 6158.

In the same debate, the Hon Scot MacDonald MLC argued that while societal acceptance of mental health issues has evolved to include greater appreciation of the complexity of mental illness, members were only required to determine if the magistrate was capable of performing the judicial function:

> Our society's greater acceptance of mental illness and our belief in our capacity to treat or manage it is unarguably a strong incentive to see this matter in the most positive light possible. But that does not abrogate our responsibility to consider the evidence and make a judgement accordingly. We are tasked with judging an individual's capacity to carry out judicial functions, not the efficacy of mental health management.[56]

The Hon Trevor Khan MLC, speaking on the motion to remove Magistrate Maloney, observed that he had reached a different conclusion for each of the Betts and Maloney matters. Whilst mental illness was a factor in both cases, Mr Khan argued that it was ultimately the ability of each magistrate to appropriately perform their judicial function that was the determining factor: 'We are not being asked to determine whether people suffering from a mental illness should be allowed to be judicial officers. We know from the case of Magistrate Betts that they can be. This is about having the right people in the role of a judicial officer'.[57]

The public and media interest in the removal of the magistrates meant that members became exposed to influence from constituents, community organisations and media outlets. In debate on the motion to remove Magistrate Maloney, the Hon Marie Ficarra MLC indicated that she had 'been overwhelmed with representations in support of Magistrate Maloney – representations individually face-to-face, by email, by phone and through letters'.[58] The Hon Cate Faehrmann MLC also indicated that she and other members had received correspondence from peak mental health groups, such as SANE Australia and the Schizophrenia Fellowship, urging members to not support the removal of the magistrate because of their mental illnesses.[59]

[56] *NSW Legislative Council Parliamentary Debates*, 13 October 2011, p 6159.
[57] *NSW Legislative Council Parliamentary Debates*, 13 October 2011, p 6157.
[58] *NSW Legislative Council Parliamentary Debates*, 13 October 2011, p 6161.
[59] *NSW Legislative Council Parliamentary Debates*, 13 October 2011, p 6176.

Parliamentary consideration of the removals of Magistrates Betts and Maloney also provoked interest from several media organisations.[60] Further, two prominent politicians, both of whom have personal experience of mental illness, were widely quoted in the media as advocating for Magistrate Maloney in particular to retain his job. Former Opposition leader John Brogden argued that '[y]ou must, of course, satisfy yourself that Mr Maloney is medically fit. From that point, you cannot make a judgment that someone with a mental illness should be barred from judicial office'.[61]

Similarly, in an article published shortly prior to the debate on the removal of Magistrate Maloney, Mr Andrew Robb MP contended that if the Parliament were to remove Magistrate Maloney '[i]t would be an overwhelming injustice and we will set back the acceptance of mental illness by two decades'.[62] Mr Robb also highlighted the fact that Magistrate Maloney was successfully managing his illness: 'He needs to take his medication like anyone with an illness. People with diabetes, high blood pressure, asthma, epilepsy and thyroid problems are all treated for their conditions and are able to work'.[63]

Whilst public interest in the removal process is inevitable, there is potential for the individual decision making processes of members to be impacted by these external influences. However, given that members of parliament are representatives of their constituencies, it could be argued that robust public interest in these matters will cause members to afford a more rigorous and careful examination of the relevant issues. Public debate on the matter also allows members to take contemporary community standards into consideration when making their decision. This is critically important given the evolving nature of community standards, particularly in regard to the area of mental health. Without representations from community groups or discussion in the media on this matter, members would be less well equipped to make a decision that accurately reflects community expectations and standards.

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[60] See for example G. Jacobsen, 'Trials of life put hard-working magistrate under pressure', *Sydney Morning Herald*, 16 June 2011, p 5; G. Chambers, 'Judge's plea to keep her position', *The Daily Telegraph*, 16 June 2011, p 7; M. Whitbourn, 'Magistrate pleads for compassion', *Australian Financial Review*, 22 June 2011, p 6.

[61] G. Chambers, 'John Brogden backing bipolar magistrate Brian Maloney', *The Daily Telegraph*, 27 May 2011, retrieved 3 January 2012 < http://www.dailytelegraph.com.au/news/john-brogden-backing-bioplar-magistrate-brian-maloney/story-e6freuy9-1226063748032>

[62] H. Aston, 'Black and Blue – keeping the black dog at bay', *Sun Herald*, 5 June 2011, pp 1-3.

[63] Aston, p 3.

Personal perceptions of mental health issues are also likely to have been an influencing factor in each member's decision on the motions to remove both magistrates. Ultimately, however, members were required to determine if the existence of mental illness prohibited either magistrate from exercising their judicial function impartially. As both magistrates were receiving ongoing treatment for their mental conditions, and had received reports for mental health professionals attesting to their ability to perform their duties, it would seem that concerns over mental health would not, on its own, have been a sufficient reason to remove either magistrate from office. Additionally, the high degree of support from the community and peak mental health organisations for both magistrates to retain office may have influenced members to reject the motion to remove the magistrates from office.

Transparency of parliamentary involvement in the removal process

While members will inevitably be exposed to a wide range of influences during the deliberative process, it is not mandatory for members to explain the reasons for their decision during the debate on the removal motion, or disclose representations that have been made to them on the matter by various interest groups. Additionally, neither House of Parliament is required to produce a report outlining the reasons for its conclusions. This raises questions as to the transparency of the Parliament's deliberative process.

In the case of Magistrate Betts, only eight of the 42 members of the Legislative Council spoke to the motion to remove the magistrate from office.[64] While these eight members outlined the reasons for their decision on the matter, the reasons for the decisions of the remaining 34 members is unknown. Further, as the motion was defeated on the voices, there is no record as to how members voted.[65]

During debate on the motion to remove Magistrate Maloney, 17 of the 42 members of the Council chose to explain the basis for their decision on the matter. However, 25 members did not participate in the debate. Four of the members who spoke indicated that whilst they had not originally intended to contribute to the debate, the seriousness of the matter prompted a desire to put on the record the reasons for their decisions.[66]

[64] Each of the members indicated that they would not support the motion for the removal of Magistrate Betts. *NSW Legislative Council Parliamentary Debates*, 16 June 2011, pp 2479-2496.
[65] *NSW Legislative Council Minutes*, No. 19, 16 June 2011, p 210.
[66] *NSW Legislative Council Parliamentary Debates*, 13 October 2011, p 6174, p 6175, p 6176.

The motion for the removal of Magistrate Maloney was negatived following a division. Twenty-two members voted against the motion, while 15 members supported the motion for removal.[67]

Of the members who did speak to the removal motions for each magistrate, several expressed reluctance to be involved in the process. During debate on the removal of Magistrate Betts, the Hon Michael Gallacher MLC noted the difficult position that members found themselves in:

> … all members understand how we have come to be in the position of having to make this decision. It is something that has not been done by choice; it is the result of a requirement arising from the way the Judicial Commission operates with this Parliament in respect of its recommendations.[68]

The Hon Paul Green MLC expressed discomfort with the situation, stating that he was '… absolutely uncomfortable adjudicating this matter'.[69]

A similar uneasiness was again expressed during the debate on the removal of Magistrate Maloney. Dr John Kaye MLC noted that '[c]learly, this is an extremely difficult matter in which I personally find I am extraordinarily ill-equipped to make a sensible judgement'.[70] Dr Kaye concluded his remarks by highlighting that 'this is a very finely balanced matter', and observed that ultimately, a decision depends largely on one's own personal judgement, with each member having to determine if there was proven incapacity and the likelihood of the magistrate reoffending.[71]

There is, however, no obligation on members of parliament to speak on any motion before the House. Although the removal of a judicial officer from office is a highly unusual aspect of parliamentary procedure, it is simply a reflection of the normal parliamentary procedures that not all members speak to each motion. While the transparency of the removal process may benefit from all members contributing to debate, it would be unreasonable to force members of parliament to participate.

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[67] *NSW Legislative Council Minutes*, No. 47, 13 October 2011, pp 495-497.
[68] *NSW Legislative Council Parliamentary Debates*, 16 June 2011, p 2496.
[69] *NSW Legislative Council Parliamentary Debates*, 16 June 2011, pp 2492-2493.
[70] *NSW Legislative Council Parliamentary Debates*, 13 October 2011, p 6167.
[71] *NSW Legislative Council Parliamentary Debates*, 13 October 2011, p 6168.

Judicial independence and public confidence in the judicial system

In addition to concerns about the role of 'personal judgement' in the decision to remove a judicial officer from office, a further issue exists in relation to the incursion of decisions of the parliament on the performance of the judiciary.

The *Act of Settlement 1701* halted the ability of the Crown to remove judges from office by providing that judicial officers could only be removed following an address by both Houses of Parliament. The initial object of the Act was '… to protect the judges, not from parliament, but from the arbitrary and uncontrolled discretion of the Crown'.[72] The impact of the *Act of Settlement 1701*, and the entrenchment of the role of the parliament in the removal process by the *Constitution Act 1902* and the *Judicial Officers Act 1986*, was to grant the parliament influence over the judiciary.[73]

The role of the parliament in the removal process could be seen to interfere with the independence of the judiciary, while simultaneously assisting to ensure the accountability of the judiciary. Sir Anthony Mason noted the importance of finding the correct balance between independence and accountability:

> A failure to strike the right balance between judicial independence and judicial accountability will result in either an unacceptable weakening of judicial independence or inadequate accountability.[74]

During debate on the removal of Magistrate Maloney, the Hon Scot MacDonald MLC argued that while the Parliament seeks to distance itself from the judiciary wherever possible, parliamentary involvement in the removal process was an appropriate oversight mechanism:

> To dismiss a judicial officer could be an erosion of the separation of powers and would only be considered in the most serious circumstances. Nevertheless, the mechanism exists for removal, and I believe it exists to protect and enhance the judiciary, not as a means of interference or the exercise of power.[75]

[72] *McCawley v The King (1918) 26 CLR* at 58-59 per Isaacs and Rich JJ.
[73] *McCawley v The King (1918) 26 CLR* at 58-59 per Isaacs and Rich JJ.
[74] Mason, p 2.
[75] *NSW Legislative Council Parliamentary Debates*, 13 October 2011, p 6149.

Other members of the NSW Legislative Council considered the need to balance the rights of judicial officers to perform their role free from interference from the Parliament with the need to ensure that the public has access to an effective and impartial judicial system. The Hon Trevor Khan MLC outlined his position on the tension between these two competing interests:

> On the one hand is the issue of Magistrate Maloney's position of local court magistrate. On the other hand is the integrity and effectiveness of our judicial system. When these competing interests are in balance I am inclined to favour the importance of the integrity and effectiveness of the judicial system.[76]

Mr Khan continued to note that, in his opinion, 'we are obliged to ensure that members of the public appearing before our courts have recourse to a fair and public hearing by a competent, independent and impartial tribunal'.[77]

Similarly, the Hon John Ajaka MLC considered that whilst judicial officers should be removed from office 'only in exceptional circumstances', the interest of the public should be afforded greater weight in any consideration of the removal of a judicial officer from office: 'Members have a paramount duty to the citizens of New South Wales to protect their interests, rights and entitlements'.[78]

The maintenance of public confidence in the judicial system is a core element a successful judiciary. It is suggested that there are two elements to this confidence. It is critical that public confidence is maintained in the parliament's role in decision-making regarding the removal of judicial officers. It is similarly critical that public confidence is maintained in the proper functioning of the judiciary.

In a journal article on the appointment and removal of judges, Sir Anthony Mason noted the 'vital' importance of public confidence in the judiciary, arguing that a lack of confidence could undermine the judicial system:

> The preservation of public confidence in the impartial and independent administration of justice is a vital element in the judicial function. Loss of

[76] *NSW Legislative Council Parliamentary Debates*, 13 October 2011, p 6151.
[77] *NSW Legislative Council Parliamentary Debates*, 13 October 2011, p 6151.
[78] *NSW Legislative Council Parliamentary Debates*, 13 October 2011, p 6176.

> confidence in the system whether due to its inefficiency or, more particularly, due to perceptions of a want of independence or impartiality on the part of the judiciary is extremely damaging to the effective working of the justice system.[79]

The Hon John Doyle, Chief Justice of South Australia, has also commented on the importance of public confidence in the judicial system, noting that in order to preserve this confidence, members of the judiciary must conduct themselves appropriately in both their private and public lives:

> … public confidence is something with which the judiciary should concern itself and which it should foster. In one sense this has long been accepted. It is accepted that judges must act in public so that justice itself is public, and the people, seeing what is done, can be confident that justice is being done. It is also accepted the judges must conduct themselves, officially and in their private lives, in a manner which will not inhibit public confidence in their judicial capacity.[80]

During debate on the removal of Magistrate Maloney, the Hon Lynda Voltz MLC commented on this tension between the public and private lives of judges, noting that many in the community were uncomfortable with the very public discussion of a judicial officer's capabilities during the removal process. However, Ms Voltz concluded that members of the judiciary must accept the public scrutiny of their performance:

> I know that many people feel uncomfortable to see these issues aired in public and believe that personal issues ought to be dealt with privately … I wish there was a more private way of dealing with this. But just as politicians' lives are conducted in the full public glare of the media and at the mercy of the ballot boxes, so too magistrates must accept that they are bound by the procedure of the *Constitution Act* when taking on their role.[81]

It is evident that there are concerns over the public nature of the removal process, along with questions about the appropriateness of parliamentary involvement in the process.

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[79] Mason, p 7.
[80] The Hon J. Doyle (1997), 'The Well-Tuned Cymbal', p 41 in *Fragile Bastion: Judicial Independence in the Nineties and Beyond*, Judicial Commission of NSW.
[81] *NSW Legislative Council Parliamentary Debates*, 13 October 2011, p 6150.

This posits the question about if a more appropriate removal mechanism could be developed and implemented.

Options for reform of the current regime for the removal of judicial officers

The recent debate regarding the removal of two judicial officers, both of whom cited mental illness as a causal factor in the behaviour which led to complaints against them, has resulted in some members of parliament, members of the legal profession and the media to advocate for the establishment of additional steps in the removal process. During the public and parliamentary debates on the issue, two opposing options for reform emerged. The first involves a more interventionist approach by the parliament through the parliamentary committee system, while the second advocates for an expanded suite of options for the Judicial Commission to use in managing judicial officers, particularly those with mental illnesses.

In advocating for the expanded role of the Parliament, Mr David Shoebridge MLC suggested that it may be appropriate, in instances where parliamentary involvement in the removal process is warranted, to refer the matter to a multi-partisan parliamentary committee for examination:

> … what has occurred with this matter shows the need for a far less cumbersome process in deciding such matters in the future. It shows that there is real merit in this Parliament considering a fresh approach to dealing with complaints such as this, including having them first considered by a multi-partisan committee which can hear, test and consider the evidence collectively and then provide a recommendation to the House.[82]

The approach suggested by Mr Shoebridge is consistent with the existence of other parliamentary committees that have a role in monitoring and reviewing the functions of oversight bodies like the Judicial Commission. Examples of such oversight committees in NSW include the Joint Statutory Committees on the Health Care Complaints Commission, the Ombudsman and Police Integrity Commission, and the Independent Commission Against Corruption. However, it must be noted that these oversight

[82] *NSW Legislative Council Parliamentary Debates*, 13 October 2011, p 6166.

committees are not authorised to investigate specific conduct or complaints, or reconsider the findings or decisions of the relevant bodies.

In contrast to the proposal from Mr Shoebridge, it was argued that equilibrium already exists within the current removal process, with both the Judicial Commission and the Parliament providing different types of scrutiny on judicial performance for matters that may warrant the removal of a judicial officer.

In his remarks on the Maloney matter, the Hon Dr Peter Phelps MLC noted the ability of Judicial Commission to undertake 'a forensic examination' of the complaints against the judicial officer through the exercise of its inquisitorial powers. Dr Phelps further observed that the Commission:

> … is an expert body. It is not constituted of political staffers, or historians, or telephonists, or plumbers; it is constituted of high-ranking, intelligent people who have a direct and proximate relationship with the law. It is an impartial body. It gains no money from finding against a magistrate. It gains no kudos from its determination. Indeed, given the limited and select nature of the legal fraternity in New South Wales, its members may well lose kudos for having determined against the magistrate.[83]

Dr Phelps continued to note that while the Parliament should not be 'mere ciphers of the Judicial Commission', the role of the Parliament in matters such as this should be to determine if '… such a manifest injustice been done by the Judicial Commission – the chief and, in this case, the only investigative body – against Magistrate Maloney that it requires the Legislative Council to intervene in this matter and halt proceedings?'.[84]

The Hon Adam Searle MLC cautioned against making any rapid changes to the current system for removing judicial officers from office. Mr Searle acknowledged the 'embryonic suggestions for law reform in this area' proposed by some members, but continued to state:

> … I would be slow to fundamentally alter the current legislative regime. If it does not fall to us to make this decision, who else can judge the judges? I do not think it would be appropriate to leave it to heads of jurisdiction.

[83] *NSW Legislative Council Parliamentary Debates*, 13 October 2011, p 6175.
[84] *NSW Legislative Council Parliamentary Debates*, 13 October 2011, p 6175.

> The idea of having a screening committee of this House to cross-examine judges or magistrates who may be brought before us would potentially have difficulties. With the maturity of time we can reflect on those matters.[85]

Mr Richard Ackland, a legal commentator for the *Sydney Morning Herald*, reflected on the seeming absurdity of having members of parliament judge members of the judiciary:

> Having politicians judging judicial officers is a bit like having one branch of the asylum acting as caretakers for another. It seems to be one tiny corner where judges failed to properly nail down their 'independence'.[86]

However, Mr Ackland concluded by supporting the status quo of parliamentary involvement in the removal of judicial officers from office, observing:

> If someone tried to introduce the *Act of Settlement* today, the judges would be screaming from the rooftops. Yet, the parliamentary retention of the final say on misconduct or incapacity is a useful check on the sort of clubby protection racket that accompanies any self-regulating guild.[87]

The role of parliament in the removal of judicial officers can be seen as acting as a check and balance on the Judicial Commission, affording judicial officers against whom findings of misbehaviour or incapacity have been made a final opportunity to present reasons as to why they should not be removed from office. Further, whilst the Judicial Commission is a professional, expert body that undertakes a 'forensic examination' of the matter in question, members of parliament bring a range of personal experiences and judgement to the decision making process, together with a reflection of contemporary community standards. While the existence of these factors does provoke some concern, the involvement of members of parliament, in their role as representatives of the people of NSW, allows for a diverse range of opinions and standards to be brought to bear on the removal process.

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[85] *NSW Legislative Council Parliamentary Debates*, 13 October 2011, p 6168.
[86] R. Ackland, 'High time to put an end to clubby protection', *Sydney Morning Herald*, 17 June 2011, p 11.
[87] Ackland, p 11.

Notwithstanding the importance of retaining the role of parliament in the removal process, the Parliament should be satisfied that the Judicial Commission has explored all options available to it prior to escalation of the matter to parliament for consideration.

The second reform proposal that has emerged involves providing the Judicial Commission with an expanded suite of options for managing judicial officers, prior to escalation of the matter to the Parliament for consideration and determination. The two most recent examples of judicial officers being referred to the Parliament has involved each judicial officer appearing as a result of inappropriate behaviour attributable to a treatable mental illness, rather than a question of unethical or corrupt conduct. Providing the Judicial Commission with options that recognise the possibility of a treatable mental illness may divert judicial officers from facing the serious penalty of dismissal by the Parliament.

In support of this approach, the Hon Matthew Mason-Cox MLC posited that there should be better management of the risk of inappropriate conduct of judicial officers because of untreated mental illness, 'rather than opting for the drastic solution of dismissal'.[88] Mr Mason-Cox suggested that any public risk from potential future misconduct relating to mental illness should be managed '… by way of statutory intervention rather than parliamentary execution'.[89]

Mr Mason-Cox's suggestion of better management of judicial officers in instances concerning the mental health of judicial officers were echoed in the media, with suggestions that an alternate resolution system would better serve both the judiciary and the public. Several news articles, citing the concerns of authorities on legal ethics and the regulation of the legal profession, criticised the lack of flexibility in the current system, noting that both the Judicial Commission and the Parliament were limited in their options to deal with a judicial officer's conduct, and were unable to compel judicial officers to seek treatment for mental illnesses.[90] The Judicial Commission can dismiss the matter, send a report to the Chief Magistrate outlining recommendations, or refer the

[88] *NSW Legislative Council Parliamentary Debates*, 13 October 2011, p 6167.
[89] *NSW Legislative Council Parliamentary Debates*, 13 October 2011, p 6167.
[90] C. Merritt, 'Calls to track fitness of judiciary', *The Australian*, 24 June 2011, pp 33-34; 'The public deserves better protection', *The Australian*, 21 October 2011, retrieved 2 January 2012, <http://www.theaustralian.com.au/business/legal-affairs/the-public-deserves-better-protection/story-e6frg97x-1226172291294>.

matter to the Parliament. The Parliament is limited to either returning the judicial officer to the bench or recommending the removal of the judicial officer.

It was suggested by legal commentators in the media that the Judicial Commission could be granted the power 'to require judicial officers suffering from treatable illnesses to accept mandatory medical monitoring to assess their fitness for office'.[91] An article in *The Australian,* citing Kay Lauchland, Associate Professor of Law at Bond University, concluded that adding flexibility to the current system would provide better protection for both the judiciary and the public: 'It is necessary for the law to "find that balance point" between allowing people with treatable mental illnesses to remain on the bench while providing the community with the knowledge that there were adequate controls in place'.[92]

The idea of granting the Judicial Commission an additional option – being mandated and monitored medical treatment – prior to referring the matter to the Parliament for determination received further support within the media. Mr Chris Merritt, legal affairs reporter for *The Australian*, concurred that '[i]t makes sense to at least explore whether the powers of the Judicial Commission should be expanded to provide a middle course in these cases'.[93] Mr Merritt acknowledged that some people within the legal profession may be 'affronted' by the notion that judicial officers could be monitored, but observed that it would be '… hard to see how anything that guaranteed the integrity of individual judicial officers could be seen as a threat'.[94]

At present, the Judicial Commission does not have the capacity to require that the judicial officer follow a prescribed treatment plan to reduce the likelihood of misbehaviour or incapacitation occurring, nor does the Commission have the capacity to monitor if a treatment plan is followed. The suggestion to provide the Judicial Commission with such an additional option to respond to complaints against judicial officers has merit, particularly in instances where the inappropriate behaviour is attributable to a treatable mental illness.

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[91] 'The public deserves better protection', *The Australian*, 21 October 2011.
[92] 'The public deserves better protection', *The Australian*, 21 October 2011.
[93] C. Merritt, 'Other options must be explored for ill magistrates', *The Australian*, 24 June 2011, Legal Affairs, p 34.
[94] C. Merritt, 'Other options must be explored for ill magistrates', p 34.

Investing in the Judicial Commission the power to require medical treatment provides an interim step prior to referring the matter to the Houses of Parliament. If the judicial officer in question were to refuse to follow the directions of the Commission in regard to their treatment, or ceased to receive the appropriate treatment resulting in further complaint, the Commission would retain the power to refer the matter to the parliament.

This additional mechanism would serve to provide assurances for both the judiciary and the public. For the judiciary, the possibility of being removed from office following an address by both Houses of Parliament is lessened, as is the possibility of having their professional and private lives laid bear in a very public setting. For the community, the mechanism would provide increased assurance that judicial officers are being appropriately monitored in the performance of their judicial function, protecting public confidence in the impartiality and independence of the judiciary. Escalation to the Houses of Parliament for consideration of the removal of a judicial officer from office would occur only in exceptional circumstances, where other avenues of addressing the judicial officer's behaviour had been pursued and failed.

Conclusion

The role of the Houses of Parliament in the removal of judicial officers from office is a rare instance of the Parliament involving itself in the functioning of the judiciary. The legislature is acutely aware of the importance of maintaining the sovereignty and separation of the parliamentary and judicial domains. Nonetheless, since the enactment of the *Act of Settlement 1701*, an address by both Houses of Parliament has been the sole method for the removal of a judicial officer from office.

The involvement of parliaments across Australia in the removal of judicial officers from office remains an exceptionally rare event. However, the two recent motions for the removal of judicial officers in NSW generated discussion within the parliamentary and legal fraternities, as well as within the media, about the appropriateness of the Parliament's central role in the removal of judicial officers.

Acknowledging that the current removal mechanism has existed for a significant period of time, any mooted reforms must be appropriate and measured. By providing the Judicial Commission with expanded management options for judicial officers suffering from mental illness, the Parliament will facilitate the timely resolution of treatable issues

without significant impact on the judicial system. This is preferable to the Judicial Commission shifting the problem to the doorstep of a Parliament reluctant to use its powers, and would also assist to maintain public confidence in the judiciary rather than have issues aired in the court of public opinion. Such reform will ultimately ensure that the role of the Parliament in the removal of judicial officers is not diminished but used to judge the judges as a last resort.