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THE SENATE

SELECT COMMITTEE ON ALLEGATIONS CONCERNING A JUDGE

REPORT TO THE SENATE

OCTOBER 1984

Presented to the President of the Senate, 31 October 1984,
and publication authorised by resolution of the Senate
of 6 September 1984.

SELECT COMMITTEE ON ALLEGATIONS CONCERNING A JUDGE

MEMBERS OF THE COMMITTEE

Senator M.C. Tate (Chairman)
Senator N. Bolkus
Senator J. Haines
Senator A.W.R. Lewis

SENATE SELECT COMMITTEE ON ALLEGATIONS CONCERNING A JUDGE

REPORT TO THE SENATE

A. GENERAL MATTERS

ESTABLISHMENT OF THE COMMITTEE

1. This Committee was appointed by the Senate on 6 September 1984:

(a) to inquire into the allegations made by Mr C.R. Briese, the Chairman of the Bench of Stipendiary Magistrates of New South Wales, concerning Mr Justice Murphy of the High Court of Australia, made before the Select Committee on the Conduct of a Judge and referred to in Appendix 5 of the Report of that Committee, and, after conducting such inquiry,

(b) to report to the Senate its findings of fact upon those allegations, and

(c) to report in relation to those allegations whether Mr Justice Murphy engaged in any conduct which could amount to misbehaviour providing sufficient grounds for an address to the Governor-General in Council by both Houses of the Parliament praying for his removal from office pursuant to section 72 of the Constitution.

2. The resolution of the Senate further required the Committee, in its report, to:

(a) indicate whether there was conduct which could amount to misbehaviour in accordance with the interpretation of the meaning of "misbehaviour" contained in

(i) the opinion of the Solicitor-General of the Commonwealth, and

(ii) the opinion of Mr C.W. Pincus, Q.C.,

attached to the report of the Select Committee on the Conduct of a Judge

and,

(b) indicate whether there is proof of conduct which could amount to misbehaviour

(i) beyond reasonable doubt, and

(ii) upon the balance of probabilities.

The full resolution of the Senate appointing the Committee, as amended on 2 October 1984 to remove a drafting error in paragraph (2)(b), is included in this report as Appendix 1.

3. The resolution establishing this Committee contained a number of important provisions which have not previously been included in resolutions appointing Committees of the Senate. These included: appointment of two Commissioners Assisting to advise the Committee in its deliberations on matters of fact and law; appointment of counsel to assist the Committee on questions of law, evidence and procedure; and allowing witnesses to be

examined and cross-examined by counsel assisting the Committee and counsel for other witnesses. All these provisions were deemed by the Senate to be necessary in order to allow as full and impartial an assessment of the evidence as possible, and to accord to Mr Justice Murphy the rights to which he is entitled under the rules of natural justice.

MEMBERSHIP OF THE COMMITTEE

4. At the meeting of the Committee on 24 September 1984, counsel for Mr Justice Murphy, Mr T.E.F. Hughes, Q.C., foreshadowed a submission to the effect that the three members of this Committee who also served on the Select Committee on the Conduct of a Judge should not sit on this Committee, on the ground that it would be contrary to the rules of natural justice, because they had already made findings on some matters before this Committee.

5. At the meeting on 1 October 1984, Mr Hughes indicated that he would not press this matter. Whilst not conceding the validity of the submission foreshadowed by Mr Hughes, the three members concerned considered whether they should disqualify themselves from sitting on the Committee, and concluded that they should not do so. They considered that their service on the previous Committee did not preclude them from making a proper and unbiased judgement on the matters before this Committee on the basis of the evidence to be heard by it, or that they had any sense of vested interest in maintaining their earlier decision.

EXTENSION OF TIME TO REPORT

6. The resolution required the Committee to report by 11 October 1984. On 10 October 1984, however, when it became apparent that the Committee could not meet this date, an indefinite extension of time to report was requested and

subsequently granted by the Senate. The Committee believes that, given the nature of the task entrusted to it and the procedures adopted for its hearings and deliberations, it could not have reported responsibly any earlier.

STATEMENT OF THE ALLEGATIONS

7. Early in the Committee's deliberations it was decided that there was a need to formulate a precise statement of the allegations against Mr Justice Murphy. The Committee was of the view that it was important to refine the issues referred to in Appendix 5 of the Report of the Select Committee on the Conduct of a Judge. That Appendix is included in this report as Appendix 2. The statement of the allegations was considered essential in according natural justice to the judge and in assimilating the proceedings of the Committee as closely as possible to those of a judicial hearing.

8. The statement of the allegations against Mr Justice Murphy, as agreed to by the Committee, read:

> The issues upon which the Committee is required to make findings of fact are as follows:
>
> Whether Mr Justice Murphy spoke and acted as alleged by Mr Briese in the allegations of Mr Briese contained in Appendix 5 to the Report of the Senate Select Committee on the Conduct of a Judge or in some other, and if so what, way or ways on the occasions referred to in those allegations, in an attempt to, and/or with the intention of, obstructing, preventing, perverting, defeating, interfering with and/or influencing the due course of justice in relation to the committal proceedings against Morgan Ryan or with any other, and if so what, intention?

9. At the meeting on 4 October 1984, prior to the opening address of counsel assisting the Committee, the contents of the statement of the allegations were announced publicly in order that the defined scope of the Committee's inquiry would be known. The expression of the allegations in specific terms became crucial when objections to the admission of evidence, especially on the ground of relevance, had to be decided by the Committee.

10. The formulation of the specific statement of the allegations prevented what became known as the conspiracy allegation from becoming an issue for determination by this Committee. This latter allegation, which had been made by Mr Briese in a written statement to the previous Committee, was thus excluded from the evidence-in-chief of Mr Briese before this Committee. It was introduced only when counsel for Mr Justice Murphy, Mr Hughes, cross-examined Mr Briese as to his credit. By the rigorous exclusion of matters outside the specific terms of the inquiry, the Committee did not become a forum for the resolution, or even the airing, of other allegations, some of which are subject to proceedings in other State and Federal jurisdictions.

11. In his closing address counsel assisting, Mr T. Simos, Q.C., raised the issue of whether unintentional contempt of court on the part of Mr Justice Murphy could be found by the Committee under the resolution of its appointment and under the statement of the allegations. It was agreed that the Committee could not regard unintentional contempt of court on the part of Mr Justice Murphy as being encompassed by the statement of the allegations. Having regard to that statement it would have been contrary to the principles of natural justice for the Committee to make a finding on that issue.

PROCEEDINGS OF THE COMMITTEE

12. From the outset the Committee was concerned that, in general, and in the interests of fairness to the judge, its inquiry should be conducted in a manner as near as practicable to a judicial proceeding. It therefore determined that it would in general be bound by the rules of evidence, that it would make its findings of fact upon the evidence adduced before it and that it would not take into account any other material. The Committee agreed that it would depart from these strictures only after counsel had been heard, and then only if it was deemed just and appropriate to do so.

13. The resolution of the Senate required public hearings unless an absolute majority determined otherwise, and the procedures and rules adopted by the Committee required that all its hearings be conducted in public unless the Committee deemed it just and appropriate to hear evidence in camera. In accordance with the intent of this procedure and in the interests of according natural justice, all witnesses gave their evidence in public session.

PREJUDICE TO CERTAIN PROCEEDINGS

14. On 24 September 1984, during a private session of the Committee, attended by counsel for Mr Justice Murphy and counsel for Mr Briese, the Commissioners Assisting, Mr J. Wickham, Q.C., and Mr X. Connor, Q.C., raised the question of whether the publicity attending the Committee's inquiry could cause prejudice to pending legal proceedings against Mr Morgan Ryan in the State of New South Wales. Mr Hughes indicated that a similar question might arise in connection with legal proceedings against Mr Murray Farquhar in the same State. Counsel for Mr Justice Murphy and counsel for Mr Briese made submissions before withdrawing from the meeting. The Committee discussed the issue and agreed that both the Director of Public Prosecutions and

counsel for Mr Ryan should be invited to make submissions in relation to possible prejudice to the legal proceedings in question.

15. At its meeting on 27 September 1984, the Committee's attention was drawn to a response from the Deputy Director of Public Prosecutions which indicated that the Commonwealth would not oppose an application for an adjournment in the legal proceedings against Mr Ryan. It was reported that unsuccessful attempts had been made to obtain a response from Mr Ryan and his solicitor. In the light of this information and the earlier submission of counsel, the Committee agreed that it should proceed with the inquiry. Subsequently an application for adjournment in the legal proceedings against Mr Ryan was made and his retrial was adjourned for further mention in February 1985. The legal proceedings against Mr Farquhar remained fixed for hearing in March 1985.

COMMITTEE'S NON-PUBLICATION ORDER AND ITS RESCISSION

16. On 4 October 1984, as part of the cross-examination of Mr Briese, counsel for Mr Justice Murphy sought to examine Mr Briese on the contents of a written statement that he had made to the previous committee. After the names of Mr Farquhar and the Premier of New South Wales had been mentioned, Mr M. Neil, counsel for Mr M. Farquhar, made an application to the Committee that these matters should either be heard in camera or by way of a direction in relation to a limitation of publicity. Counsel representing other witnesses were heard on the application. The Committee received advice from the Commissioners Assisting who were of the view that a non-publication order should not be made. Nevertheless, the Committee unanimously agreed to make the following order:

> The Committee orders that, until further order of the Committee, in reports of or references to the evidence of Mr Briese given before the

> Committee, Mr Farquhar and the Premier of New South Wales are not to be referred to by their names, offices or former offices, or in any other way which would identify them.

17. This course of action was adopted in an attempt to prevent prejudice to the trial of Mr Farquhar.

18. In public session on the following day, counsel assisting submitted:

> The Committee made the order, of course, having a very proper concern that its proceedings should not prejudice the position of any witnesses before this Committee in other places. Notwithstanding what were no doubt the very best endeavours of the Press to comply with the suppression order, there is no doubt in anyone's mind in this country at this point of time as to the identity of the persons whose identities were suppressed pursuant to the suppression order, and in those circumstances the continuation of the order is, in my respectful submission, futile and I would submit, with respect, it should now be rescinded by the Committee.

Counsel for Mr Farquhar maintained his position that the order should stand. The Chairman restated the Committee's concern that its proceedings should not prejudice the position of any person who might be mentioned in relation to his receiving a fair trial and pointed out that the decision to suppress the two names had not been taken to protect the persons concerned from mere embarrasment. In view of the changed circumstances due to the media coverage of the non-publication order and in accordance with the submission of counsel assisting, the Committee agreed to make an order rescinding the non-publication order.

THE COMMISSIONERS ASSISTING THE COMMITTEE

19. In accordance with paragraph (10) of the resolution establishing this Committee the Hon. J.L.C. Wickham, Q.C., and the Hon. F.X.Connor, Q.C., were appointed as Commissioners Assisting the Committee. The terms and conditions of their appointment were approved by Mr President and, as originally accepted by the Commissioners Assisting, included a daily rate of remuneration. After consultation with each other, the Commissioners Assisting indicated that they would act without remuneration and their terms and conditions were amended accordingly by Mr President.

20. The Commissioners Assisting, both of whom are distinguished recently retired Supreme Court ~~judg~~es, were appointed in recognition of the necessity that independent advice of the highest quality be available to the Committee.

21. Under the terms of the resolution of the Senate the Commissioners Assisting were to be present at all meetings of the Committee; to participate in the Committee's deliberations; to examine witnesses before the Committee on any matter relevant to the Committee's inquiry; to make recommendations to the Committee that particular witnesses be summoned; to make recommendations to the Committee as to the procedures and rules for the examination of witnesses before it; and to advise the Committee, in writing, upon the matters into which the Committee was to inquire and upon which the Committee was to report.

22. During the course of the Committee's inquiry the Commissioners Assisting fulfilled all these roles. Witnesses were not called to give evidence to the Committee unless their appearance had been recommended by the Commissioners Assisting. The Commissioners Assisting made recommendations as to the procedures and rules for the examination of witnesses which were ultimately agreed to by the Committee.

23. Throughout the Committee's hearing of evidence the Commissioners Assisting were called on to give advice as to the admissibility of evidence and on other matters. With one exception (the making of the non-publication order, see paragraph 16 above) their advice on all matters was accepted by the Committee.

24. As to the admissibility of evidence, the Commissioners Assisting, on numerous occasions, heard submissions from counsel for witnesses and conferred between themselves, and their recommendations to the Committee were made known publicly.

QUESTIONS AS TO THE ADMISSIBILITY OF EVIDENCE

25. On thirteen occasions objections to certain evidence or to a line of questioning were taken by counsel representing witnesses.The evidence of Chief Judge J. Staunton, Judge P. Flannery and Judge J. Foord, all of the District Court of New South Wales, gave rise to a number of objections from counsel representing other witnesses. These objections were made under two heads: the rules of evidence and relevance to the Committee's statement of the allegations. Twice, during the evidence of Judge Staunton, and of Judge Flannery, that part of the evidence objected to was ruled to be relevant and admissible. Eleven objections to parts of evidence were sustained by the Committee and the evidence was not admitted; these instances occurred during the evidence of Judge Staunton, Judge Flannery and Judge Foord. The grounds for these rulings were as to relevance to the terms of reference of the Committee on three occasions; and as to the rules of evidence on six occasions. Two objections were sustained on the joint grounds of relevance and the rules of evidence. It should be emphasised that on all such matters the Committee accepted the advice of the Commissioners Assisting and that the Committee stated the reasons for their advice in public. (Details of these matters are included in this report as Appendix 3).

26. On one occasion, during examination-in-chief, counsel assisting attempted to adduce certain evidence from a witness, Judge Flannery, which was objected to by counsel for Mr Justice Murphy as hearsay evidence. In his submission Mr Simos recognised that the evidence was indeed hearsay but argued that the rules of evidence should be relaxed given the importance of the evidence.

27. The Commissioners Assisting made a unanimous recommendation upholding the objection against the admissibility of the hearsay evidence. Mr Connor in a statement of reasons for this advice, summed up the approach of the Commissioners Assisting to the admissibility of evidence before the Committee:

> I would advise very strongly against the admission of this evidence. ... The proceedings of this Committee so far have been very, very similar to the proceedings in a superior court of record ... anybody familiar with courts, walking into this place, must have been struck by the similarity of these proceedings to court proceedings, and for my part I would like to see them remain that way right till the very end. Once we depart on just one occasion from the rule about hearsay, I think we'll get into a lot of trouble further down the track.

COMMISSIONERS ASSISTING ADVISING ON FINDINGS OF FACT

28. Counsel for Mr Justice Murphy, Mr D. Bennett, Q.C., made a submission that, based on his reading of the resolution of the Senate, the function of the Commissioners Assisting was to advise the Committee on matters of law relevant to the inquiry, for example, the admissibility of evidence, and to advise on the question of mixed law and fact raised by paragraph 2(a) of the resolution, but not to express their concluded views in relation to questions of pure fact. Mr Connor, Commissioner Assisting, summed up the thrust of the submission from Mr Bennett with the

question: "You're in a word saying that what we ought to do is a direction to a jury?" Mr Bennett replied in the affirmative. Counsel for Mr M. Farquhar, Mr Neil, supported the submission made by Mr Bennett.

29. Counsel assisting the Committee, Mr Simos, made a submission in which he argued that the Commissioners Assisting were entitled to advise the Commitee as to the facts that the Committee should find and preliminary to doing so, should state their own conclusions as to the facts in issue. He indicated that under the terms of the resolution the advice of the Commissioners Assisting was:

> "not binding on the Committee - it is merely advice which the Committee is free to accept or reject in whole or in part, as the case may be."

30. Mr Simos, in developing this submission, drew attention to the fact that there was no limitation on the role of the Commissioners Assisting such as there was on counsel assisting; and to the wording of paragraph (19) of the resolution:

> (19) That the Commissioners Assisting advise the Committee in writing, in accordance with paragraph (2) of this resolution, upon the matters into which the Committee is to inquire and upon which the Committee is to report, and the Committee include in its report the advice of the Commissioners Assisting.

In advising on the question of proof of conduct, required by paragraph (2), it was submitted that the Commissioners Assisting were obliged to make findings on questions of fact if they were to fulfil their functions as set out in paragraph (19).

31. The Commissioners Assisting did not give advice on the question of their own jurisdiction, as Mr Wickham emphasised that, under the terms of the resolution, they were not empowered to do so.

32. The Committee considered this matter and unanimously agreed to accept the submission of counsel assisting. It was stated that the Commissioners Assisting were in an advisory position and that their conclusions were not binding on the Committee members. It was reiterated that the Commissioners Assisting were required to advise the Committee as to the facts that it should find, and that, to enable this to occur, they must first make their own findings of fact and include them in their advice to the Committee. The Committee believes this interpretation to be in accordance with the intention of the Senate.

DETERMINATION OF PROCEDURES AND RULES OF THE COMMITTEE

33. In paragraph (17) of the resolution of 6 September 1984, the Senate required that the Committee determine procedures and rules for the examination of witnesses before it, having regard to the procedures and rules followed by the Supreme Court of the Australian Capital Territory and subject to paragraph (18) of the resolution. This latter paragraph of the resolution laid down explicit rules with regard to the participation of Mr Justice Murphy and his counsel in the inquiry.

34. A list of matters which might be covered in formulating these procedures and rules was drawn up. The Committee agreed that the list of matters should be supplied to the Commissioners Assisting for their use in making recommendations to the Committee and to other counsel for the purpose of their submissions to the Committee. It was further agreed in principle that, subject to the terms of the resolution of appointment of the Committee, and without derogating from the rights of the Senate or the Committee, the Committee would follow the law of evidence of the Australian Capital Territory in the conduct of its hearings.

35. Counsel assisting the Committee was then invited to draw up suggested rules and procedures for the conduct of the Committee's hearings. These suggested rules and procedures were referred to counsel for Mr Justice Murphy and counsel for Mr Briese, both of whom were requested to make submissions on procedures and rules during a public session of the Committee. At a public hearing, which took place on Monday, 24 September 1984, counsel assisting together with counsel for Mr Justice Murphy and counsel for Mr Briese made submissions as to the rules and procedures which should be adopted by the Committee.

36. With the benefit of these submissions the Commissioners Assisting, in accordance with paragraph (17) of the resolution, formulated recommendations as to the procedures and rules for the examination of witnesses. These were presented to the Committee which then discussed the recommendations. The Procedures and Rules for the Examination of Witnesses, as recommended by the Commissioners and finally determined by the Committee, are included in this report as Appendix 4.

37. The Committee agreed to paragraphs 1-12, 15-16 and sub-paragraphs 13(a) and 13(b) of the recommended procedures and rules. Motions to agree to sub-paragraph 13(c) and paragraph 14 were negatived by the Committee. It was agreed that the Senate be asked to give a direction on the matter raised in these last mentioned paragraphs, namely, the question of the cross-examination of witnesses by counsel for other witnesses.

38. In the Senate on 2 October 1984, the Chairman of the Committee, after presenting the views for and against allowing the right of cross-examination by counsel for witnesses; moved the following motion:

> That the Senate Select Committee on Allegations Concerning a Judge, in determining procedures and rules under paragraph (17) of the resolution of 6 September 1984 appointing

> the Committee, may determine procedures and rules which do not permit the cross-examination of witnesses and of Mr Justice Murphy, should he give evidence, by counsel for other witnesses, notwithstanding paragraphs (12) and (18) (d) of that resolution.

39. The Senate negatived the motion, which action the Committee interpreted as a direction to restore to the procedures and rules the omitted provisions recommended by the Commissioners Assisting. The Committee duly amended the procedures and rules on 3 October 1984.

COUNSEL ASSISTING THE COMMITTEE

40. Paragraph (11) of the resolution of the Senate required the Committee to appoint counsel to assist it in relation to questions of law, evidence and procedure. For this purpose the resolution allowed counsel assisting to attend all meetings of the Committee and to participate in its deliberations.

41. With the concurrence of Mr President, the Committee appointed Mr T. Simos, Q.C., a distinguished senior member of the New South Wales bar, as senior counsel assisting. The Committee also appointed Mr P. Biscoe of the New South Wales bar and Mr R. Williams of the Australian Capital Territory bar as junior counsel. Mr J. Stanwix of Stephen Jaques Stone James was engaged as instructing solicitor.

42. It was reported to the Committee that Mr Justice Murphy objected to the firm of Stephen Jaques Stone James acting for the Committee, on the grounds that this firm also acted for John Fairfax and Sons. Mr Simos stated that he had examined this matter and in his view there was no legal, professional or ethical reason why the firm should not act for the Committee, and there was no conflict of interest. The Committee and the

Commissioners Assisting discussed the matter and it was agreed that Stephen Jaques Stone James should continue to act for the Committee and to instruct counsel on its behalf.

43. From the outset counsel assisting made it clear that their role was that of facilitating the work of the inquiry and not that of prosecutor. In his closing address Mr Simos, stressed this role:

> It is not for me in my role of counsel assisting the Committee to urge the Committee to come to any particular conclusion in relation to the findings of fact which it is required to make. Rather, it is my task to draw attention, fairly and impartially, to all relevant considerations, regardless of whether they tend to support one conclusion of fact or another. It will be for the Committee and the Committee alone in the last analysis to weigh the competing considerations and reach its own conclusions of fact. In this respect, my role is analogous to the role of a judge summing up to a jury after the close of the evidence and the completion of addresses by counsel and immediately before the jury retires to consider its verdict. In such circumstances, the judge reviews the evidence and the various arguments for and against particular findings of fact but informs the jury that they and they alone are the judges of fact.

SELECTION OF RELEVANT DOCUMENTS OF THE PREVIOUS COMMITTEE

44. The resolution of the Senate, in paragraph (20), provided that the Committee, the Commissioners Assisting, witnesses and counsel appearing before it have access to the records of, the transcripts of evidence taken by and the documents submitted to the Select Committee on the Conduct of a Judge in so far as they related to the current inquiry.

45. The large volume of material gathered in the course of the previous Committee's inquiry was clearly not all relevant to the terms of inquiry of the present Committee. Initially the

Committee made a selection of the most obviously relevant documents, which were made available to the Commissioners Assisting, together with the relevant public documents pertaining to the previous Committee.

46. Counsel assisting examined all the material of the previous Committee and made assessments as to its relevance to the Committee's inquiry. Counsel assisting drew up a list which indicated those documents which would be made available to witnesses and their counsel and those documents which would not be made available under paragraph (20) of the resolution. The Committee discussed this categorisation and agreed on a list of documents to be made available. (The list of documents made available is included in this report as Appendix 5).

47. Counsel for Mr Justice Murphy objected to two of these documents being made available to Mr Briese and other witnesses. These were the written statement by Mr Justice Murphy submitted to the Select Committee on the Conduct of a Judge; and the transcript of the oral submissions made before the previous Committee by counsel for Mr Justice Murphy relating to the evidence of Mr Briese. The Committee agreed that the Senate be asked to give a direction in respect of this matter.

48. In the Senate, on 2 October 1984, the Chairman of the Committee, after presenting the arguments for and against allowing access to these documents, moved the following motion:

> That, notwithstanding paragraph (20) of the resolution of 6 September 1984 appointing the Select Committee on Allegations Concerning a Judge, the Committee may determine that it will not disclose to witnesses or their counsel the written statement made by Mr Justice Murphy to the Select Committee on the Conduct of a Judge and the transcript of oral submissions made before that Committee by counsel for Mr Justice Murphy and relating to the evidence of Mr C.R. Briese.

49. An amendment was moved to remove the reference to the written statement of Mr Justice Murphy to the previous Committee; the amendment and the motion, as amended, were agreed to by the Senate.

50. A further question which arose relating to access to the documents of the previous Committee was whether all other witnesses and their counsel should be granted access to the material which was deemed to be relevant to the terms of the inquiry of the current Committee.

51. After discussing this matter, the Committee agreed to ask the Senate for a discretion to make the documents available to persons other than to Mr Justice Murphy and Mr Briese and their counsel. On 2 October 1984 the following motion was moved and agreed to by the Senate:

> That, notwithstanding paragraph (20) of the resolution of 6 September 1984 appointing the Senate Select Committee on Allegations Concerning a Judge, the Committee may determine, in respect of any person other than Mr Justice Murphy, Mr C.R. Briese and their counsel, that it will not grant to that person access to the whole or part of the records of, transcripts of evidence taken by and documents submitted to the Select Committee on the Conduct of a Judge.

52. In accordance with these resolutions of the Senate the Committee agreed to make all the relevant documents of the previous Committee available to Mr Justice Murphy, Mr Briese and their respective counsel. It was further decided that the relevant documents, with the exception of the written statement of Mr Justice Murphy, would be made available to Judge Flannery and his counsel.

53. At a later public hearing Mr J. Pritchard, counsel for Judge Foord, and Mr Neil, counsel for Mr Farquhar, made applications for access to the relevant documents of the previous Committee. The Committee, after receiving the advice of the Commissioners Assisting, determined that these requests for access to the documents not be granted.

54. In accordance with the principle of conducting the inquiry as a judicial proceeding, the Committee agreed to a "self-denying ordinance" in relation to the records, transcripts and documents of the previous Committee, except to the extent that this material was received in evidence before the current Committee. The text of this declaration is contained in paragraphs 4 and 5 of The Procedures and Rules for the Examination of Witnesses, in Appendix 4 of this report.

55. Some of the documents of the Select Committee on the Conduct of a Judge were eventually admitted into evidence before the present Committee. These were:

- Written statement given by Mr C.R. Briese to the Select Committee on the Conduct of a Judge on 28 May 1984.

- Letter dated 12 June 1979 from Mr C.R. Briese to Mr T.W. Haines, Under-Secretary of Justice of New South Wales (originally on attachment to the statement listed above).

- Letter dated 16 May 1984 from the secretary of the Select Committee on the Conduct of a Judge to Mr C.R. Briese and parts of the attachments to that letter.

- Letter dated 5 June 1984 from Mr C.R. Briese to the secretary of the Select Committee on the Conduct of a Judge, concerning Mr Briese's evidence before that Committee.

- Pages from the transcript of the evidence given before the Select Committee on the Conduct of a Judge by Mr C.R. Briese: 165-167; 149-152; 388; 389-394; 440; 447-449.

- Report of the Select Committee on the Conduct of a Judge.

WITNESSES

56. Clearly an important stage in the work of the Committee was its decision as to witnesses to be called to give evidence before it. The Committee agreed that, after consideration of the evidence and documents of the Select Committee on the Conduct of a Judge, counsel assisting the Committee would make a preliminary submission as to the witnesses to be heard by the Committee.

57. The Committee required that counsel assisting confer with the Commissioners Assisting in this preliminary determination of witnesses, and counsel assisting were authorised to discuss with potential witnesses the evidence they might give. This was duly done and Mr Simos made a preliminary submission. In accordance with paragraph (15) of the resolution, the Commissioners Assisting indicated that they would make recommendations on witnesses to be called, having first considered the proofs of evidence which counsel assisting were engaged in taking.

58. At a private meeting on 1 October 1984, the Commissioners Assisting made recommendations to the Committee in relation to proposed witnesses listed by counsel assisting. The Committee discussed these recommendations and agreed that Mr C.R. Briese, Judge P. Flannery and Judge J. Staunton be asked to give evidence. At a later private meeting Mr Simos made a further

report on his consideration of potential witnesses, the Commissioners Assisting made their recommendations, and the Committee agreed to ask Mr M.J. Ryan, Justice J. McClelland and Mr J. Troutman to give evidence.

59. The same procedure was followed in the calling of Judge J. Foord, Mr B. Roach, Mr M. Farquhar and Mrs G. Briese, to give evidence before the Committee. In consideration of the state of health of Mr K.W. Jones S.M., his statement was tendered as evidence by Mr Simos by consent of all parties.

60. The recommendations of the Commissioners Assisting with regard to the calling of witnesses were, in all cases, based on a due consideration of the relevance to the issues of any admissible evidence they could offer. This further ensured that only admissible evidence was admitted as evidence-in-chief.

61. The Committee placed an advertisement in the press, the terms of which are set out in Appendix 6, giving notification of the public meetings of the Committee, in case there were other persons with relevant evidence to give.

62. In accordance with paragraph 7 of The Procedures and Rules for the Examination of Witnesses, proofs of evidence of all witnesses whom counsel assisting proposed to call were made available to counsel for Mr Justice Murphy and to counsel for Mr Briese. Objections to the proofs of evidence of Judge Flannery and Judge Foord being made available to counsel for Mr Justice Murphy were made by their respective counsel. After counsel for all witnesses were heard on this matter the Committee decided that the proof of evidence of Judge Flannery should be made available to counsel for Mr Justice Murphy and to counsel for Mr Briese, on conditions of confidentiality. It was further agreed that the part of Judge Foord's proof of evidence, which the Commissioners Assisting regarded as potentially admissible,

should be provided to counsel for Mr Justice Murphy and counsel for Mr Briese, and that counsel for Judge Foord should be informed accordingly.

63. Counsel for Judge Flannery requested that proofs of evidence of potential witnesses be made available to them. Counsel present made submissions on this matter and the Committee agreed to this request.

64. During an early meeting of the Committee it was agreed that it would be inappropriate for counsel assisting to communicate to the Committee details of the evidence to be given by witnesses. This was consistent with the intention of paragraph 2 of the Procedures and Rules for the Examination of Witnesses which, inter alia, stated that:

(a) the rules of evidence shall be applicable to the Committee's hearings;

(b) the Committee shall make its findings of fact upon the evidence adduced before it in this way and shall not take into account any other material.

65. At the subsequent meeting the Committee again discussed this matter. The Commissioners indicated that, in making recommendations to the Committee as to witnesses to be called, they would give a general indication of the evidence to be given. The Committee agreed that its members would not see proofs of evidence except in exceptional circumstances. In fact, the Committee saw no proofs of evidence before agreeing to recommendations of the Commissioners Assisting that witnesses be called. An exceptional circumstance arose only once during the Committee's hearings. This was when it became appropriate for members to have access to the proof of evidence of Judge Flannery in order that the Committee could make a decision as to the admissibility of some parts of the evidence.

66. On 10 October 1984 Mr Hughes, counsel for Mr Justice Murphy, and Mr Neil, counsel for Mr Farquhar, asked counsel assisting to consider calling the Hon. B.R. Unsworth, Minister for Transport of New South Wales, to give evidence before the Committee. In response, Mr Simos, counsel assisting, drew the attention of the Committee to remarks attributed to Mr Unsworth which had been reported in the media, but made no submission as to the calling of Mr Unsworth. Mr Simos said:

> I just want to make it clear, Mr Chairman, that it does not follow that because my learned friends have requested that he be called that he will be called. It is ultimately a matter for the Committee.

67. Later in the day the Committee discussed the calling of Mr Unsworth and agreed that it should indicate to counsel that whilst it was of the preliminary view that Mr Unsworth should not be called to give evidence, it would receive submissions from counsel. On the following day Mr Simos stated that counsel for Mr Justice Murphy had indicated that the request for Mr Unsworth to be called to give evidence had been withdrawn. The Commissioners Assisting made their recommendation in relation to the calling of Mr Unsworth and the Committee agreed subject to receiving submissions from counsel that he would not be called to give evidence.

68. At the public hearing later that day, Mr Neil made a submission in which he requested that Mr Unsworth be called to give evidence. Counsel for Mr Justice Murphy, counsel for Mr Briese and counsel for Judge Foord were heard in relation to this matter. The Chairman made a statement which indicated that, having heard counsel and on the recommendations of the Commissioners Assisting, the Committee had decided not to call Mr Unsworth, as his evidence would not go to a matter in issue before the Committee.

69. Early in its proceedings counsel assisting reported to the Committee that counsel for Mr Justice Murphy had asked the Committee to seek documents which were in the custody of the New South Wales Government. After Mr Simos advised that the documents would be relevant to the Committee's inquiry, the Committee agreed to suggest that counsel for Mr Justice Murphy make a request directly to the New South Wales Government. It was further suggested that, if this request was not complied with in a short time, the Committee would request the documents. It was agreed that counsel for Mr Justice Murphy be advised that if the documents were supplied to the Committee, they could be made available to counsel for other witnesses.

70. The Committee was informed that the request was made by counsel for Mr Justice Murphy but refused by the New South Wales Government on the ground that it would prefer to have a request from the Committee. The Committee then wrote to the New South Wales Government asking that the documents be supplied. The documents were duly supplied to the Committee and counsel for Mr Justice Murphy were given access to them. Counsel for Mr Briese and counsel for Judge Flannery made submissions that they also be given access to the documents and this was agreed to by the Committee. At a later stage counsel for Judge Foord, Mr Pritchard, made a request for access to these documents, but the Committee agreed that he be given access only to the report of the Solicitor-General of New South Wales contained in the documents.

71. During the course of the Committee's public hearings ten witnesses gave evidence before it. They were:

- Mr C.R. Briese, Chairman of the Bench of Stipendiary Magistrates, Sydney.

- Chief Judge J.H. Staunton of the District Court of New South Wales, Sydney.

- Justice J. McClelland, Chief Judge of the Land and Environment Court of New South Wales, Sydney.

- Judge P.F. Flannery of the District Court of New South Wales, Sydney.

- Mr M.J. Ryan, Solicitor, Sydney.

- Judge J.M. Foord of the District Court of New South Wales, Sydney.

- Mr J. Troutman, Commonwealth car driver, Sydney.

- Mrs G.M. Briese, wife of Mr C.R. Briese, Sydney.

- Mr B.L. Roach, Solicitor for Public Prosecutions of New South Wales, Sydney.

- Mr M.F. Farquhar, former Chairman of the Bench of Stripendiary Magistrates, Sydney.

72. A number of exhibits was accepted into evidence by the Committee following the advice of the Commissioners Assisting. The list of exhibits is included in this report as Appendix 7.

73. At a private meeting on 11 October 1984 the Committee discussed the question of whether counsel assisting should tender the relevant part of the written statement given by Mr Justice Murphy to the Select Committee on the Conduct of a Judge. The Committee agreed that counsel would be invited to make submissions to the Committee on whether this statement might be tendered as evidence by counsel for any witness. On the following day Mr Simos informed the Committee that, after consideration, he did not propose to tender the relevant part of

the written statement given by Mr Justice Murphy to the previous Committee. In response the Committee agreed that it should hear submissions on the admission of this document.

74. During public session Mr Simos made a statement in which he indicated his decision not to tender the relevant part of the statement of Mr Justice Murphy to the previous Committee. Counsel for Mr Justice Murphy, counsel for Mr Briese, counsel for Mr Farquhar and counsel assisting made submissions on this matter. The Committee, after receiving the advice of the Commissioners Assisting, directed by majority decision that Mr Simos should not tender the document. Counsel for Mr Justice Murphy did not tender the document but submitted that it should be tendered and admitted into evidence.

75. Counsel for Mr Farquhar, Mr Neil, then tendered the document, to the admission of which counsel for Mr Briese objected. Counsel for Mr Farquhar, counsel for Mr Justice Murphy, counsel for Mr Briese and counsel assisting were heard in relation to the matter. The Committee, after receiving the advice of the Commissioners Assisting, determined by majority decision that the document not be admitted into evidence.

76. These decisions were made on the basis that the relevant part of the statement was not admissible under the rules of evidence. They also accorded with the resolution of the Senate, which required that, should Mr Justice Murphy give any evidence, he should be subject to examination in accordance with the resolution.

77. On 12 October 1984, after ten witnesses had been examined in public and twenty documents had been accepted into evidence, Mr Simos indicated that he did not propose to call any other witnesses or adduce any further evidence. The Chairman, in accordance with paragraph (18)(c) of the resolution of the Senate appointing the Committee, then issued an invitation to Mr Justice Murphy to give evidence to the Committee.

78. In response to the invitation, counsel for Mr Justice Murphy, Mr Hughes, sought leave to make a statement to the Committee. After leave was granted Mr Hughes made a statement in which he indicated that Mr Justice Murphy would not give evidence to the Committee and stated the reasons for this decision. Although leave was granted to make the statement and it included a denial of any misbehaviour, it was not regarded as evidence before the Committee. The text of the statement by Mr Hughes is included in this report as Appendix 8.

UNAUTHORISED DISCLOSURE OF COMMITTEE DOCUMENT

79. On the evening of 3 October 1984, before the examination of witnesses had commenced, counsel for Mr Briese, Mr A.M. Gleeson, Q.C., disclosed to the Committee that he had received through the mail a copy of the transcript of the oral submission by counsel for Mr Justice Murphy, Mr Hughes, to the Select Committee on the Conduct of a Judge. In public session, on 4 October 1984, the Chairman of the Committee indicated that it was greatly disturbed by this revelation, especially given the resolution of the Senate of 2 October 1984 which had specifically allowed the Committee to determine that this document should not be made available to any person. Its disclosure was clearly unauthorised.

80. Mr Gleeson gave an undertaking that the contents of the submission would not be made available to his client, Mr Briese. This undertaking was accepted by the Committee, on the advice of the Commissioners Assisting and counsel assisting, and by counsel for Mr Justice Murphy.

81. As a result of the very proper behaviour of Mr Gleeson, no harm was done to the proceedings of the Committee and no further action was taken in relation to the matter. The unauthorised disclosure of the document was, however, in the Committee's view, a serious contempt of the Senate.

REMARKS BY CERTAIN PERSONS CONCERNING THE COMMITTEE'S PROCEEDINGS

82. On two occasions during the hearing of evidence by the Committee remarks by certain persons concerning the proceedings of the Committee were drawn to the Committee's attention.

83. On the first occasion material from the Sunday Telegraph, 7 October 1984, purporting to be, inter alia, a report of comments made in London by the Hon. Neville Wran, Premier of New South Wales, on the evidence of Mr Briese given before the Committee on 5 October 1984, was drawn to the attention of the Committee. During public session, counsel assisting submitted:

> ... on one view Mr Wran's comments may well be thought to have had the effect of putting pressure on Mr Briese in relation to the remainder of his evidence before this Committee and, if Mr Wran's comments have been correctly reported and if he was aware that his comments would be published, it may be that, on that view he, as well as the newspaper, are prima facie in contempt of the Senate. Mr Wran, however, may not have been aware at the time he made his comments that Mr Briese had not completed his evidence and, if that were the case, then the matter would bear a somewhat different complexion although any comments of that nature on the evidence before the Committee has delievered its report are no doubt best avoided. In those circumstances I do no more this morning than to bring the matter to the Committee's attention so that it may consider its position in that regard.

Counsel for Mr Briese, in his submission, reiterated that the matter might turn upon the issue of whether or not it was known at the time the remarks were made that Mr Briese had not finished giving his evidence.

84. The Committee, while recognising that the alleged comments had not yet been established as accurate, gave the following assurance to all witnesses:

> The Committee itself will, of course, in making its findings of fact only take into account that evidence which is properly before it and will certainly not be influenced by any statements made outside the giving of evidence before the Committee and, we very readily give that assurance.

85. In addition, the Committee adopted and affirmed for itself the motion passed by the Senate on 13 September 1984:

> That the Senate -
>
> (a) reaffirms the long-established principle that it is a serious contempt for any person to attempt to deter or hinder any witness from giving evidence before the Senate or a Senate committee, or to improperly influence a witness in respect of such evidence; or
>
> (b) warns all persons against taking any action which might amount to attempting to improperly influence a witness in respect of such evidence.

86. On the second occasion, remarks on the proceedings of the Committee made by the Hon. L.F. Bowen, M.P., Deputy Prime Minister and Minister for Trade, in the House of Representatives on 9 October 1984, were drawn to the attention of the Committee. During a private session on 10 October 1984 the Committee agreed that a statement on this matter should be made in public session of the Committee. In the subsequent statement, the Committee acknowledged that Mr Bowen had made a further statement late the previous night in which he had stated that he had not intended to cast any reflection on the integrity of members of the Committee, but the Committee emphasied that:

Within the rules of procedure as laid down the Committee has been scrupulously careful to admit into evidence only those matters which would be admitted before a court in a criminal trial. In this it has had the benefit of the advice of the commissioners assisting, Mr Wickham, QC, and Mr Connor, QC, two distinguished retired judges, and the myriad of counsel have ensured that no opportunity to consider the exclusion of evidence is let pass.

In particular it is quite wrong to suggest, as Mr Bowen did yesterday in another place, that any evidence has been improperly admitted. On the contrary, on Monday hearsay evidence was excluded despite strenuous and lengthy submissions that it be admitted. Again, the Committee was at pains last Thursday to suppress the name of a person whose trial might be prejudiced by the publication of his name. The suppression order caused uproar in the media and protests from the Premier of New South Wales. The Committee shares Mr Bowen's concern in that regard; it is a pity others did not. In these respects Mr Bowen's criticism of the actual proceedings of the Committee were unfounded. Neither Mr Bowen nor many commentators are attending to the elementary fact that the making of allegations by way of admissible evidence is the way in which any judicial trial proceeds. It is another question altogether whether the allegations are substantiated at the end of the day and, if so, what weight to attach to them.

The Committee notes that Mr Bowen, in a statement issued late last night, states that he did not intend to cast any reflection on the integrity of members of the Committee. The Committee acknowledges this somewhat repentant addendum to yesterday's attack, but we emphasise that that attack was mistaken in its suggestions that evidence had been improperly let in and that the Committee had been reckless in failing to protect the fair trial of a person in New South Wales.

PROPOSED REFERENCE OF MATERIAL TO THE DIRECTOR OF PUBLIC PROSECUTIONS

87. On 6 September 1984 the Senate passed a resolution:

> That the Senate -
>
> (a) refer -
>
> (i) all evidence given before the Senate Select Committee on the Conduct of a Judge; and
>
> (ii) all documentary or other material furnished to the Committee relevant to the Briese allegation, to the Director of Public Prosecutions for consideration by him whether a prosecution should be brought against the Judge; and
>
> (b) request the Director of Public Prosecutions, should he conclude that a prosecution not be brought, to furnish a report to it on the reasons for reaching that conclusion.

88. In a letter dated 10 September 1984 to the President of the Senate, the Director of Public Prosecutions stated, inter alia:

> ... when I am formally requested to give an opinion in relation to the motion passed (Senate Hansard for 6 September, pages 528, 578 and 584) I will respectfully decline to do so until the Select Committee on Allegations Concerning a Judge has taken such evidence into the allegations as might touch upon the question of criminality. It would then be for the Senate to decide whether further materials should be sent to my office. If the Select Committee decided not to take evidence until I had provided it with a report, I would be prepared to assist in that way. However, I must say that my clear preference is for there to be no report made until the best available material touching upon questions of possible Federal misconduct have been gathered and made available.

89. This letter, which was presented to the Senate and referred to the Committee, was considered at the private meeting of the Committee on 12 September 1984. Following discussion, the Committee agreed that the Chairman make a statement in the Senate on behalf of the Committee, indicating that it was the Committee's view that it should conduct its inquiry and make its report to the Senate, that the Senate should then consider whether any of the evidence or documents of the Select Committee on the Conduct of a Judge or of this Committee should be referred to Mr Temby for examination, that, accordingly, the material referred to in the Senate's resolution of 6 September 1984 should not be forwarded to Mr Temby in accordance with that resolution, and that the resolution of 6 September be appropriately treated to conform with this course of action. The Senate accepted this view and the resolution of 6 September was rescinded.

REPORT OF THE COMMITTEE

90. Paragraph (22) of the resolution of the Senate appointing the Committee laid down procedures to be followed in the event that the Senate be not sitting when the Committee completed its report:

> The Committee may send the report to the President, or if the President is unable to act, to the Deputy President, and in that event
>
> (a) the report shall be deemed to have been presented to the Senate,
>
> (b) the publication of the report is authorized by this Resolution,
>
> (c) the President or the Deputy President, as the case may be, may give directions for the printing and circulation of the report, and

(d) the President or the Deputy President, as the case may be, shall lay the report upon the Table at the next sitting of the Senate.

91. On 19 October 1984 the Chairman tabled in the Senate, an opinion of the Solicitor-General, dated 9 October 1984, and a paper by the Clerk Assistant (Committees), dated 18 October 1984, on the powers of Committees of the Senate following the dissolution of the House of Representatives or the prorogation of Parliament.

In concluding his tabling statement, the Chairman stated:

> Each of the opinions, although by differing and sometimes contradictory routes, supports the conclusion that the Senate Committee on Allegations Concerning a Judge may meet after the dissolution of the House of Representatives, expected on 26 October, and that the publication of its report after that date, if done in accordance with the resolution appointing the Committee, would be absolutely privileged.

92. The Committee now sends its report to the President in accordance with the procedures laid down in paragraph (22) of the resolution of the Senate appointing the Committee.

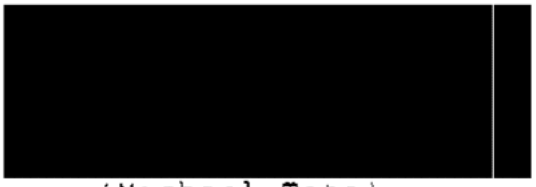
ACKNOWLEDGEMENTS

93. The Committee expresses its appreciation of the indispensible assistance provided by the Commissioners Assisting the Committee and the counsel assisting the Committee. It was greatly advantaged by having such able and experienced persons assisting and advising it.

94. The Committee is also indebted to the Clerk Assistant (Committees), Mr Harry Evans, whose long experience in the Senate proved invaluable. His supporting staff are also to be commended, principal amongst whom were Peggy Grossbechler, Robert Walsh and Gary Lilley.

B. FINDINGS

95. In respect of findings on the matters referred to the Committee, the Committee has adopted the procedure of asking members of the Committee to submit to it their respective reports on those matters. These reports are attached to the Committee's report. In accordance with paragraph (19) of the resolution of the Senate appointing the Committee, the advices of the Commissioners Assisting the Committee are also attached to this report. The remainder of this report consists of summaries of the advices of the Commissioners and of the reports of the members of the Committee.



(Michael Tate)

Chairman

All/

SUMMARY OF COMMISSIONERS' ADVICES

Both commissioners found that Mr Justice Murphy engaged in conduct which had the tendency to pervert the course of justice. They differed on the question of the judge's intention, which led to a difference in their conclusions.

Mr Commissioner Wickham

His advice was that he was satisfied beyond reasonable doubt that Mr Justice Murphy at the material times intended that Mr Briese would convey to Mr Jones, S.M. (the magistrate hearing the committal proceedings against Morgan Ryan) Mr Justice Murphy's views that the case of conspiracy against Morgan Ryan was a wrong case of conspiracy and that he had read the evidence and was of the view that the evidence was very weak and did not support a charge of conspiracy, and hoped that those views would be conveyed, and intended that those views if conveyed would influence the committing magistrate against the prosecution and in favour of Morgan Ryan.

Mr Wickham also advised that he was of the opinion that what Mr Justice Murphy did carried with it a real risk that Mr Jones, S.M. would become subject to the influence intended.

He therefore advised the Committee as follows:-

(1) That the conduct of Mr Justice Murphy could amount to misbehaviour in accordance with the interpretation of the meaning of "misbehaviour" contained within paragraph (2) of the summary of the opinion of the Solicitor-General of the Commonwealth, and also within the opinion of Mr C.W. Pincus, Q.C.

(2) That that conduct which could amount to misbehaviour within each of the two opinions had been proved beyond a reasonable doubt.

Mr Commissioner Connor

His advice was that one interpretation of the facts afforded a reasonable hypothesis consistent with innocence and for that reason he was not satisfied beyond reasonable doubt that Mr Justice Murphy intended to or attempted to pervert the course of justice by having his view of the Ryan case conveyed to Mr Jones, S.M.

His further advice was that as the onus of proof on the balance of probabilities, where criminal conduct was in issue, was so close to the standard of proof beyond reasonable doubt, he was also not satisfied on the balance of probabilities that Mr Justice Murphy intended to pervert the course of justice in that way.

He further advised that he did not consider that there was any conduct in those conversations which could amount to misbehaviour in accordance with the interpretation of "misbehaviour" contained in the opinion of the Solicitor-General of the Commonwealth.

As to the interpretation of "misbehaviour" contained in the opinion of Mr Pincus, Q.C., Mr Connor advised that on that footing, once it was clear that there is unworthy conduct , it would be a usurpation of the role of Parliament to attempt to say whether or not the conduct was serious enough to merit the one sanction which Parliament has, namely, removal from office with its accompanying disgrace. He was of the view that there was no alternative but to say that there was conduct which could amount to misbehaviour and that therefore, in his opinion, there was proof beyond reasonable doubt of conduct which could amount to misbehaviour in accordance with the interpretation of the meaning of "misbehaviour" contained in the opinion of Mr C.W. Pincus, Q.C.

SUMMARY OF REPORTS OF MEMBERS OF THE COMMITTEE

Findings of Fact

1. Senators Tate, Lewis and Haines make findings of fact (other than findings of fact as to the intention of Mr Justice Murphy), both on the balance of probabilities and beyond a reasonable doubt, in accordance with the evidence of Mr Briese.

2. Senators Tate, Lewis and Haines find, on the balance of probabilities, that Mr Justice Murphy spoke and acted as he did (as deposed to by Mr Briese in evidence before the Committee) in an attempt to influence and with the intention of ~~in~~influencing the due and ordinary course of justice in relation to the committal proceedings against Morgan Ryan.

3. Senators Tate and Haines do not find beyond a reasonable doubt that Mr Justice Murphy spoke and acted as he did in the course of attempting to influence or with the intention of influencing the due and ordinary course of justice in relation to the said committal proceedings.

4. Senator Lewis finds, beyond a reasonable doubt, that Mr Justice Murphy spoke and acted as he did in an attempt to influence and with the intention of influencing the due and ordinary course of justice in relation to the said committal proceedings.

5. Senator Bolkus makes findings of fact (other than findings of fact as to the intention of Mr Justice Murphy), both on the balance of probabilities and beyond a reasonable doubt, as set out in his separate report.

6. Senator Bolkus does not find on the facts as found by him, either beyond a reasonable doubt or on the balance of probabilities, that Mr Justice Murphy attempted to influence

or had the intention of influencing the due and ordinary course of justice in relation to the said committal proceedings.

7. Senators Tate, Lewis and Haines find that the conduct of Mr Justice Murphy, as found by them on the balance of probabilities, had an actual tendency to pervert the course of justice.

8. Senator Lewis finds that the conduct of Mr Justice Murphy, as found by him beyond a reasonable doubt, had an acutal tendency to pervert the course of justice.

9. Senator Bolkus does not find, on the facts as found by him, either beyond a reasonable doubt or on the balance of probabilities, that the conduct of Mr Justice Murphy had any tendency to pervert the course of justice.

Whether the conduct of Mr Justice Murphy as found could amount to misbehaviour within the meaning of Section 72 of the Constitution

1. Senators Tate, Lewis and Haines indicate that the conduct of Mr Justice Murphy, as found by them on the balance of probabilities, could amount to misbehaviour in accordance with the interpretation of the meaning of "misbehaviour" contained in each of the opinions of the Solicitor-General of the Commonwealth and of Mr C.W. Pincus, Q.C.

2. Senator Lewis indicates that the conduct of Mr Justice Murphy, as found by him beyond a reasonable doubt, could amount to misbehaviour in accordance with the interpretation of the meaning of "misbehaviour" contained in each of the said opinions.

3. Senator Bolkus indicates that the conduct of Mr Justice Murphy as found by him, both beyond a reasonable

doubt and on the balance of probabilities, could not amount to misbehaviour in accordance with the interpretation of the meaning of "misbehaviour" contained in either of the said opinions.

(Michael Tate)
Chairman

APPENDICES

Appendix 1: Resolution of the Senate 6 September 1984, as amended 2 October 1984.

Appendix 2: Appendix 5 of the Report of the Select Committee on the Conduct of a Judge: Evidence of Mr Briese - summary.

Appendix 3: Rulings on the admissibility of evidence.

Appendix 4: Procedures and Rules for the Examination of Witnesses.

Appendix 5: List of relevant documents from the Select Committee on the Conduct of a Judge.

Appendix 6: Advertisement of public hearings.

Appendix 7: List of exhibits.

Appendix 8: Statement by Mr T.E.F. Hughes, Q.C., 12 October 1984.

SELECT COMMITTEE ON ALLEGATIONS CONCERNING A JUDGE

Resolution of the Senate of
6 September 1984

as amended on 2 October 1984

(1) That a select committee, to be known as the Select Committee on Allegations Concerning a Judge, be appointed

(a) to inquire into the allegations made by Mr C.R Briese, the Chairman of the Bench of Stipendiary Magistrates of New South Wales, concerning Mr Justice Murphy of the High Court of Australia, made before the Select Committee on the Conduct of a Judge and referred to in Appendix 5 of the Report of that Committee, and, after conducting such inquiry,

(b) to report to the Senate its findings of fact upon those allegations, and

(c) to report in relation to those allegations whether Mr Justice Murphy engaged in any conduct which could amount to misbehaviour providing sufficient grounds for an address to the Governor-General in Council by both Houses of the Parliament praying for his removal from office pursuant to section 72 of the Constitution.

(2) (a) That the Committee, in its report, indicate whether there was conduct which could amount to misbehaviour in accordance with the interpretation of the meaning of "misbehaviour" contained in

(i) the opinion of the Solicitor-General of the Commonwealth, and

(ii) the opinion of Mr C.W. Pincus, Q.C.,

attached to the report of the Select Committee on the Conduct of a Judge.

(b) That the Committee, in its report, indicate whether there is proof of conduct which could amount to misbehaviour

(i) beyond reasonable doubt, and

(ii) upon the balance of probabilities.

(3) That the Committee consist of four Senators, as follows:

(a) two to be nominated by the Leader of the Government in the Senate,

(b) one to be nominated by the Leader of the Opposition in the Senate, and

(c) one to be nominated by the Leader of the Australian Democrats.

(4) That the Committee proceed to the despatch of business notwithstanding that all members have not been duly nominated and appointed and notwithstanding any vacancy.

(5) That the Chairman of the Committee be a member nominated by the Leader of the Government.

(6) That the Chairman of the Committee may, from time to time, appoint another member of the Committee to be the Deputy Chairman of the Committee, and that the member so appointed act as Chairman of the Committee at any time when there is no Chairman or the Chairman is not present at a meeting of the Committee.

(7) That, in the event of an equality of voting, the Chairman, or the Deputy Chairman when acting as Chairman, have a casting vote.

(8) That the quorum of the Committee be two members.

(9) That the Committee have power to send for and examine persons, papers and records, subject to paragraph (18) of this resolution, and to meet notwithstanding any prorogation of the Parliament or dissolution of the House of Representatives.

(10) That there be two Commissioners Assisting the Committee, appointed by resolution of the Senate upon terms and conditions approved by the President, and those Commissioners Assisting shall be present at all meetings of the Committee, and may participate in the Committee's deliberations and examine witnesses before the Committee on any matter relevant to the Committee's inquiry.

(11) That the Committee appoint counsel to assist it, subject to the approval by the President of the terms and conditions of the appointment, and such counsel shall assist the Committee in relation to questions of law, evidence and procedure, and for that purpose may attend all meetings of the Committee and participate in the Committee's deliberations.

(12) That witnesses before the Committee may be examined by counsel assisting the Committee, by counsel for Mr Justice Murphy, and by counsel for witnesses.

(13) That Mr President be authorized to reimburse witnesses for reasonable costs of legal advice and representation by counsel in respect of the Committee's inquiry.

(14) That the examination of witnesses before the Committee and any submissions made to the Committee by counsel be heard in public session unless the Committee by absolute majority otherwise determines.

(15) That the Commissioners Assisting may recommend to the Committee that a particular witness be summoned.

(16) That all witnesses before the Committee be heard on oath or affirmation.

(17) That the Committee, after receiving recommendations from the Commissioners Assisting, determine procedures and rules for the examination of witnesses before it, having regard to the procedures and rules followed by the Supreme Court of the Australian Capital Territory, and subject to paragraph (18) of this resolution.

(18) That the Committee conduct its inquiry in accordance with the following procedures:

(a) Mr Justice Murphy shall not be summoned to give evidence;

(b) all examination of all witnesses shall take place in the presence of counsel for Mr Justice Murphy and of Mr Justice Murphy if he chooses to attend;

(c) when all examination of all witnesses has concluded, Mr Justice Murphy shall be invited to give evidence; and

(d) if Mr Justice Murphy gives evidence, he shall be sworn and subject to examination in accordance with this resolution.

(19) That the Commissioners Assisting advise the Committee in writing, in accordance with paragraph (2) of this resolution, upon the matters into which the Committee is to inquire and upon which the Committee is to report, and the Committee include in its report the advice of the Commissioners Assisting.

(20) That the Committee, the Commissioners Assisting, witnesses and counsel appearing before the Committee have access to the records of, transcripts of evidence taken by, and documents submitted to the Select Committee on the Conduct of a Judge and relating to the

Committee's inquiry, and may refer to those records, transcripts and documents in the course of the Committee's proceedings.

(21) That the Committee report as soon as possible but not later than 11 October 1984.

(22) That, if the Senate be not sitting when the Committee has completed its report, the Committee may send the report to the President, or, if the President is unable to act, to the Deputy President, and, in that event

(a) the report shall be deemed to have been presented to the Senate,

(b) the publication of the report is authorized by this Resolution,

(c) the President or the Deputy President, as the case may be, may give directions for the printing and circulation of the report, and

(d) the President or the Deputy President, as the case may be, shall lay the report upon the Table at the next sitting of the Senate.

(23) That the foregoing provisions of this Resolution, in so far as they are inconsistent with the Standing Orders, have effect notwithstanding anything contained in the Standing Orders.

SENATE SELECT COMMITTEE ON ALLEGATIONS CONCERNING A JUDGE

Resolutions of the Senate, 2 October 1984

(1) That, notwithstanding paragraph (20) of the resolution of 6 September 1984 appointing the Select Committee on Allegations Concerning a Judge, the Committee may determine that it will not disclose to witnesses or their counsel the transcript of oral submissions made before the Select Committee on the Conduct of a Judge by counsel for Mr Justice Murphy and relating to the evidence of Mr C.R. Briese.

(2) That, notwithstanding paragraph (20) of the resolution of 6 September 1984 appointing the Senate Select Committee on Allegations Concerning a Judge, the Committee may determine, in respect of any person other than Mr Justice Murphy, Mr C.R. Briese and their counsel, that it will not grant to that person access to the whole or part of the records of, transcripts of evidence taken by and documents submitted to the Select Committee on the Conduct of a Judge.

EVIDENCE OF MR BRIESE

1. Mr Briese first met Mr Justice Murphy at a dinner at the home of Morgan Ryan on 10 May 1979. This was a small dinner party attended by Mr Murray Farquhar, who was then Chief Stipendary Magistrate of New South Wales, and Mr Mervyn Wood, then Commissioner of Police of New South Wales.

2. The nature and purpose of the dinner have been the subject of considerable evidence before the Committee. The only significance of this dinner in relation to the issue now remaining before the Committee is the fact that Mr Briese and Mr Justice Murphy engaged in lengthy conversations about various subjects concerned with the courts and the law including the administration of justice in New South Wales until 2 or 3 a.m. Mr Briese made the most of what he saw as an opportunity to seek the views of a High Court Judge for whom he had the highest respect.

3. Mr Briese and Mr Justice Murphy met again on several occasions at a Sydney restaurant, at the High Court and at Mr Justice Murphy's Canberra home over the period 1980-81, during which the principal topic of conversation was the question of independence for the New South Wales Bench of Magistrates, which Mr Briese was anxious to obtain and for which Mr Justice Murphy expressed his support. Mr Briese sought Mr Justice Murphy's intervention with the Premier and the Attorney-General of New South Wales. Mr Justice Murphy said he would take the opportunity of doing so.

4. Although one or two statements were made by the judge in the course of these various conversations to which Mr Briese now ascribes some significance to matters before the Committee, we do not believe that they are relevant to the question which the Committee must now decide.

5. Early in January 1982, Mr Briese received a telephone call at his home from the judge who, according to

Mr Briese, said he had a matter which he would like to discuss, but not on the telephone. The judge denies this and explains the telephone call as being in response to several messages he had received from Mr Briese reminding him of a standing invitation to return his hospitality.

6. Mr Briese denies this but agrees that in reponse to the call from the judge he invited the latter and his wife to dinner with him and his wife at their home in Sydney. Prior to dinner being served, while Mrs Briese was engaged in its preparation, the judge, his wife and Mr Briese had a discussion in the lounge room. According to Mr Briese the judge raised the question of the social security conspiracy case, and criticised it in strong terms.

7. There is again some conflict between Mr Briese and the judge as to how this subject arose, but it is common ground that the judge criticised the case in strong terms, although there is no suggestion that any request was made by the judge to Mr Briese that he should communicate the judge's views to the magistrate who was hearing that case.

8. The judge states that Mr Briese said that he had not discussed this case with the magistrate handling it, and that he had made it an invariable rule never to discuss any case with a magistrate unless that magistrate came to him for advice. The judge claims he responded that this was the proper course. Mr Briese denies this conversation.

9. Mr Briese says that the judge then said to him "and I will tell you about another wrong case of conspiracy too and that is against Morgan Ryan". The judge denies this, saying that Mr Briese first mentioned the Morgan Ryan case.

10. The judge admits that he criticised the Crown for its habit of "tossing in (a) conspiracy (charge) if a case is not very strong". Mr Briese states that he had the impression from the judge that he had read the evidence and

that it was very weak. The judge denies indicating anything more than a reading of newspaper accounts.

11. There is no suggestion that Mr Justice Murphy requested Mr Briese to speak with the magistrate hearing the Morgan Ryan case. Nevertheless Mr Briese indicated he would make some inquiries about the matter to see what the situation was. He says that he did so because he felt that he was under pressure to take some action in relation to the case because of the possibility of some wrong happening in his court.

12. Prior to the judge's departure from his home that evening, Mr Briese alleges that the judge told him that he might be able to do something about obtaining an official government car for his use. This embarrassed Mr Briese to the extent that he told the judge that he already had one, which was not the case. The judge denies that any such conversation occurred.

13. Shortly after this visit by the judge to Mr Briese's home, Mr Briese asked the magistrate hearing the case about the strength of the evidence against Morgan Ryan, and was told that there was enough for a prima facie case, although it was not that strong. Mr Briese did not tell the magistrate that any inquiries had been made of him about the matter, and emphasised to the magistrate that the case was one entirely for his own judgement.

14. A few days later, Mr Briese received another telephone call from the judge who, he says, asked him about the inquiries he had promised to make about the Ryan case. The judge denies this and said he rang Mr Briese to thank him for the dinner, though Mr Briese does not recall that. He questioned the likelihood of this because a huge bouquet of flowers had been delivered at his home the morning following the judge's visit.

15. Mr Briese asked the judge whether he would be attending a reception at the State office block that evening, and told the judge that he would see him there. At the reception Mr Briese told the judge that it was his impression that the presiding magistrate seemed to have a different view of the Ryan case than the judge and it was Mr Briese's guess that Ryan would probably be committed for trial. Mr Briese says that the judge responded "the little fellow will be shattered". Although the judge denies that he used the expression "the little fellow" he admits commenting that "Ryan would be shattered".

16. Mr Briese then went on to suggest two possible ways that Ryan had of getting around the problem. First, he could try to persuade the magistrate not to commit him under "the second leg of section 41", which is a reference to a section of the New South Wales Justices Act under which a charge may be dismissed if the magistrate is of the view that even though there is a prima facie case it is not of sufficient strength to commit for trial. The second matter mentioned by Mr Briese was an application for a "No Bill", which Mr Briese and the Judge then proceeded to discuss.

17. Several days later the judge again rang Mr Briese and told him that he had discussed the question of the independence of the magistracy with the New South Wales Attorney General, and that the government was going ahead with legislation to give effect to it. The judge states that he told Mr Briese that his conversation with the Attorney-General had taken place at the reception. Mr Briese does not recall this.

18. Mr Briese says the judge then said to him "and now what about my little mate?". In evidence Mr Briese was unsure of the exact opening words of the inquiry ("and" or "now" or "and now"), but was adamant that the question was asked with such emphasis as to suggest a link between the inquiry and the preceding conversation.

19. The judge's recollection is that he did not use the expression "my little mate", but that, not having heard the exact reference at the reception, he did make an inquiry about the section of the Justices Act there referred to by Mr Briese.

20. Mr Briese and the judge agree that Mr Briese then simply repeated the general advice he had offered at the reception.

APPENDIX 3

RULINGS ON THE ADMISSIBILITY OF EVIDENCE

Date	Transcript Pages	Witness	Counsel Examining	Objection by	Ground	Ruling	Reason	Summary of reason
5.10.83	276-283	Judge Staunton	Mr Simms Q.C.	Mr Hughes Q.C.	Not relevant to Committee's terms of reference	Admissible	Not irrelevant to the inquiry-probative value to be determined later	Relevance and rules of evidence
5.10.84	290-292	Judge Staunton	Mr P. Capelin Q.C.	Mr T. Hughes Q.C.	Not relevant to Judge Flannery's evidence	Inadmiss	Not relevant to Judge Flannery's evidence	13(c) of Procedures and rules
5.10.84	292-293	Judge Staunton	Mr P. Capelin Q.C.	Mr T. Hughes Q.C.	Not relevant to Judge Flannery's evidence	Inadmiss	Not relevant to Judge Flannery's evidence	13(c) of Procedures and rules
5.10.84	461-471	Judge Flannery	Objection taken to whole of Judge Flannery's evidence before examination commenced	Mr Hughes Q.C.	- hearsay material - no evidence establishing connection between Judge Flannery and Mr Justice Murphy - not admissible as similar facts evidence	Admissible	Relevant to the matter of fact in statement of allegations Hearsay a separate matter - to be determined later	Relevance
8.10.84	484-491	Judge Flannery	Mr T. Simms, Q.C.	Mr D. Bennett, Q.C.	hearsay evidence	Inadmiss	Rules of evidence against hearsay evidence	Rules of Evidence
9.10.84	543-549	Judge Flannery	Mr P. Capelin Q.C.	Mr D. Bennett Q.C. Mr J. Pritchard	Question not permitted under principles of re-examination	Inadmiss	"Judge Flannery's credit not put in issue; re-exam on it too remote to justify pursuing the question"	Rules of Evidence
9.10.84	549-550	Judge Flannery	Mr P. Capelin Q.C.	Mr D. Bennett, Q.C.	Re-examination to introduce new material	Inadmiss	"question too general"	Rules of Evidence
9.10.84	550-551	Judge Flannery	Mr P. Capelin Q.C.	Mr D. Bennett Q.C.	(i) leading question (ii) does not arise from cross-examination	Inadmiss	"reasons to be given later"	Rules of Evidence
10.10.84	672-677	Judge Foard	Mr M. Neil	Mr J. Pritchard	Relevance to the Crown's terms of reference	Inadmiss	"too remote from the terms of reference"	Irrelevance
10.10.84	678-683	Judge Foard	Mr P. Capelin Q.C.	Mr T. Hughes Q.C.	Cross-exam to restore credit cannot be achieved by asking question of another witness, relevance to terms of reference	Inadmiss	"question ... not relevant to the evidence of Judge Flannery"	Rules of Evidence and Irrelevance
10.10.84	685	Judge Foard	Mr P. Capelin Q.C.	Mr J. Pritchard	Reference to terms of reference	Inadmiss	"Not sufficient connection between the question and the position of Mr Justice Murphy"	Irrelevance
10.10.84	685-692	Judge Foard	Mr P. Capelin Q.C. seeking leave to ask questions ruled as inadmissible	Mr T. Hughes Q.C. Mr C. Papayanni Mr J. Pritchard	Irrelevance to terms of reference	Leave not granted	not stated specifically	Irrelevance
10.10.84	692-696	Judge Foard	Mr P. Capelin Q.C.	Mr T. Hughes Q.C. Mr C. Papayanni	Irrelevance	Inadmiss	"Not necessary to give support to Judge Flannery's earlier answers not sufficiently connected with the position of Mr Justice Murphy"	Rules of Evidence and Irrelevance

SENATE SELECT COMMITTEE ON ALLEGATIONS CONCERNING A JUDGE

Procedures and Rules for the Examination of Witnesses

Determined 27 September 1984, amended 3 October 1984

GENERAL

1. These procedures and rules shall be followed unless the Committee, after hearing counsel, deem it just and appropriate to depart from them in particular circumstances.

2. The Committee's inquiry shall, in general, be conducted as a judicial proceeding to the intent that, save as provided in paragraph 3 hereof,

   (a) the rules of evidence shall be applicable to the Committee's hearings;

   (b) the Committee shall make its findings of fact upon the evidence adduced before it in this way and shall not take into account any other material.

3. The Committee reserves the right, after hearing counsel, to receive evidence not admissible under the rules of evidence should it deem it just and appropriate to do so.

4. The records, transcripts and documents referred to in paragraph (20) of the Resolution of the Senate of 6 September 1984 shall not be taken into account by the Committee in making its findings of fact except to the extent to which any such records, transcripts or documents are received in evidence before this Committee.

5. Consistently with paragraph 4 and notwithstanding the rights conferred upon them by paragraph (20) of the Resolution of the Senate of 6 September 1984, the Members of the Committee and the Commissioners now indicate that they do not propose hereafter to have access to or refer to the records, transcripts or documents mentioned in paragraph (20) except in the presence of counsel and in formal sittings when they

deem it necessary to consider whether any such records, transcripts or documents should be received in evidence or referred to in the course of the evidence.

6. All hearings of the Committee shall be conducted in public unless the Committee deems it just and appropriate to hear evidence in camera, whether on the application of any person or of its own motion.

7. Counsel assisting the Committee shall make available to counsel for Mr Justice Murphy and to counsel for Mr Briese proofs of evidence of all witnesses he proposes to call to give evidence.

8. In accordance with the ordinary practice in courts, witnesses shall not be allowed to consult their counsel while they are giving evidence unless the committee grants leave.

OPENING ADDRESS

9. (a) Counsel assisting the Committee shall be entitled to make an opening address before calling evidence.

(b) Counsel for Mr Justice Murphy, if he proposes to call evidence, shall be entitled to make an opening address before doing so.

(c) Counsel for witnesses shall not be entitled to make an opening address.

EVIDENCE IN CHIEF

10. All witnesses, other than Mr Justice Murphy (should he give evidence) and witnesses called on his behalf, shall in the first instance be examined in chief by counsel assisting the Committee by means of non-leading questions.

11. Counsel for any witness who is called by counsel assisting the Committee may ask supplementary non-leading questions of that witness.

12. Counsel for Mr Justice Murphy shall have the right to examine in chief Mr Justice Murphy (should he give evidence) and any witness called on his behalf.

CROSS EXAMINATION

13. (a) Counsel assisting the Committee may cross-examine generally Mr Justice Murphy (should he give evidence) and any witness called on his behalf.

(b) Counsel for Mr Justice Murphy may cross-examine generally all witnesses other than those called by him.

(c) Counsel for a witness may cross-examine all other witnesses including Mr Justice Murphy (should he give evidence) and any witness called on his behalf, on matters relevant to the evidence of the witness for whom that counsel appears.

14. The Committee may stop any secondary cross-examination if it considers it repetitive or oppressive.

RE-EXAMINATION

15. (a) Counsel for a witness may re-examine that witness before counsel assisting the committee does so.

(b) Counsel for Mr Justice Murphy may re-examine Mr Justice Murphy (should he give evidence) and any witness called on his behalf.

(c) Counsel assisting the Committee may re-examine any witness called by him.

CLOSING ADDRESS

16. At the conclusion of all the evidence,

(a) Counsel for a witness shall not make a closing address except with the leave of the Committee.

(b) Counsel for Mr Justice Murphy may make a closing address.

(c) Counsel assisting the Committee shall be entitled to make the final closing address.

SCHEDULE OF RELEVANT DOCUMENTS

BEFORE THE

SENATE SELECT COMMITTEE ON THE CONDUCT OF A JUDGE

1. The purported transcripts and summaries of conversations, given to The Age newspaper by Mr R. Bottom, in which Mr Justice Murphy is allegedly a participant or is referred to.

2. Hansard transcript of one conversation, purportedly recorded on a tape recording given to The Age newspaper by Mr R. Bottom.

3. Profile of Morgan Ryan and summary of information supplied by informant.

4. Opinions (4) provided by Mr C.W. Pincus, Q.C.

5. Interim report of Special Prosecutor Mr I. Temby, Q.C. Final Report of Mr Temby.

6. Australian Federal Police records of interview, supplied by Mr I. Temby, Q.C., interviews with Messrs Lewington, Lamb, Jones and Kennedy.

7. Transcripts of evidence taken by the Committee:

   Mr I. Temby, Q.C., 18 April 1984
   Mr R. Bottom, 15 May 1984
   Mr C.R. Briese, 28 May 1984
   Mr D.J. Lewington, 28 May 1984
   Mr R.A. Jones, 28 May 1984
   Mr P.J. Lamb, 7 June 1984
   Mr M.J. Ryan, 8 June 1984
   Mr C.R. Briese, 4 July 1984.

8. Letter of 12 June 1984 to Mr Justice Murphy and attachments.

9. Statement of 2 July 1984 by Mr Justice Murphy.

10. Other correspondence

Letter of 16 May 1984 to Mr C.R. Briese, and attachments
Letter of 1 June 1984 to Mr M.J. Ryan

Committee documents

11. Index to matters referred to in materials
Index to transcripts of evidence
Chronology of significant events
List of references to Mr Farquhar

AUSTRALIAN SENATE
CANBERRA A.C.T.

SELECT COMMITTEE ON ALLEGATIONS CONCERNING A JUDGE

The Senate has appointed this Committee

(a) to inquire into the allegations made by Mr C.R. Briese, the Chairman of the Bench of Stipendiary Magistrates of New South Wales, concerning Mr Justice Murphy of the High Court of Australia, made before the Select Committee on the Conduct of a Judge and referred to in Appendix 5 of the Report of that Committee, and, after conducting such inquiry,

(b) to report to the Senate its findings of fact upon those allegations, and

(c) to report in relation to those allegations whether Mr Justice Murphy engaged in any conduct which could amount to misbehaviour providing sufficient grounds for an address to the Governor-General in Council by both Houses of the Parliament praying for his removal from office pursuant to section 72 of the Constitution.

The Committee will meet in public session at 1 p.m. on Monday, 24 September 1984, in Senate Committee Room No. 1, Parliament House, Canberra, to hear submissions of counsel on procedural matters.

The Committee will meet in public session at 10 a.m. on Monday, 1 October 1984, in Senate Committee Room No. 1, Parliament House, Canberra, to hear evidence.

Harry Evans
Secretary of the Committee
The Senate
Parliament House
Canberra
21 September 1984

SENATE SELECT COMMITTEE ON ALLEGATIONS CONCERNING A JUDGE

LIST OF EXHIBITS

Exhibit 1A: Statement given by Mr C.R. Briese to the Select Committee on the Conduct of a Judge on 28 May 1984.

Exhibit 1B: Letter dated 12 June 1979 from Mr C.R. Briese to Mr T.W. Haines, Under-Secretary of Justice of New South Wales (originally an attachment to 1A).

Exhibit 2: Letter dated 16 May 1984 from the secretary of the Select Committee on the Conduct of a Judge to Mr C.R. Briese and parts of the attachments to that letter.

Exhibit 3: Transcripts of proceedings in the District Court of New South Wales in respect of R v Ryan, dated 29 April 1982, 18 June 1982 and 19 July 1982.

Exhibit 4: Copy of letter dated 23 March 1982 from Morgan Ryan and Brock to Mr B. Roach, Solicitor for Public Prosecutions of New South Wales, concerning the trial of Mr M.J. Ryan.

Exhibit 5: Report of Queen v Hoar, High Court of Australia, 1981 148 CLR 32.

Exhibit 6: Photocopy of court lists from Sydney Morning Herald, 9 May 1984.

Exhibit 7: Copy of judgement in R v Ryan, New South Wales Court of Criminal Appeal, 26 July 1984.

Exhibit 8: Newspaper articles

National Times 1 December 1983 "Big Shots Bugged'

The Age 2 February 1984 'Secret tapes of judge'

The Age 3 February 1984 'Phone taps reveal crime web'

The Age 4 February 1984 'Trimbole's line to the top'

The Age 2 March 1984 'Authentic? How 'The Age' matched people and places with the transcripts'

Sydney Morning Herald 18 February 1984 'Ample scope for prosecutions: Dowd'

Bundles of purported transcripts of conversations headed

"Rabid tape No. 1 FROM PM 6.2.80 to 8am 7.2.80"

"No's for Mad Dog"

Bundle of purported summaries of conversations headed

"Morgan John Ryan".

Exhibit 9: Letter dated 1 June 1982 from Mr Justice Murphy's associate to Judge J. Foord and attached report of judgement in R v Perry, N.S.W. Court of Criminal Appeal, 20 October 1981.

Exhibit 10: Department of Administrative Services, Transport and Storage Division, Daily work sheet of Mr J. Troutman, 6 January 1982.

Exhibit 11: Letter dated 5 June 1984 from Mr C.R. Briese to the secretary of the Select Committee on the Conduct of a Judge, concerning Mr Briese's evidence before that Committee.

Exhibit 12: List headed "Judicial arrangements - lengthy trials - May 1983", dated 2 May 1983.

Exhibit 13: Documents relating to the proceedings against Mr M. Ryan

information dated 7 August 1981

summaries dated 7 August 1981

charge sheet dated 5 November 1981

indictment dated 11 July 1983

letter dated 23 March 1982 from Morgan Ryan and Brock to the Solicitor for Public Prosecutions of New South Wales, relating to the trial of Mr M. Ryan, with covering letter dated 29 March 1982 from Assistant Registrar (Crime) to the Deputy Crown Solicitor of New South Wales.

Exhibit 14: Solicitor for Public Prosecutions of New South Wales, file of documents relating to proceedings against Mr M. Ryan.

Exhibit 15: Court of Petty Sessions, New South Wales, case sheet on R.B. Cessna, 15 March 1979, 3 pages.

Ditto T.W.L. Milner.

Exhibit 16: Report of the Royal Commission concerning proceedings against Mr K. Humphries, 1 page.

Exhibit 17: Statement of Mr K.W. Jones.

Exhibit 18: Court notation concerning proceedings against Mr M. Ryan, photo copy of handwritten entries and typed copy.

Exhibit 19: Pages from the transcript of the evidence given before the Select Committee on the Conduct of a Judge by Mr C.R. Briese:

165-167; 149-152; 388; 389-394; 440; 447-449.

Exhibit 20: Report of the Select Committee on the Conduct of a Judge.

STATEMENT BY MR T.E.F. HUGHES, Q.C., 12 OCTOBER 1984

Mr Chairman, the context in which this Committee has been conducting this inquiry has undergone an essential change as a result of political events which have occurred during the last week. The present Parliament is now within a fortnight of its expiry as a total entity. The House of Representatives last night adjourned indefinitely and is to be dissolved on 26 October next. These in a practical sense are unalterable political facts. One result of these events is that it is now impossible, even if misbehaviour were found, for the procedures envisaged by section 72 of the Constitution to be implemented before the forthcoming election. This is because section 72 requires that an address for the removal of a Federal judge must be passed by both Houses in the same session. Unless that happens, the Governor-General in Council has no power of removal. It follows that, with all respect, the Senate, as presently constituted, could be seen to be acting inappropriately if it were to contemplate an address for removal before the expiry of the present Parliament. Again with respect, I say that any attempt so to do could be seen as a futile step taken solely for political reasons. Further persistence by the Senate, as presently constituted, in requiring this Committee to bring in a report on its terms of reference may be seen to be, without any fault whatsoever on the part of this Committee, an unjustifiable attempt based upon political considerations to pre-empt the proper role of the new Parliament. When the new Parliament assembles next year the Senate will be constituted differently inasmuch as its numbers will be increased from 64 to 76 as from the date of its first sitting. It will be a different Senate.

Also, without any fault on the part of this Committee - and I wish to emphasise that as strongly as I can - there has been another alteration in the context in which this inquiry is being conducted. It has become quite clear that its procedings are being conducted in a highly politicised environment and are being treated as a factor in the opening stages of an election campaign. If the judge gives evidence, it is virtually inevitable that he may become a political football in the election. This would be intolerable. I emphasise that if it were to happen it would be quite unavoidable so far as this Committee is concerned.

In these circumstances, coupled with another to which I shall refer in a moment, our client takes the view that it would be altogether inappropriate for him to appear as a witness before this inquiry. It would be incompatible, in our submission, with the position of the Court of which our client is a member that he should give oral evidence before this Committee. Few things could be more detrimental to the constitutional position of the Court than that one of its justices, not charged with any alleged offence and not the subject of any charge formulated by the Senate, should give evidence in the present circumstances. In this connection it should be remembered that the terms of reference of the Committee were altered so as to remove from its jurisdiction any power to make a finding on the issue whether there has been misbehaviour. That alteration was made, I think, by resolution of the Senate on 2 October.

Another, but I emphasise less important, factor that has influenced our client in making this decision is that an important safeguard proposed by this Committee was overruled by the Senate, which voted in this respect on party lines. In the result, our client has been deprived of a fundamental protection available to any sole defendant in a criminal trial - namely, protection from multiple cross-examination. I have covered this ground before, sir, and I shall not go over it again. Any participation on Mr Justice Murphy's part by testifying before this Committee will create a precedent, or would create a precedent, which, in our respectful submission, should never be tolerated in the relations between the judiciary and the Parliament. No judge should be subjected to this and my client will not lend his aid to such a procedure. For these reasons the Committee's invitation is respectfully declined. I am instructed finally to say, so that it is quite clear, that Mr Justice Murphy categorically denies any misbehaviour and will, if necessary, insist on exercising his constitutional rights under section 72 of the Australian Constitution in the next Parliament. I thank you, sir.

REPORTS BY MEMBERS OF THE COMMITTEE

REPORT OF SENATOR MICHAEL TATE AND SENATOR JANINE HAINES

INTRODUCTION

1. We are required by the Senate to report my findings of fact upon the allegations of Mr C.R. Briese set out in appendix 5 of the report of the Senate Select Committee on the Conduct of a Judge (Senate resolution 1(b)) and whether Mr Justice Murphy engaged in any conduct which could amount to misbehaviour providing sufficient grounds for an address praying for his removal (Senate resolution 1(c)).

2. We are also asked to indicate in our report (presumably because the Senate wishes not to have the standard of proof of conduct or the appropriate criterion for misbehaviour to be conclusively determined by its Committee) whether there is any proof of conduct which could amount to misbehaviour (1) beyond reasonable doubt and (2) upon the balance of probabilities, and using the meanings of misbehaviour contained in the opinions of the Solicitor-General of the Commonwealth and that of Mr C.W. Pincus, Q.C.

3. We shall refer to the Senate Select Committee on the Conduct of a Judge as "the prior Committee" and the allegations contained in appendix 5 of the prior Committee's report are to be found in appendix 2 of this Committee's report. For convenience, the reference will remain to 'appendix 5'.

THE FACTS

4. We turn to the allegations of Mr Briese and the finding of fact.

5. There are two types of facts to be determined. One type is of overt conduct, observable to a bystander, whether by sight or by hearing words uttered. We shall call this 'observable conduct'. The other is of a state of mind, the accompanying intent, if any, with which observable conduct is undertaken. This fact can only be inferred, but it is nevertheless possible to reach a conclusion that the state of mind existed.

OBSERVABLE CONDUCT

6. It is convenient to deal first with the occurrence of the 'observable conduct' outlined in appendix 5, containing the alleged sequence of events in the relationship between Mr Justice Murphy and Mr Briese over some years.

7. It is only those events which are in issue and which require resolution by this Committee. It is to be emphasised that a notion of Mr Briese that a general conspiracy existed to pervert the administration of justice in New South Wales and involving the judge and others was not an issue before this Committee and we do not make any finding as to whether such a conspiracy existed.

8. However, his notion of a conspiracy was vehemently attacked by counsel for Mr Justice Murphy in an attempt to discredit Mr Briese as a reliable witness on the issues which were before the Committee.

9. Although Mr Briese was unable to substantiate his notion, and although the notion clearly coloured his presentation of evidence to the prior committee, the inability of Mr Briese to sustain the inference which he had drawn did not affect the general impression of honest recollection of the observable conduct outlined in appendix 5 and about which he gave evidence in chief.

10. He was not shaken in cross-examination on those matters. Such inconsistencies as existed between his original written submission or evidence to the prior committee and his evidence before this Committee were trivial or explicable by the different format of proceedings. We accept Mr Briese's account as reliable, but are these observable facts proved either on the balance of probabilites or, alternatively and more demanding, beyond a reasonable doubt?

11. This requires some consideration of the fact that Mr Briese's account of observable conduct is uncontradicted by evidence of Mr Justice Murphy.

12. Mr Justice Murphy declined the Committee's invitation to give evidence at the conclusion of the presentation of the evidence of witnesses by counsel assisting in the presence of counsel for the judge. He was entitled to do so, both in terms of the Senate resolution and by way of analogy with criminal proceedings. He gave reasons which clearly weighed with him.

13. We do not find it necessary to draw the inference which Mr Wickham invited the Committee to draw (at p.32) where he said "I do, however, advise that it should be inferred that his real reason for not giving evidence was that to do so would be unlikely to make his position better". On the other hand, the "categorical denial" of misbehaviour made by the judge through counsel we put to one side as not being a privilege open to the judge under the law of evidence applicable in the A.C.T.

14. It is important to note that the written response of the judge to certain matters put to him by the prior Committee was not admitted in evidence before this

Committee by its decision after receiving the unanimous advice of the Commissioners that to do so would be contrary to the rules of evidence, the body of which had been adopted primarily in the interests of fairness to the judge. Even the judge's version of events in appendix 5 is thus not in evidence as to its truth before this Committee.

15. Suffice to say the judge voluntarily chose to leave Mr Briese's evidence as to his observable conduct uncontradicted. Therefore it leaves a situation where the fact-finding tribunal, being constrained to have regard only to the evidence before it, if it finds Mr Briese credible, must find the facts given in such evidence proved.

16. We find the facts as alleged by Mr Briese in the sense of observable conduct proved beyond reasonable doubt, and even more clearly on the balance of probabilities. We would adopt the process of reasoning and conclusions of Mr Wickham from half-way down page 9 to half-way down page 21.

17. The next question for the Committee was whether the observable conduct of the judge carried with it an actual tendency to cause an interference in the due course of the committal proceedings against Morgan Ryan. This is separate from the question of the judge's actual intent, and quite independent of the fact there was no such interference in the event.

18. Counsel assisting the Committee recapitulated the essential factors the pre-dinner conversation at the Briese home on 5 January, (being a time when Mr Jones was considering whether to commit Morgan Ryan for trial, evidence having been concluded on 22 December 1981) in the following way:-

"To recapitulate then that conversation, the essential factors are: Mr Justice Murphy said to Mr Brise, (1), that the Morgan Ryan conspiracy case was wrong; (2), that he had read the evidence; (3), that the evidence was very weak and did not support a charge of conspiracy; and (4), that he, Mr Justice Murphy, was really concerned about the case."

19. We conclude that the cumulative effect of those remarks was inherently likely to produce the result which they did, namely to cause Mr Briese to make some inquiries of the magistrate. We conclude further that they carried a real risk and a natural tendency for Mr Briese to indicate to the magistrate the nature of some concern about the propriety of the charge and the weakness of the evidence. It is possible also that the words carried the risk that the judge might have been mentioned by name or by reference to his prestigious office.

20. The words uttered would have been well calculated to affect the mind of Mr Jones, particularly if, as we now know, he did not think the case was very strong. But, apart from that latter circumstance, there was every chance he would be influenced by a matter put to him otherwise than in open court.

21. To summarise the stage reached in our consideration of the evidence: We find beyond a reasonable doubt and on the balance of probabilities that Mr Justice Murphy uttered the alleged words in a sequence of events and that his conduct had a real tendency to produce an interference in the due and proper course of the magistrate's consideration of the committal proceedings against Morgan Ryan.

INTENTION

22. Were the words intended to produce that result, rather

than the more innocuous inquiry actually undertaken by Mr Briese without expressing any misgivings either of his own or anyone else's?

23. This brings us to the other type of fact upon which the Committee is required to make a finding, namely the judge's state of mind which was a matter of fact, though its existence and character are to be discerned by inference drawn from the evidence before this Committee.

24. In attempting to discern the judge's state of mind, this Committee was presented with a different body of admissible evidence compared with the matters taken into account by the Senate Select Committee on the Conduct of a Judge.

25. First, the Committee had no evidence before it from the judge as to his state of mind whereas the prior Committee had an unsworn statement from the judge as to the relevant events. (see para.12). We draw no adverse inference from the judge's decision not to give evidence personally, but the net result is that the best evidence as to his thoughts in uttering the words in the course of conduct which we find proved is not available.

26. Secondly, the Committee had evidence of conversations between the judge and Chief Judge Staunton and Judge Flannery of the District Court of N.S.W. Those conversations can properly be used to throw light on the state of mind of the judge in speaking with Mr Briese.

27. We do not take into account any inference drawn by Mr Briese either at the time or subsequently as to the judge's state of mind. He could have been mistaken; but, in any case, it is for the Committee to draw the

relevant inferences from the whole of the evidence before it.

28. The question to be asked is, did the judge in uttering the words in the contexts found proved above, harbour an intention that the ordinary and due course of the committal proceedings against Morgan Ryan would be influenced by the uttering of those words?

29. Counsel assisting the Committee, at pages 1318-1319 of the transcript, suggested the question could be refined and expressed in this way.

> "Did Mr Justice Murphy intend that Mr Briese should communicate with Mr Kevin Jones in that way?" ("that way" being such as to cause Mr Jones to have regard in reaching his decision in the committal proceedings to matters other than those which came before him in open court in the ordinary course of those proceedings).
>
> Mr Simos, Q.C. went on: "Relevant to this more refined question of intention is the question whether Mr Justice Murphy tried to procure Mr Briese to communicate with Mr Jones for that purpose, because if he tried to procure that result it is a legitimate inference that he intended to do so. The question as to Mr Justice Murphy's intention then becomes: Did Mr Justice Murphy endeavour or try by any means - for example, persuasion, suggestion, pressure or request - to procure the result that Mr Briese should communicate with Mr Jones in that way?" (p. 1319)

30. We have concluded that it is more probable than not that Mr Justice Murphy did harbour such an intention though we cannot entirely exclude a reasonable hypothesis of innocence.

31. We therefore find that on the balance of probabilites an intention to influence the ordinary and due course of the committal proceedings against Morgan Ryan accompanied the uttering of the relevant words at the

Briese dinner. We do not find such an intention proved beyond reasonable doubt. We will try to explain why.

32. In the last week of December 1981, the judge telephoned Mr Briese and said he would like to discuss a matter, but not on the telephone, nor, as suggested by Mr Briese, at a restaurant. This is equivocal, and does not necessarily anticipate a matter of delicacy or some impropriety - but it points to a desire for confidentiality.

33. Dinner was eventually arranged at the Briese home for the following week. Before going in to dine, general conversation took place and turned at one point to the conspiracy case known colloquially as the "Greek Social Security case". It is as well to set out the evidence in chief of Mr Briese as to subsequent conversation:

> "Mr Simos - Yes. Could you put in words of the first person the substance and effect of the conversation as you recall it.
>
> Mr Briese - I think I said something to the effect: 'The magistrate has already been on that case for years and it's causing considerable inconvenience to our backlog of arrears'. Mr Justice Murphy said: 'Those conspiracy charges that were laid in that case are really quite outrageous. In my view, the magistrate hearing those charges should dismiss them. In my view, he would be a hero in the community if he dismissed those charges, and what he should do for special emphasis is to dismiss them in one short paragraph for special emphasis'.
>
> Mr Simos - Did you make any response to that?
>
> Mr Briese - I said: 'Well, I haven't spoken to the magistrate about those charges and I don't know anything about them. However, my impression, from incidental remarks I have overheard him make, is that he will probably be committing - he will probably be finding a prima facie case against some of the defendants'.
>
> Mr Simos - Yes; what happened after that, or what was said after that?

Mr Briese - Mr Justice Murphy then said: 'Anyway, I'll tell you about another wrong case of conspiracy, too, and that's the Morgan Ryan case'.

Mr Simos - Now, just as to those words, what is your recollection? Is it your recollection that they're the very words he used or are they the substance and effect of ....

Mr Briese - They are very close to the exact words that he used.

Mr Simos - Yes; what did you say?

Mr Briese - I said: 'Yes, well, what's wrong with it?'. He said: 'The evidence is very weak and doesn't support a charge of conspiracy'.

Mr Simos - did you make any reply?

Mr Briese - I said: 'What, have you read the evidence?'. He said, he said: 'Yes'. I said: 'Who's the magistrate that's hearing the case?'. He said: 'Jones'.

Mr Simos - Were you aware at that time who the magistrate was?

Mr Briese - Yes, I was aware that it was Jones who was hearing the case.

Mr Simos - All right. What further conversation was there, if any?

Mr Briese - There was further, further indic...., and I suppose I must say it in the first person, there was further discussion from Lionel about the matter and I said 'Lionel, you're really concerned about this case, are you?' and he said: 'Yes'. I said: 'Well, I don't know anything about the case. I haven't spoken to the magistrate' or 'the magistrate hasn't spoken to me about it. I'll make some inquiries and see what the situation is'.

Mr Simos - And did he make any reply to that?

Mr Briese - I don't think so.

Mr Simos - All right. What happened then?

Mr Briese - I think it was shortly thereafter that we moved to the dinner table."

34. Counsel assisting the Committee recapitulated the

conversation in this way:

> "To recapitulate then that conversation, the essential factors are: Mr Justice Murpjy said to Mr Briese, (1), that the Morgan Ryan conspiracy case was wrong; (2), that he had read the evidence; (3), that the evidence was very weak and did not support a charge of conspiracy; and (4), that he, Mr Justice Murphy, was really concerned about the case."

35. We conclude that it is more probable than not that the conversation was intended by the judge to suggest to Mr Briese that he should do something to convey the concerns of the judge to the magistrate. We do so for the following reasons.

36. The judge raised no demur when Mr Briese indicated he would make some inquiries. As the response was to expressions of his concern both about the legal impropriety ("a wrong case") of what was going on in the Morgan Ryan committal proceedings and about the cogency of the evidence ("very weak") it would be fair to conclude that the judge understood the inquiries to be likely to be about those matters of concern. For example, he had not asked what stage the proceedings had reached. He had expressed concern at a wrong and a weak case moving through the Court of Petty Sessions of which Mr Briese was the Chief Magistrate and who might be expected to inquire into such an allegation made by a High Court judge.

37. The judge need not have had a clear idea as to how Mr Briese would communicate these misgivings, whether by attributing them to the judge or adopting them for himself or indicating the existence of high level concern around the place. It was enough that he embarked on the conversation "taking a punt" that something useful to Mr Ryan might come of it.

38. Second, we return to the telephone call initiating the dinner. We have said that this, of itself, does not indicate the subject-matter of discussion best undertaken 'face to face'. However there is no evidence of any other element of the night's discussion which might be thought to require such a personal and confidential meeting.

39. A High Court judge entertaining the gravest doubts as to the propriety of proceedings before a Magistrates' court may well want to acquaint discreetly the Chief Magistrate of that court with his concern. It is this part of the pre-dinner conversation which ties in with the preceding telephone call and we conclude that the judge had in mind making some such expression of his concern about the conspiracy charge brought against Morgan Ryan when making that call.

40. Third, we have regard to the evidence given by Chief Judge Staunton and Judge Flannery.

41. In the case of Chief Judge Staunton, a proper approach was made to him by Mr Justice Murphy with a view to expediting the trial of Morgan Ryan. It is inconceivable that such an approach would be made without some assurance that this accorded with Morgan Ryan's wishes. (In fact, Mr Justice McClelland recalled Murphy telephoning him and saying "The poor little bugger's worried out of his mind. He ought to get it on and over with as soon as possible."). The judge adduced some argument in support of the request, and did not merely seek out information as to how a speedy trial might be brought about (as did Mr Justice McClelland "reluctantly").

42. In other words, the judge went to some pains, and not reluctantly, to assist Morgan Ryan in the manner appropriate to that stage of the judicial process. It

indicates a preparedness to put in a word, though not necessarily an improper word.

43. Judge Flannery's evidence, which is uncontradicted as to the observable facts, also falls to be assessed for any light it might shed on Mr Justice Murphy's state of mind in discussing the committal proceedings with Mr Briese.

44. Judge Flannery had been specially assigned as the trial judge in early May. Even though the case was not reached on 9 May it was an invariable practice that the assigned judge would stay with the case, more particularly in this instance as Judge Flannery was one of the few available judges who had no prior association with Morgan Ryan.

45. We find that Mr Justice Murphy knew that Judge Flannery had been designated the trial judge when he spoke to him on the telephone in early July. It was readily accessible knowledge. It seems improbable that Mr Justice Murphy, having exhibited a keen interest at both the committal (where he had discovered the identity of the magistrate) and pre-trial stages (where he interceded for a speedy trial) would not have discovered for himself, or been informed, that the identity of the trial judge had not altered in the two months since he had been designated. What makes it probable is the very nature of the judge's activity in early July.

46. A revival of an association which had been no more than casual and formal for a decade, at the instance of Mr Justice Murphy, (and one might almost say at his insistence) and the evident seeking of an opportunity to speak to Judge Flannery in a congenial atmosphere may indicate no more than looking for an occasion in which to assess the character of the judge who was to

try his friend, Morgan Ryan. But, in the absence of any credible alternative explanation, that is the most innocent interpretation that can be placed on his seeking out of Judge Flannery.

47. In any event, a dinner party was held at Judge Murphy's home two days before Morgan Ryan's trial. Only the judges and their wives were present at the dinner. At dinner, the judge expressed his views on conspiracy charges and the unfair use of what somebody said about somebody else and pointed to a recent High Court decision - Hoar's case, (R. v Hoar, A.L.R. 357) in which he had written a particularly scathing judgment on the use of conspiracy charges, supplementing the strong expressions of the other members of the Court. [at 363-4]

48. As we have found that the judge knew that Judge Flannery was to be the trial judge in the Morgan Ryan conspiracy case, we conclude that the judge had it in mind, probably when he sought out Judge Flannery and certainly on the occasion of the dinner, that Judge Flannery should conduct that trial with his mind refreshed by a reading of the views of the High Court, especially those of the judge (and as supplemented by some remarks at the dinner table) on the use of conspiracy charges, and that this was intended to have some impact in the course of the trial. It clearly had that tendency.

49. We regard as irrelevant and do not take into account the fact that Mr Miles attempted to use Hoar's case in an opening address to Judge Flannery the following Monday.

50. We conclude that this activity of the judge manifested an intention to put in a word in the appropriate ear in a way which might assist the outcome of the judicial

proceedings in which Morgan Ryan was enmeshed.

51. We make no comment on the propriety or lawfulness of the judge's conduct in relation to Judge Flannery as that is not called for in this case.

52. Suffice to say that the conversations with Chief Judge Staunton and Judge Flannery re-inforce the conclusion about which we might otherwise have been more tentative, namely, that the telephone call in late December in which the judge indicated he wished to discuss a matter, but not on the phone, when linked to the actual conversations at the Briese dinner party indicate a deliberate course of action undertaken to assist a friend in a way suitable to the committal stage of the proceedings.

53. The raising in discussion of the Morgan Ryan conspiracy case, characterising it as 'wrong' and the evidence supporting the allegation as 'weak', were not unpremeditated remarks with no special interest in the effect they might have on the person to whom they were directed.

54. We understand the Commissioners' advice to be that this is a legitimate use of the evidence of Chief Judge Staunton and Judge Flannery and, further, in so using it, both Commissioners came to substantially the same conclusions as we have.

55. He could not know, or be sure, how Mr Briese would respond, anymore than he could be sure that Judge Flannery would read Hoar's case in the light of the judges' disapproval of conspiracy charges. But, I consider it more probable than not that he hoped for some response and intended that the response should in some way influence the ordinary and due course of Mr Jones' conduct of or decision upon, the committal proceedings.

56. We have reached this conclusion independently of any inferences which may be drawn from the persistent inquiries made by the judge of Mr Briese in several conversations subsequent to the Briese dinner. We have already found proved the facts as outlined by Mr Briese, both as to sequence and as to content but find any inferences quite equivocal.

57. The conversation at the State Office Block involved no more than the giving of information by Mr Briese to the judge regarding his (Briese's) guess about the outcome of the committal proceedings following inquiries as to which there was no indication of impropriety. The response from the judge was simply "the little fellow will be shattered". Mr Briese then outlined some proper steps which Morgan Ryan could take, if a prima facie case were found, such that he would not face a trial. And that was an end to it.

58. The telephone conversation some days later started with a matter of long-standing mutual interest to both men - independence of the N.S.W. magistracy - and an indication that the matter was progressing well with legislation to be introduced by the State Attorney-General. The subsequent inquiry "And now, what about my little mate?" could be an inquiry about the decision of Mr Jones which the judge may have thought to be imminent, or could be a request for repetition of the advice as to what steps could be taken following a finding of a prima facie case or could be a suggestion that a 'quid pro quo' was required for the advancing of the cause of magisterial independence.

59. We are unable to find which of the various inferences is the more probable. Although, on one view, we are entitled to use a conclusion as to the intent of

Mr Justice Murphy at the Briese dinner to help discern the intent with which the subsequent conversations were undertaken, that would be rather circular when we are inquiring whether the intent at the Briese dinner was guilty or not. We derive no great help from them.

60. The Chief Justice and Justice Mason in a joint judgment in the High Court Chamberlain and Another v R (51 A.L.R., 225 at 237) had this to say about the civil and criminal standards of proof.

> "When the evidence is circumstantial the jury, whether in a civil or in a criminal case, are required to draw an inference from the circumstances of the case; in a civil case the circumstances must raise a more probable inference in favour of what is alleged, and in a criminal case the circumstances must exclude any reasonable hypothesis consistent with innocence." (our emphasis)

61. In elucidating that, Mr Connor asked counsel assisting:

> "Does that amount to this, that in drawing inferences on the balance of probabilities, the civil onus, you can select the more probable one; but in a criminal case, if there's a reasonable one that's consistent with innocence, even though it's not the probable one, that's a bar to accepting the probable one?
>
> Mr Simos - Yes. I'm not sure that one would find universal agreement as to how to state the effect of what I've read, but certainly that is one way of expressing it and I would not dissent from it." (pages 1331-1332)

62. We find that the circumstances do not exclude a reasonable hypothesis consistent with innocence or, to put it Mr Connor's way, there is a reasonable inference consistent with innocence, even though it's not the probable one.

63. We outline the alternative inference, which we find reasonable on the evidence though less probable, that the Committee was invited to draw as to the judge's

state of mind at the dinner.

64. It was submitted on this view that Mr Justice Murphy had no reason, when he embarked on the conversation at the Briese dinner, to suppose that Mr Briese would communicate improperly with Mr Jones. This was put on the basis that

(1) Mr Justice Murphy did not request or suggest to Mr Briese that he should take steps to inquire in any way of Mr Jones or anyone else about the case. Mr Briese agreed that no such request was put to him.

(2) Mr Briese had indicated that he had not spoken to Mr Brown, the magistrate hearing the "Greek Social Security" case, about its progress but had nevertheless picked up from incidental remarks of Mr Brown that he was likely to commit. It may be thought remarkable that Mr Briese as Chief Magistrate had not made some such inquiry concerning a notorious case creating a backlog of work in his courts.

(3) When, therefore, Mr Briese offered to make some inquiries, the judge had reason to suppose they would not go beyond the same general kind of inquiry as outlined in (2), and hence did not demur. And it is to be emphasised that Mr Briese did not say he would make inquiries of the magistrate. Other persons around the court may have been a source of information for Mr Briese.

(4) Further, the judge had every right to assume that Mr Briese would not improperly discuss the merits of the case with Mr Jones.

(5) The subsequent conversations with Mr Briese at the State Office Block (preceded by a telephone call) and, a few days later on the telephone, then fall into place as simple follow-ups to ascertain the result of an inquiry believed to be properly undertaken.

65. We do not find this hypothesis so straining of credulity as to require exclusion as unreasonable on

the evidence, bearing in mind the presumption of innocence which is the 'golden thread' in our criminal justice system.

66. In this we differ from Mr Wickham who says, at p. 37. "The Justice did not expressly suggest that the Chief Magistrate should make any inquiries of Jones, S.M. On the other hand when the Chief Magistrate said that he would the Justice did not, as one might expect, immediately demur. One would expect the Justice to demur in emphatic terms, having regard to his friendship with Ryan." We would emphasise more strongly than the Commissioner Assisting the fact that Mr Briese did not reply in terms of making an inquiry of Mr Jones. This seems to us to leave an innocent explanation of the judge's failure to demur at least reasonably open, though not more probable than the explanation we favour.

67. On the other hand, Mr Connor thought "that...the latter interpretation affords a reasonable hypothesis consistent with innocence .... To find otherwise would in my view involve attaching too little weight to the presumption of innocence". We have tried to give that presumption its due weight as a crucial element in the common law tradition, and feel ourselves constrained in the same way as was Mr Connor.

68. Nevertheless, we disagree with Mr Connor in his very nearly equating the civil and criminal standards of proof where criminal conduct of a serious nature is in issue. We believe the proper approach as laid down by the High Court in Chamberlain's case (supra) if adopted as an aid (as we do) to the application of the standards, indicates how different answers can be readily given on the same evidence.

69. In Rejfek and McElroy (1964-65) 112 C.L.R. 517 the Full

Court of the High Court held:

> "This Court decided in 1940 in Helton v Allen (3) that in a civil proceeding facts which amount to the commission of a crime have only to be established to the reasonable satisfaction of the tribunal of fact, a satisfaction which may be attained on a consideration of the probabilities." (at 519).
>
> "But the standard of proof to be applied in a case and the relationship between the degree of persuasion of the mind according to the balance of probabilities and the gravity or otherwise of the fact of whose existence the mind is to be persuaded are not to be confused. The difference between the criminal standard of proof and the civil standard of proof is no mere matter of words: it is a matter of critical substance. No matter how grave the fact which is to be found in a civil case, the mind has only to be reasonably satisfied and has not with respect to any matter in issue in such a proceeding to attain that degree of certainty which is indispensable to the support of a conviction upon a criminal charge: see Helton v Allen (1) per Dixon, Evatt and McTiernan JJ. (2). The reservation made in Watts v Watts (3) is no longer necessary in Australia having regard to s. 96 of the Matrimonial Causes Act 1959." (at 521-2).

70. Therefore, we report to the Senate that on the evidence admitted before the Committee, and without the benefit of any evidence from Mr Justice Murphy, we conclude that, on the balance of probabilities, Mr Justice Murphy when uttering the words at the Briese dinner, intended that Mr Briese should undertake some action which would interfere with the due and ordinary course of the committal proceedings against Morgan Ryan.

71. In discerning this intent as the more probable of several states of mind which the judge could have entertained, we are unable to say that a less probable view is not reasonably open. In so saying we cannot exclude a reasonable hypothesis consistent with innocence. We are therefore unable to find the intent proved beyond reasonable doubt.

72. We further report that, given our findings of fact, Mr Justice Murphy engaged in conduct which could amount to misbehaviour justifying an address for his removal in accordance with the interpretation of the meaning of "misbehaviour" contained in both

(1) the opinion of the Solicitor-General of the Commonwealth in that the elements of an offence known to the law have been proved in the sense outlined above; and

(2) the opinion of C.W. Pincus, Q.C. in that the conduct as proved in the sense outlined above is a sufficiently serious impropriety on the part of the judge such that the Senate could characterise it as conduct amounting to misbehaviour justifying an address for removal from office.

73. It is to be noted that whilst a finding of fact is made, the characterisation of that conduct as "misbehaviour providing sufficient grounds for an address for removal" is not conclusive but is meant to be open to the Senate in that it "could" so characterise it. This accords with the task given us in Senate resolution, paragraph 1(c).

74. We wish it to be clearly understood that the report we have made is exclusively based on the evidence properly before this Committee.

75. Further, we regard ourselves as free to adopt a different or preferred standard of proof or criteria

for conduct amounting to misbehaviour in the event that any further inquiry is undertaken by the Senate.

76. In short, our report must not be taken as any indication of any view we might adopt either as to the law or the facts should they fall to be determined in the Senate itself.

[redacted]

(Janine Haines)

[redacted]

(Michael Tate)

REPORT TO THE SELECT COMMITTEE ON ALLEGATIONS CONCERNING A JUDGE

SENATOR N. BOLKUS

It is desirable that I state at the outset my conclusions. These are that:

1. Mr Justice Murphy committed no criminal offence.

2. In particular he did not commit the offence of attempting to pervert the course of justice.

3. Nothing that Mr Justice Murphy did amounted to misbehaviour such as to warrant consideration of his removal from the High Court.

4. This is so on the Solicitor-General's criteria and even on the wider conception of misbehaviour suggested by Mr C.W. Pincus Q.C..

5. This applies whatever the standard of proof adopted.

The facts shown appear to be these:

1. The Judge is a compassionate and approachable man with an informal egalitarian and unconventional style, given to the forceful expression, publicly and privately, of strong views about injustice in a variety of areas.

2. The Judge had known Mr Ryan for 30 odd years. At times they had been closely associated but for the bulk of the time not.

3. Their acquaintance was renewed in connection with the Sankey conspiracy allegations against several former Ministers in the Whitlam Government including the Judge. Mr Ryan acted for one of the other former Ministers. Those charges were dismissed after years of hearings. Upon their dismissal some of the erstwhile defendants gave thought to legal redress they might pursue and Mr Ryan was involved in that.

4. At all relevant times the Judge shared the reservations felt by many people interested in civil liberties about the possible misuse of conspiracy charges by prosecutors.

5. The Judge and Mr Briese first met each other at a dinner party at Morgan Ryan's home on 10 May 1979. Mr Farquhar and Mr Wood were also guests there.

6. Between December 1979 and June 1981 the Judge helped Mr Briese, at the latter's request, in his efforts to increase the independence of magistrates in New South Wales.

7. In August 1981 Mr Ryan was charged with being knowingly involved in forging a letter deliverable to the Immigration authorities. In November 1981 a conspiracy charge was laid against Mr Ryan, arising out of the same alleged facts.

8. Mr Ryan has throughout protested his innocence of these charges both in and out of court.

9. There was apparently no contact between the Judge and Mr Briese after June 1981 until late December 1981.

10. On 6.1.82 the Judge and Mrs Murphy dined at Mr Briese's home at the latter's invitation. There was discussion about the then current Social Security conspiracy case, which may have been initiated by Mr Briese. The Judge expressed himself in strong terms critical of the prosecution in that case. In the course of discussing that case Mr Briese told the Judge that he had not spoken to the magistrate hearing that case. According to Mr Briese the following then transpired.

"Mr Briese - Mr Justice Murphy then said: 'Anyway, I'll tell you about another wrong case of conspiracy, too, and that's the Morgan Ryan case.'

Mr Simos - Now, just as to those, what is your recollection? Is it your recollection that they're the very words he used or are they the substance and effect or ...

Mr Briese - They are very close to the exact words that he used.

Mr Simos - Yes; what did you say?

Mr Briese - I said: 'Yes, well, what's, what's wrong with it?'. He said: 'The evidence is very weak and doesn't support a charge of conspiracy'.

Mr Simos - Were you aware at that time who the magistrate was?

Mr Briese - Yes, I was aware that it was Jones who was hearing the case.

Mr Simos - All right. What further conversation was there, if any?

Mr Briese - There was further, further indic...., and I suppose I must say it in the first person, there was further discussion from Lionel about the matter and I said 'Lionel, you're really concerned about this case, are you?' and he said: 'Yes'. I said: 'Well, I don't know anything about the case. I haven't spoken to the magistrate' or 'the magistrate hasn't spoken to me about it. I'll make some inquiries and see what the situation is'.

Mr Simos - And did he make any reply to that?

Mr Briese - I don't think so".

11. Pausing there, it was entirely natural that either the Judge or Mr Briese should remark to the other upon the conspiracy case concerning Mr Ryan as they had first met each other at Mr Ryan's home and the charges against Ryan had had some publicity.

12. It is to be noted that (a) Mr Briese was then known to the Judge fiercely to uphold the independence of magistrates (b) the mention of Ryan's case immediately followed a statement by Mr Briese inconsistent with any interference with his colleagues (c) the Judge asked for nothing at all to be done (d) Mr Briese did not say that he intended to speak to the magistrate hearing Mr Ryan's case.

13. In all those circumstances, that the Judge did not demur at Mr Briese' suggestion that he would make inquiries is readily explicable (a) because the Judge had reason, from the Social Security case discussion, to suppose that Mr Briese could make general inquiries without talking to the magistrate hearing the case and (b) by the Judge's entitlement to act upon the assumption that Mr Briese would do nothing improper.

14. Preceding the dinner of 6.1.82 Mr Briese says that the Judge telephoned him in the last week of December 1981, saying he would like to discuss a matter "but not on the phone". This, Mr Briese says, led to the dinner invitation. Nothing sinister flows from this. It is and was in 1981 and 1982 commonplace for all sorts of people to wish to discuss

all sorts of matters not on the telephone but face to face. It is and was scarcely less common for a busy person to have some matter of perceived importance to discuss with another which perceived importance then soon vanishes.

15. Mr Briese now says that three weeks later, on 27.1.82, (the lapse of time being hardly an indicator that pressure was applied) the Judge asked him by telephone whether he had yet made the inquiries which he, Mr Briese, had foreshadowed about Mr Ryan's case. Mr Briese apparently then preferred not to discuss the matter by telephone for he indicated he would see the Judge later the same day at an official function.

16. At that function Mr Briese says he told the Judge that he "guessed" that the magistrate would probably be committing Mr Ryan for trial. The Judge commented that "the little fellow will be shattered". Mr Briese referred to some quite lawful avenues by which Mr Ryan might be assisted and there was some discussion of them. Mr Briese did not tell the Judge then or at any other time that he had spoken to the magistrate although apparently he had. Nor did the Judge ever ask Mr Briese whether he had spoken to the magistrate. Thus, on Mr Briese's account, the Judge was at all times quite unaware that Mr Briese was going to speak to the magistrate or had done so.

17. On either 28 or 29 January 1982 Mr Briese says the Judge telephoned him and, after saying that the then N.S.W. Attorney-General, Mr Walker, had assured him that he was going ahead with legislation for independence of magistrates, said with emphasis: "And now what about my little mate?" Mr Briese's reply, he says, was to the effect that he had already explained the position and Mr Ryan would just have to follow normal procedures.

18. It is of importance to the assessment of this allegation that on 29 January 1982 Mr Jones S.M. found a prima facie case established against Mr Ryan. Given the Judge's compassionate concern about Mr Ryan's position the informal mention of Ryan, during a telephone call which had a proper purpose and which may, apparently, as likely have been on the 29th as on the 28th, is entirely consistent with the Judge wanting to go over again with Mr Briese the possible lawful ways in which Mr Ryan might assist himself. Mr Briese had, it may be thought, unrivalled, current, practical knowledge of how the system worked. Mr Briese did in fact run over those ways. The fact that, according to Mr Briese, the mention of Ryan was preceded by the Judge passing on views which must in any event have come to Mr Briese's attention hardly gives rise to an inference that the Judge was seeking any quid pro quo. The suggestion that either in exchange for this piece of information or as a reward for assisting with the independence of the magistrates, the Judge was asking the Chief Magistrate to

subvert the independence of a magistrate is far-fetched and unacceptable, to say the least of it. As far the "emphasis" it is ludicrous to base anything on a mere change of tone heard over the telephone, particularly when Mr Briese conceded that the words allegedly emphasised may not even have been said.

19. In April 1982 the Judge further expressed his concern about Mr Ryan's position. He did this by putting to Judge Staunton the Chief Judge of the N.S.W. District Court, that Ryan's trial should be expedited. There was, as Chief Judge Staunton said, nothing improper about this. Indeed the contrary emerges. In truth what Mr Justice Murphy was doing was the absolute antithesis of conduct designed to hinder or stifle the prosecution. He was asking that proper legal processes should be brought to bear on Mr Ryan and brought to bear early, an uncommon but proper and even commendable request in relation to an accused, most of whom are not, as Chief Justice Staunton said, anxious to hasten their trial date.

20. The final episode that may be thought relevant is that relating to Judge Flannery who eventually presided over Morgan Ryan's trial. He says he was approached by Mr Justice Murphy in Brisbane on 1.7.83 who invited him and his wife to join the Judge and others at a restaurant. Judge Flannery and Mr Justice Murphy had before that time been only casually and professionally acquainted. Judge

Flannery followed up this approach in Sydney and eventually the two Judges and their wives dined at Mr Justice Murphy's Sydney home unit on 9.7.83. Although legal matters were discussed, there was no mention of Morgan Ryan nor of his case but Mr Justice Murphy did tell Judge Flannery of Hoar's case, a December 1981 High Court decision in which judgements critical of the overuse of conspiracy charges were delivered. It is clear from Judge Staunton's evidence that Mr Justice Murphy regularly referred decisions of the High Court of interest to the District Court to those judges. Some time after the trial on an approach by Judge Flannery Mr Justice Murphy made clear to Judge Flannery that he had no very high opinion of Mr Ryan's choice of legal representation for his trial. This whole matter is only relevant to the state of the Judge's mind in relation to Mr Briese. At most all it shows is concern by the Judge about Ryan and a desire that he be lawfully and fairly dealt with. There is no evidence of any descent by the Judge to impropriety.

21. Indeed, whether these various events are taken individually or if they are seen as a whole course of conduct, there is nothing at all inconsistent with simple concern by the Judge for Mr Ryan and a desire that he be lawfully dealt with.

22. The essence of the whole matter is this: It may be true, as Mr Briese said (p.320) that "... if one wanted to look for a pattern over the years some of this language (of the Judge) is equivocal and it could be interpreted by different people in different ways...". The task of the Committee however is not to "look for a pattern". Our task is to start with the presumption of the Judge's innocence, regard no fact as established unless we have a "comfortable satisfaction of mind" about it having regard to its gravity (on the civil standard of proof) and infer nothing unless that inference is more probable than any other available inference. One matter of high overall probability is that mere concern for an old friend would hardly lead a Justice of the High Court to try to pervert the course of justice at all, let alone by trying to make the Chief Magistrate of New South Wales his accomplice. If proof beyond reasonable doubt be applied, this standard could not rationally begin to be met by the material before us.

The reliability of Mr Briese's evidence in this matter

This issue cannot be shirked or passed over as an unnecessary unpleasantness best avoided. In a number of instances it is only Mr Briese's interpretations and his alleged very precise memories superadded to what he might more neutrally have said which have given rise to any suggestions apart from complete innocence. Further, this Committee had the benefit of competent and full (though fair) cross-examination of Mr Briese.

It is not necessary to call Mr Briese a liar to question the reliability of his evidence. Unreliability may derive from many causes, honest as well as dishonest. It is not necessary to allege motivation for lying to suggest possible motivation for distortion and error. Bias may be unconscious as well as conscious.

The following factors tend strongly against reliance on Mr Briese's evidence where challenged and/or where nuance or detail is important.

a) Every conversation to which he attested occurred well over two years and in one case over five years before he gave evidence of it to this Committee. Considerable reconstruction, even if honest, is inevitable.

b) He never made any contemporaneous note at all from which to refresh his recollection.

c) This has an additional and different significance for Mr Briese's credibility because in respect of some matters he now claims he did have contemporaneous concern.

d) There were various official channels open to him (including in 1981 and 1982 the then Federal Attorney-General, Senator Durack) to tell his story and raise his concerns, yet he availed himself of none of them. There is just no satisfactory reason why he used or would use none of these channels.

e) He admits that much of the significance he attaches to various events he describes only arose with, or is coloured by, hindsight. This hindsight must inescapably have influenced his memory and/or his reconstruction of events and conversations.

f) Although a lawyer, he made some very serious allegations without apparent regard for elementary notions of proof or evidence.

g) He was often evasive in his manner of answering questions, suggesting a desire to protect himself which overshadowed a proper readiness to make concessions. Consider for example the following (which was just the first example):

"Mr Hughes - Very well, Mr Chairman, could the witness be shown the document marked for identification 1?

You've identified that document as the document that you prepared for the first Committee. Is that right?

Mr Briese - That's right.

Mr Hughes - Did you compile that document with care?

Mr Briese - Reasonable care, yes.

Mr Hughes - Reasonable care?

Mr Briese - Yes.

Mr Hughes - Did you do it in a rush?

Mr Briese - No. I prepared it in the week, prior to coming down to Melbourne.

Mr Hughes - I'll put my question to you again, Mr Briese. Did you prepare that document in a rush?

Mr Briese - No, I did not.

Mr Hughes - It would be quite false, would it, to suggest that you prepared that document in a rush?

Mr Briese - Yes. Well, no, that's not quite right.

Mr Hughes - Not quite right? Well, I asked you a distinct question, didn't I Mr Briese, namely whether you had prepared that document in a rush?

Mr Briese - Yes.

Mr Hughes - That was a clear question, wasn't it?

Mr Briese - Yes, yes.

Mr Hughes - And you gave an unequivocal answer in the first instance, didn't you, the answer being: 'No'?

Mr Briese - Yes.

Mr Hughes - Was that a true answer, the answer: 'No'?

Mr Briese - Yes. It's a true answer except for dates, which I did not have the opportunity to check.

Mr Hughes - Look, I was asking you whether you prepared the document in a rush.

Mr Briese - No, it's not in a rush.

Mr Hughes - Not in a rush. You are quite clear about that, are you?

Mr Briese - Yes.

Mr Hughes - Didn't you tell the first Committee that the document, MFI 1, was done in a rush?

Mr Briese - Yes, I believe I did, but on the basis that it was - I didn't have the chance to check some dates.

Mr Hughes - Well, you didn't add that qualification when you were giving evidence before the previous Committee, did you?

Mr Briese - I don't think that I did.

Mr Hughes - No. So what is the truth of the matter. Did you do it in a rush, as you suggested to the previous Committee, or didn't you?

Mr Briese - I did not do it in a rush, but there were some facts that I was unable to check in the time available to me.

Mr Hughes - And you agree you didn't say that to the last Committee.

Mr Briese - That's right.

Mr Hughes - Of course, if you'd prepared that document in a rush, it would have been a disgraceful thing to do because of the seriousness of certain allegations that you made in that document, wouldn't it?

Mr Briese - Correct.

Mr Hughes - And you remember being asked by the previous Committee - page 163 of ...

CHAIRMAN - Well, I don't know that it's in evidence yet, is it? You were looking as though we had it in front of us.

Mr Hughes - Yes.

CHAIRMAN - We don't.

Mr Hughes - No. Do you remember being asked this question, after a reference to a passage in your statement:

I asked him if he was attending the function at the State Office Block that afternoon. He said that he was and I replied that I would see him there.

Do you remember being asked this question:

To make that complete, the fact is that a few days later there was a phone call to your office from Lionel Murphy inquiring after Morgan Ryan. Is that so?

Remember he asked that question?

Mr Briese - Yes.

Mr Hughes - And your answer was: 'That is right, yes, definitely. I am sorry; you see, this ...' - indicating MFI 1 - 'was done in a rush'.

Mr Briese - Yes.

h) It is plain that he has become so suspicious that his own judgment, in relation to matters touched by his suspicions, is itself gravely suspect. The importance of this impairment of Mr Briese's judgment is that his memory and/or his reconstruction cannot rationally or confidently be separated from his judgment.

i) He conceded that his prime purpose was to explain how he mentioned in the "Age" tapes and that this could be interpreted as being to distance himself from imputations that might be raised against him (p.392). That is alarming in itself but, further, this motivation would be bound to colour his recollection and his reconstructions.

j) Some of his actual evidence was frankly unacceptable e.g. his explanation of the political "favours" that he says he intimated to Mr Farquhar he would be prepared to do.

k) He endeavoured to suppress from the Committee that he obtained the purported "Age" transcripts from the N.S.W. Liberal Party organization in the midst of a N.S.W. State election campaign. The facile suggestion that the Liberal M.L.A. concerned "would've been known" is a quite unacceptable explanation for this attempted suppression as the following extracts from pp.637-641 indicate:

...

Mr Hughes - Mr Bruce Baird is a Liberal member of the State Parliament, isn't he, Mr Briese?

Mr Briese - Yes.

...

CHAIRMAN - Has Mr Briese got a copy?

Mr Hughes - Page 151. I asked you 'Who is he?', didn't I?

Mr Briese - Yes.

Mr Hughes - And you said: 'Well, he's a member of the church to which I attend and I knew him personally'.

Mr Briese - That's right.

Mr Hughes - No reference at any time in your evidence to the fact the he was a member of parliament.

Mr Briese - That's right.

Mr Hughes - Did you think that was telling the whole truth when you gave that answer: 'He is a member of the church which I attend and I knew him personally'.?

Mr Briese - Well, I thought that was true answer, yes.

Mr Hughes - No, was it the whole truth?

Mr Briese - Well, I could've mentioned other details about him but I didn't do so.

Mr Hughes - Well, it's a very significant detail about him, isn't it, that he's a Liberal member of the State Parliament.

Mr Briese - Yes, from one perspective, yes, but ...

Mr Hughes - From any reasonable perspective, is it not, Mr Briese?

Mr Briese - I would've thought that he - mentioning his name, Bruce Baird, I thought he would've been known.

...

Mr Hughes - Didn't you think that the fact that he was a member of Parliament was a more important piece of information concerning who he is than the information that he was a member of your church?

Mr Briese - No, because I asked him at the church.

...

Mr Hughes - It was clear to your mind at the time I asked you the question 'Who is he?' that he was a member of the State Parliament, wasn't it?

Mr Briese - Yes.

1) The fact is that Mr Briese has become a political tool of the Liberal Party. Consider his evidence at pp.643-4:

Mr Hughes - I will reframe it. You understood, didn't you, that this material - the three documents forming part of Exhibit 8 - was being given to you by Mr Baird with the assent of the his Party?

Mr Briese - Well, I assumed that, yes.

Mr Hughes - In the height of a very bitter election campaign; is that right?

Mr Briese - Well, there was an election campaign.

Mr Hughes - And it was a very bitter one, wasn't it?

Mr Briese - Yes, I think that it was, yes.

Mr Hughes - With allegations of corruption ...

Mr Briese - Yes.

Mr Hughes - Thick in the air?

Mr Briese - Yes.

Mr Hughes - Is that right? And in your statement MFI 1A you set about, did you not, connecting the Premier of New South Wales with people of whom you alleged that they were part of a conspiracy.

Mr Briese - I did not set about to connect the Premier with them.

Mr Hughes - You included in MFI 1A, did you not, some hearsay material ...

Mr Briese - That's right.

Mr Hughes - Concerning the alleged connection of the Premier, or association of the Premier, with two of the people whom you alleged were conspirators?

Mr Briese - Yes.

Mr Hughes - Didn't you?

Mr Briese - That's right.

...

I do not believe he is unwitting in this. He says he did talk to Mr Barry Unsworth about some of his allegations at a time when, as he explained to the N.S.W. Solicitor- General, he thought Mr Unsworth might be able to change the leadership of the Labor Party in N.S.W. (I do not believe him when he tries to pass this off as a "throw-away remark" to the Solicitor-General. It was a remark that was sufficiently serious to cause the Solicitor-General to mention it specifically in her report.) This conversation with Mr Unsworth preceded by a considerable period his intercourse with Mr Baird.

m) As he perceives he had "put his career on the line" by coming forward with his allegations it is unlikely that he would be prepared to make concessions as to matters he regarded as central to his credibility. These must have included his actual conversations with the Judge. In the light of all of the foregoing, little turns upon the fact that as to those particular conversations he did not actually recant. It would be unreal to expect him to be manifestly "shaken" about them. Witnesses rarely withdraw their central assertions but nevertheless their evidence upon them is often and properly adjudged to be unreliable. So it is here.

In summary, except where Mr Briese's evidence was plainly not challenged or where he is unequivocally corroborated by independent testimony, I am not prepared to and do not accept or rely upon his evidence in a matter having such serious possible consequences as this.

Mr Wickham's Advice

Although many of the facts analysed and dealt with in the advice of Mr Wickham are correctly based, there are certain crucial errors of facts leading to erroneous conclusions.

I reject his conclusion that the conduct of the Judge could amount to misbehaviour in the narrow sense, as defined by the Solicitor-General in terms of a proven offence, demonstrated beyond reasonable doubt.

The very language in which Mr Wickham has couched his advice is extravagent and inappropriate. Consider the following (p.33):

> "...the 'defence' of the 'accused' comprised nothing more than an attack on the credit of the chief 'prosecution' witness which, having failed, left nothing but a theatrical blend of adversary tactics and rhetoric, topped with some reasons for not giving evidence which could be only slightly raised above the level of humbug by straining credulity to the limit".

The attack on Mr Briese's credit was singularly successful in relation to the conspiracy theory, so much so that his Counsel made to attempt to justify these allegations what were central to Mr Briese's suspicious interpretations of what otherwise he considered could well be innocent.

The reasons advanced by the Judge for his not giving evidence in these proceedings included the point that after the commencement of this Inquiry, a General Election was announced, and that this

led to the likelihood that if the Judge gave evidence, he would "become a political football in the election".

It is excessive and unreasonable that this justification for not giving evidence should be dismissed in the fashion it was by Mr Wickham. To call it little more than "humbug" is grossly unfair. As much as we members of this Committee may strive for impartiality, we have to recognize that we are members of political parties contending, at the present time, for individual elected office and the collective prize of government. During the course of this Inquiry, numerous statements were made by the leaders of the various parties, seeking to make electoral capital over the Inquiry and the position of the Judge.

The Judge also pointed out that it was totally inappropriate at this stage for him to give evidence as it was impossible to move an address in both Houses of this Parliament in the same session and it was the right of the new Parliament to deal with the matter under s.72 of the Constitution. The Judge made it plain that he would, if necessary, exercise his right in the new Parliament.

In fact, in my view, the Judge's decision not to be heard before this Committee was perfectly understandable and reasonable in the circumstances. Not only ought no adverse inference be drawn from this fact, but indeed it ought to be positively borne in mind by this Committee and the Parliament that to date only one side of the story has really been heard.

In addition to the consideration that an election campaign got under way during the deliberations of this Committee, and inescapably affected its atmosphere, the Senate overruled, on party lines, the original decision of the Committee not to allow multiple cross-examination of Mr Justice Murphy.

This was unfortunate, and significantly distinguished the procedures adopted from ordinary court procedures, to the comparative disadvantage of Mr Justice Murphy. Unfortunately, neither Commissioner refers to this consideration, and indeed Mr Wickham says at p.6 of his advice in relation to the procedures adopted that:

> "the result was a process which was not only fair to the Justice but rather more than fair".

I regard this comment as lacking in balance and I do not accept it as accurate or reasonable. The contrary is, for the reasons mentioned above, unfortunately the case. Rather than being characterized by excessive fairness, these proceedings have partaken in some significant respects of what is known in the classic Australian vernacular as the "Kangaroo court".

The Requirement of Intention

I turn then to Mr Wickham's findings on the intention of the Judge which, like Mr Connor, I do not accept.

He says at p.33 that:

> "In this case I have been able to make a positive finding about the Flannery instance alone".

I regard as extraordinary and unacceptable the notion that an intention to pervert the course of justice could be deduced from a social event, a dinner, in which the actual case in respect to which it is alleged that there was an intention to pervert the course of justice, was not even mentioned. Judge Flannery himself insists that there was no mention of Morgan Ryan or his case at this dinner.

I regard it as fundamental that the presumption of innocence should be applied just as much in relation to a Judge of the High Court as in relation to any other citizen. The dinner with Judge Flannery is clearly, as a matter of fact, open to an innocent interpretation as a social event at which lawyers discussed certain legal matters, including the controversial issue of criminal conspiracy. No more should be drawn from it than that.

I reject also Mr Wickham's interpretation of the Judge's intention with respect to his communications with the Chief Magistrate, Mr Briese. Mr Wickham finds intention to pervert the course of justice, using a process of reasoning which is circuitous and tangential. He says at p.41:

> "By contrast, in the case of Jones, S.M., the Justice did not know him personally. He would need to know a suitable third person who could be spoken to in private in order that a private discussion could be organised between that third person and Jones S.M. without suspicion. That person would need to know Jones S.M., so that the matter could be mentioned privately to Jones S.M. That person would preferably need to be a professional colleague of Jones S.M., who could without alarming Jones S.M., mention a matter relating to his work. That person would need to know that the accused Ryan was a friend of the Justice. It would be beneficial if that person felt under some obligation to the Justice. It would also be beneficial if that person believed, rightly or wrongly, that the Premier might be anxious to help Morgan Ryan. The Chief Magistrate admirably met all those requirements".

This approach manifestly involves a rejection of the presumption of innocence and ascribes a series of sinister motives and manoeuvres on no other basis than speculation.

Particularly relevant on this issue of intention to pervert the course of justice is certain evidence at p.140 of the transcript of the hearing (already mentioned), where Mr Briese was cross-examined by Mr Hughes. In short, Mr Briese agreed that: "Mr Justice Murphy never suggested that anything should be done". Mr Briese agreed that there was never any suggestion by Mr Justice Murphy that "anything be done".

This brief passage of evidence serves to indicate that any attempt to attribute to the Judge a wrongful intention requires a strained interpretation of a multitude of incidents, rather than concrete evidence of direct statements of request or exhortation. Further, as indicated below, since the matters under discussion are circumstantial, it is vital that factual error be avoided.

Factual Error as to the Intention Question

A crucial factual error occurs at p.37 of Mr Wickham's advice, in the following passage:

> "The Justice did not expressly suggest that the Chief Magistrate should make any inquiries of Jones, S.M. On the other hand, when the Chief Magistrate said that he would the Justice did not, as one might expect, immediately demur. One would expect the Justice to demur in emphatic terms, having regard to his friendship with Ryan". (Emphasis added)

In fact, there is no evidence before the Committee that the Chief Magistrate said to Mr Justice Murphy that he would make inquiries of Jones S.M. Certainly Mr Briese's evidence is that he did say, at the dinner of 6.1.82, that he would make some inquiries "and see what the situation is", but no mention was made of directing such inquiry to Jones S.M., the presiding magistrate.

Regrettably this is a fundamental factual error by the Assisting Commissioner which, in the following pages of his advice, is developed into the conclusion he draws as to Mr Justice Murphy's intention. Yet on the evidence Mr Briese never told the Judge that he would make inquiries of Jones and never told the Judge that he had made inquiries of Jones.

Since Mr Briese never said to Mr Justice Murphy that he would contact Mr Jones about the matter, how can it possibly be expected that Mr Justice Murphy should demur? One cannot demur to a statement which is not made to one.

The next step in Mr Wickham's reasoning is set out at the top of p.39 of his advice:

> "That the Justice in fact wanted the Chief Magistrate to communicate with Jones S.M., in the hope that in the course of doing it he would convey the Judge's views about the weakness of the case to Jones S.M., is a conclusion which is very probable."

We see here extrapolation from an error of fact to a conclusion about the state of mind - the intention - of the judge.

At p.40, Mr Wickham concluded on this point, "...I am satisfied beyond reasonable doubt that the Justice at the material times intended that the Chief Magistrate would convey the Justice's views to the committing magistrate, and hoped that those views would be conveyed, and intended that those views if conveyed would influence the committing magistrate ...".

This point is so fundamental to this whole case that it bears repetition and emphasis. Intention to pervert the course of justice is a vital ingredient of the offence of attempting to do so. Intention cannot be inferred from non-existent facts. In my view, the error on this point in the advice of Mr Wickham exemplifies the ease with which, unless conduct is approached from the viewpoint of a presumption of innocence, one can leap over the facts to a wrong conclusion of guilt.

Mr Connor's Advice

As I have indicated, I take the view that on the criteria of misbehaviour propounded by the Solicitor-General there was no proven misbehaviour on either the civil or criminal standard of proof. I agree with Mr Connor on this point and do not need to elaborate further upon this.

However, Mr Connor does make adverse comment about the propriety or discretion, as distinct from the criminality or otherwise, of Mr Justice Murphy's conduct. He reaches the conclusion that if the "broad" test of misbehaviour propounded to Pincus Q.C. be accepted, there could be said to be misbehaviour.

At p.40 Mr Connor says:

> "What Mr Justice Murphy did was to seek an indication in advance as to what Mr Jones' decision might be about the committal proceedings at a time when they were part heard. Neither Mr Justice Murphy nor anyone else was entitled to do that".

Mr Connor refers to this as a "significant impropriety", and "unworthy conduct", but goes on to say that:

> "I think it would be a usurpation of the role of Parliament to attempt to say whether or not the conduct was serious enough to warrant ... removal from office".

I do not agree with Mr Connor's interpretation of the evidence in relation to this matter.

The evidence is not that Mr Justice Murphy did in fact:

> "seek an indication in advance as to what Mr Jones' decision might be".

There is no suggestion that the Judge ever approached Mr Jones directly. The suggestion is of an attempt to influence indirectly, merely by inquiring.

Yet the uncontradicted evidence of Mr Briese, referred to at pages 140 and 141 of the transcript, as mentioned above, is that Mr Justice Murphy never suggested that anything should be done to influence the course of the Morgan Ryan case.

"Mr Hughes - ...Now let me come to some other evidence that you gave before the first Committee. Do you remember being asked questions about the conversation which you say took place at your home on the evening early in January when the judge and wife were guests in your house?

CHAIRMAN - Which page?

Mr Hughes - Page 432. And you were being asked questions designed to establish whether the judge, on that occasion suggested that anything should be done to affect the course of the Morgan Ryan case, weren't you? Is that right?

Mr Briese - Yes.

Mr Hughes - And in that context you were asked this question by the Chairman, Senator Tate:

"But he - meaning the judge, Mr Justice Murphy - never suggested that anything should be done?

Do you remember being asked that question?

Mr Briese - That's right.

Mr Hughes - And was your answer a truthful answer?

Mr Briese - Yes.

Mr Hughes - And the answer was a monosyllabic 'No.', wasn't it?

Mr Briese - That is so.

Mr Hughes - Yes. And that answer, as you say, was the truth?

Mr Briese - Yes. Suggested in explicit terms - there was no request.

Mr Hughes - There was no request?

Mr Briese - No.

Mr Hughes - You know the meaning of the answer 'No' to the question that you answered, 'But he never suggested that anything should be done?' don't you?

Mr Briese - Yes."

Mr Connor's argument as to impropriety is based on a supposed foundation which does not exist. There could have been a variety of ways in which Mr Briese could have inquired as to the state of the Ryan case without approaching Mr Jones S.M. As I said in the summary of facts above at paragraphs 12 and 13, (a) Mr

Justice Murphy had, from the discussion of the Social Security case, reason to suppose that Mr Briese could make general inquiries without talking to the magistrate hearing a particular case, and (b) Mr Justice Murphy was entitled to assume that Mr Briese would do nothing improper. Mr Briese was, after all, a senior and experienced magistrate. He was not some junior articled clerk subjected to the influence of a senior person who could easily persuade him to engage in improper conduct.

The evidence is that Mr Briese volunteered the opinion or "guess" that Mr Jones would probably commit Mr Ryan for trial. This is the only correct interpretation of the view and is inconsistent with Mr Connor's view on this aspect. At no stage in these proceedings did Mr Briese say that he informed the Judge that he had spoken to Mr Jones about the Morgan Ryan matter, or that he would speak to Mr Jones.

This being so, Mr Connor's characterization of the conduct as being a "significant impropriety" loses its basis. As I have said, I take the view that the evidence does not support any finding of "significant impropriety" on the part of Mr Justice Murphy. True it was that the Judge was interested in the Morgan Ryan case, but on the evidence that interest did not cross the border into the territory of impropriety.

Conclusion

The Committee should report to the Senate that there is no proved misbehaviour, nor anything which could amount to proved misbehaviour by Mr Justice Murphy.

(Nick Bolkus)

SENATE SELECT COMMITTEE ON ALLEGATIONS CONCERNING A JUDGE

REPORT OF SENATOR AUSTIN LEWIS

The Senate resolution requires the Committee to inquire into the allegations of Mr C.R. Briese concerning Mr Justice Murphy, to report its findings of fact upon those allegations and to report in relation to those allegations whether Mr Justice Murphy engaged in any conduct which could amount to "misbehaviour" within the meaning of section 72 of the Constitution.

To cover doubts about the meaning of "misbehaviour" the resolution require the Committee to answer two questions, namely whether there was conduct which could amount to "misbehaviour" within the meaning set out in the opinions of:-

(i) Dr Gavan Griffith, Q.C. (Solicitor-General of the Commonwealth), and,

(ii) Mr C.W. Pincus, Q.C. (President of the Australian Law Council and counsel to the Senate Select Committee on the Conduct of a Judge).

To both of these questions the Committee is required to apply two standards of proof namely "beyond reasonable doubt" and "on the balance of probabilities".

The first question, in effect, requires the Committee to find whether or not Mr Justice Murphy committed an offence against the general law of such a quality as to indicate he is unfit to exercise his office. Counsel assisting the Committee (Mr Theo Simos, Q.C.) in his final address submitted that "the only possible relevant offences are the offence of contempt of court and the offence of attempting to pervert the course of justice".

The Commissioners Assisting the Committee deal firstly with he offence of attempting to pervert the course of justice. r Commissioner Connor has advised:

> "There are two constituents of the offence of attempting to pervert the course of justice. There must be an intention to pervert the course of justice and there must be some overt act, having a tendency to pervert the course of justice done in an attempt to effectuate the intention."

Both of the Commissioners have found proven beyond reasonable oubt the second of these elements, namely some overt act having a endency to pervert the course of justice done in an attempt to ffectuate the intention.

They have, however, differed as to the first of these lements, namely the intention of attempting to pervert the course f justice.

Mr Commissioner Wickham's findings on this point are:

> "Having found the facts as deposed to by the Chief Magistrate the central question is the intent of the Justice in acting and speaking as he did, to the person to whom he spoke. There was no certainty that the Chief Magistrate would convey the Justice's views to the committing magistrate, but having regard to all the evidence and the absence of any reasonable explanation consistent with the Justice's innocence, and coupled with the decision I have made about the Judge Flannery incident, I am satisfied beyond reasonable doubt that the Justice at

the material times intended that the Chief Magistrate would convey the Justice's views to the committing magistrate, and hoped that those views would be conveyed, and intended that those views if conveyed would influence the committing magistrate against the prosecutor and in favour of Morgan Ryan.", and

"that what the Justice did carried with it an actual tendency and a real risk that Jones, S.M., would become subject to the influence intended".

(See pages 40 and 41 of his report).

Mr Commissioner Connor has advised that whilst "It plainly is" open to the Committee on the evidence to find that Mr Justice Murphy intended to pervert the course of justice, he (Mr Connor) found that there was an interpretation of the relevant events which was a reasonable hypothesis consistent with innocence and for that reason he was:

"...not satisfied beyond reasonable doubt that Mr Justice Murphy intended to or attempted to pervert the course of justice by having his view of the Ryan case conveyed to Mr Jones.", and further that:

"As the onus of proof on the balance of probabilities, where criminal conduct is in issue, is so close to the standard of proof beyond reasonable doubt, I am not satisfied on the balance of probabilities that Mr Justice Murphy intended to pervert the course of justice by having his view of the Ryan case conveyed to Mr Jones."

(See page 38 of his report).

I have considered carefully the analysis of the objective acts by each of the Commissioners and reviewed the Hansard eports of the evidence heard by the Committee and the submissions f all counsel and agree with the Commissioners in their unanimous indings of those objective facts and with their reasons upporting those findings of fact.

As I have indicated earlier the Commissioners are not in greement as to the inferences of the intention of r Justice Murphy to be drawn from those facts. I have carefully onsidered the inferences as to intention drawn by each of the ommissioners and the reasons therefor and the submissions of all ounsel and find myself in agreement with the conclusions of r Commissioner Wickham.

What I find persuasive is the whole course of conduct of r Justice Murphy in relation to the Morgan Ryan case, considering he combination of the various conversations and events taken in heir context and in particular having regard to the light cast pon Mr Justice Murphy's intentions in relation to his onversations with Mr Briese by the evidence of Judge Flannery bout the approaches to him by Mr Justice Murphy. In all the ircumstances I have no reasonable doubt that the intention of r Justice Murphy was to influence the committal proceedings and herefore, although the intention was not effectuated, I find that here is proof beyond reasonable doubt of an attempt on the part f Mr Justice Murphy to pervert the course of justice.

The offence is of such a quality as to indicate that r Justice Murphy is unfit to exercise judicial office and ccordingly I report that there was conduct which could amount to misbehaviour" in accordance with the opinion of the Solicitor-eneral.

The second question, in effect, asked of the Committee equires it to consider the propriety of the conduct of r Justice Murphy (whether or not his behaviour constituted an

offence) and to report whether, in its opinion, and in accordance with the opinion of Mr Pincus, Q.C., that conduct is such that it could be decided by Parliament that it constitutes misbehaviour sufficient to justify removal of Mr Justice Murphy from judicial office. Another way of putting this question was expressed by Mr Commissioner Connor as:

> "That calls for an examination of Mr Justice Murphy's conduct on the footing that it was not criminal."
>
> (See page 40 of his report).

The Commissioners Assisting the Committee are unanimous in their advice on this question. Both have advised that there is proof beyond reasonable doubt of conduct which could have amounted to "misbehaviour" within the meaning set out in the opinion of Mr C.W. Pincus, Q.C. (See Mr Commissioner Wickham at page 44 and Mr Commissioner Connor at page 41 of their respective reports).

As to this second question I have considered carefully the analyses of objective facts and inferences, reviewed the evidence and submissions and find myself in agreement with the unanimous advice of the Commissioners.

Accordingly I report to the Senate that there is proof beyond reasonable doubt of conduct which could amount to "misbehaviour" within each of the two opinions and that the misbehaviour is of such a quality as to render Mr Justice Murphy unfit to exercise judicial office.

<u>There are four further matters</u> which I bring to the attention of the Senate for consideration:

1. There is what might be called the "alternative" offence of attempting to pervert the course of justice referred to by Mr Commissioner Wickham at page 45 of his report and explained by Mr Commissioner Connor at pages 39 and 40 of his report. Mr Commissioner Connor also explains why he did not take this matter further.

2. There is the offence of contempt of court. Paragraph 11 of the Committee's general report explains why the Committee made no findings on this issue.

3. There is evidence before the Committee of comments made by Mr Justice Murphy to the Chief Magistrate about what is colloquially referred to as "the Social Security Conspiracy Case". There are two points about the comments:

(i) they were made at a time when the charges were being heard by a magistrate so that they may have been improperly made and with an intention to pervert the course of justice or may have been a contempt of the court, and

(ii) they were made by a judge of the High Court who subsequently was called upon to make findings on appeal about some aspects of the case and who may reasonably have supposed that he would be required to do so.

4. There is before the Committee the evidence of Judge Flannery about the approaches to him by Mr Justice Murphy. The terms of reference of the Committee precluded it from examining this matter otherwise than in relation to the light which it might cast on the intention of Mr Justice Murphy in his approaches to Mr Briese about the committal proceedings. It should be noted however that both of the Commissioners were deeply concerned by the evidence of Judge Flannery, see Mr Commissioner Wickham at page 30 of his report and Mr Commissioner Connor at pages 26 and 27 of his report.

The Senate may consider that any of these four matters should be the subject of further inquiry and that due consideration of the evidence before the Committee may reveal other offences.

[redacted]

SENATOR FOR VICTORIA

ADVICES BY COMMISSIONERS ASSISTING THE COMMITTEE

24 October 1984

Senator M.C. Tate,
Chairman,
Senate Select Committee on
Allegations Concerning a Judge,
Parliament House,
CANBERRA A.C.T. 2600

Dear Mr Chairman,

In accordance with paragraph (19) of the resolution of the Senate of 6 September 1984 appointing the Select Committee on Allegations Concerning a Judge, I submit herewith my advice upon the matters into which the Committee was to inquire and upon which the Committee is to report.

Yours sincerely,

(John Wickham)
Commissioner Assisting
the Committee

SELECT COMMITTEE ON ALLEGATIONS CONCERNING A JUDGE

Advice with reasons of Commissioner the Honourable John Leonard Clifton Wickham, Q.C.

Commissioner Wickham: This inquiry finds its genesis in charges laid in 1981 of forgery and conspiracy against a Sydney solicitor one Morgan Ryan. The principal persons involved are the Honourable Mr Justice Lionel Murphy a justice of the High Court of Australia, and Clarence Raymond Briese Chairman of the Bench of Stipendiary Magistrates of New South Wales. I will refer to the former as "the Justice" and to the latter as "the Chief Magistrate".

The inquiry was constituted by a resolution of the Senate of the Parliament of the Commonwealth of Australia of the 6 September 1984 as amended by resolution of the 2nd day of October 1984. By that resolution a Select Committee was appointed to inquire into the allegations made by the Chief Magistrate concerning the Justice and made before a prior Committee being "a Select Committee on the Conduct of a Judge" and referred to in Appendix 5 of the report of that Committee.

This Committee is required to report to the Senate its findings of fact upon those allegations and to report in

relation to those allegations whether the Justice engaged in any conduct which could amount to misbehaviour providing sufficient grounds for an address to the Governor-General in Council by both Houses of the Parliament praying for his removal from office pursuant to section 72 of the Constitution. The Committee in its report is required to indicate whether there was conduct which could amount to misbehaviour in accordance with the interpretation of the meaning of "misbehaviour" contained in either the opinion of the Solicitor-General of the Commonwealth or the opinion of Mr C.W. Pincus, Q.C., or both, such opinions being attached to the report of the Select Committee on the Conduct of a Judge. I will refer to that Select Committee as "the prior Committee" and to the present Committee as "this Committee".

This Committee is also required to indicate in its report whether there is proof of conduct which could amount to such misbehaviour on one or other or both of two standards namely

(i) beyond reasonable doubt; and

(ii) upon the balance of probabilities.

The Commissioners, of whom I am one, are required by paragraph (19) of the Senate resolution, to advise this Committee in writing upon the matters into which this Committee is to inquire and upon which it is to report.

By paragraph (17) of the resolution this Committee, after receiving recommendations from the Commissioners, was empowered to determine procedures and rules for the examination of witnesses before it having regard to the procedures and rules followed by the Supreme Court of the Australian Capital Territory.

The Commissioners, after considering the whole of the terms of the resolution, came to the conclusion that upon the proper construction of the resolution the proceedings should be conducted as nearly as circumstances could reasonably allow as if the hearing was a judicial proceeding. The Commissioners accordingly recommended, in writing, procedures and rules under the title "Commissioners' Recommendations as to Procedures and Rules for the Examination of Witnesses". The Commissioners gave reasons in writing for so recommending. The recommendations, after a reference to the Senate to clarify the resolution, were adopted by the Committee.

Appendix 5 annexed to the report of the prior Committee sets out the allegations of fact made by the Chief Magistrate. The Appendix limits the matters in issue in respect to the objective facts. In addition the intent, if any, of the Justice, in saying and doing what is alleged, is a fact in issue.

In the course of the hearing this Committee was careful to

limit the evidence to the facts in issue, and to facts relevant to the facts in issue, and to apply the ordinary rules of evidence applicable in a court of law.

Counsel assisting the Committee (Mr Simos, Q.C.) prior to the start of the hearing supplied to all interested persons, a statement of the issues with particulars. The issues as so stated include the issue of the intent of the Justice (if any), among other things, to influence as expressed "the due course of justice in relation to the committal proceedings against Morgan Ryan or with any other, and if so what, intention".

The opinions of the Solicitor-General of the Commonwealth and of Pincus, Q.C. as to the meaning of "misbehaviour" differ.

The opinion of the Solicitor-General is summarised as follows

> "Misbehaviour is limited in meaning in section 72 of the Constitution to matters pertaining to -
>
> (1) judicial office, including non-attendance, neglect of or refusal to perform duties; and
>
> (2) the commission of an offence against the general law of such a quality as to indicate that the incumbent is unfit to exercise the office.
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> "Misbehaviour is defined as breach of condition to hold office during good behaviour. It is not limited to conviction in a court of law. A matter pertaining to office or a breach of the general law of the requisite seriousness in a matter not pertaining to office may be found by proof, in appropriate manner, to the

> Parliament in proceedings where the offender has been given proper notice and opportunity to defend himself."

The opinion of Pincus, Q.C. is summarised as follows

> "As a matter of law, I differ from the view which has previously been expressed as to the meaning of s.72. I think it is for Parliament to decide whether any conduct alleged against a judge constitutes misbehaviour sufficient to justify removal from office. There is no "technical" relevant meaning of misbehaviour and in particular it is not necessary, in order for the jurisdiction under s.72 to be enlivened, that an offence be proved."

The documents to which I have so far referred will no doubt be annexed by the Committee to its report to the Senate but, if they are not, they may be considered to be annexed to this advice and numbered accordingly.

Witnesses were entitled to be represented by counsel, and the principal witnesses were. Counsel for a witness was entitled to cross-examine other witnesses on matters relevant to the evidence of his client. Although the proceedings were conducted as closely as possible to a judicial proceeding, there was nevertheless no counsel whose duty it was to prosecute or to act as if for a complainant or a plaintiff. Mr Simos, Q.C., Mr Biscoe and Mr Williams of junior counsel together with instructing solicitor Mr Stanwix, worked with remarkable industry and professional skill while at the same time preserving a commendable objectivity and neutrality. The summing up of Simos Q.C. was a model of impartiality.

All witnesses were invited or summoned by the Committee. Their proofs of evidence were first supplied to counsel for the Justice and to some other counsel. The witnesses were called and lead in chief by counsel assisting the Committee. Mr Simos did not cross-examine except in one very minor instance. This created lack of balance because counsel for the Justice was entitled to cross-examine generally, including a witness who in normal adversary proceedings, would be "his witness". Some lack of balance was restored by counsel acting for witnesses, but full redress was by no means achieved. There was no counsel at the end who could fully put the affirmative of the case in an adversary manner. The result was a process which was not only fair to the Justice but rather more than fair. Whether it was entirely fair to the people of Australia is another matter. I mention this only to make it clear that the position of the Justice was at all times jealously regarded.

I will now examine the evidence in order to advise the Committee on the correct findings of fact in relation to the material allegations made by the Chief Magistrate about the conduct of the Justice.

The principal witness was the Chief Magistrate himself. The Justice, as he was entitled to do pursuant to paragraph (18) of the Senate resolution, did not accept an invitation by the Committee to give evidence. The evidence of the Chief

Magistrate is therefore uncontradicted. It was however, strongly questioned by counsel for the Justice substantially on two fronts.

First it was submitted that the Chief Magistrate had allowed his mind to become so poisoned with suspicion that his evidence on material matters was so unreliable that it could not safely be accepted. Second, the Chief Magistrate's evidence was questioned as being inconsistent, and not self-consistent, and for that reason it would be unsafe to accept it.

The first ground may be first dealt with.

Soon after his appointment to the office of Chief Magistrate on 26 May 1979, the Chief Magistrate began to form the suspicion that impropriety was occurring on the Bench of Stipendiary Magistrates over which he presided. Because a close examination of the grounds for the suspicion involves other people, three of whom namely, Morgan Ryan, Judge Foord of the District Court and Murray Farquhar (the retired Chief Magistrate) the affairs of whom are under consideration in other places, it is undesirable, for fear that they and perhaps others might be prematurely prejudiced, to express an opinion about those various grounds.

It is sufficient to say that there was ample combination of circumstances to justify the Chief Magistrate in holding the

suspicions which he did. I say nothing as to whether those suspicions are actually founded on fact. Those matters were only partially developed before this Committee as going only to the credibility of the Chief Magistrate and in any event are outside the terms of reference.

As a result of reading material alleged to have been taken from what have become popularly known as "The Age" tapes, the suspicions of the Chief Magistrate hardened into a positive conclusion. He reached this conclusion shortly before giving evidence to the prior Committee. He then felt it his obligation to make a written statement to that Committee of his knowledge of these matters, his suspicions, and his conclusion. On the 28th day of May 1984 he provided a written statement to the prior Committee in nine pages concluding with

> "From my personal experiences outlined above and coupled with the material contained in the illegal tapes, the inference is now inescapable in my mind that in some of these activities which were either illegal or improper, Murray Farquhar was influenced, assisted and/or advised by Morgan Ryan and Lionel Murphy".
>
> Exhibit 1A.

Again for reasons affecting other people whose affairs are pending consideration in other places it is undesirable to make any findings about this conclusion, except to say that if there was any conspiracy of that kind or of any kind (as to which I make no finding) then there is not sufficient evidence before this Committee to conclude that the Justice was a party to it.

I am however satisfied that the Chief Magistrate has not allowed his mind to become poisoned in the manner suggested or with the consequence suggested. Under intense cross-examination he presented as an honest witness. He made and acknowledged sufficient errors of recall, of comprehension, and expression, to make it clear that his evidence was not contrived, exaggerated, or irrational.

It remains to consider that evidence in its context and to examine it for credibility having regard to the submission made on behalf of the Justice, as to its inconsistency. In respect to the matters in issue it is necessary to look at the evidence in its total context and that I now proceed to do.

Morgan Ryan was a close friend of the Justice of many years standing. The Justice and the Chief Magistrate first met at a dinner given by Ryan at his home on 10 May 1979. The other guests at this dinner were Mr Mervyn Wood the then Commissioner of Police and Mr Murray Farquhar, the retiring Chief Magistrate. The Justice and Mr Briese, the Chief Magistrate elect, from this introduction established an acquaintanceship which later was to develop with the common interest of securing for the Bench of Magistrates of New South Wales, independence from the executive branch of government. The Justice made available his advice, and his influence in high places to help the Chief Magistrate in this laudable endeavour.

Morgan Ryan came under notice of the police in March or April 1981. On 7 August 1981 he was charged by the Commonwealth with being knowingly involved with forging a letter deliverable to the Department of Immigration and Ethnic Affairs. On 5 November 1981 a further charge was preferred against him alleging that he conspired with Choi, Mason and others, to effect a lawful purpose by unlawful means.

The proceedings for Ryan's committal commenced before Mr Jones, S.M. on 5 November 1981 and on the 6 November were adjourned to 16 December.

On 4 December 1981 the High Court of Australia delivered judgments in the case of the Queen v. Hoar (1981) 148 C.L.R. 32. That case involved a charge under the Fisheries Act 1965 (N.T.). Put shortly the Act empowered an inspector to seize personal property if it could be evidence relating to an offence under the Act. Anything so seized could on conviction under the Act be forfeited to the Crown. The accused was charged, and convicted, of the offence of conspiring with others to commit an offence against the Act and the Judge ordered that the things seized be forfeited to the Crown. It was held by the Court on Appeal that there was no power to make the order for forfeiture because there was no conviction for an offence under the Act. In dealing with

that matter the Court concluded that it was undesirable that conspiracy should be charged when a substantive offence had been committed and there was a sufficient and effective charge of that offence. The majority of the Court so held in the relevant manner stated, but Mr Justice Murphy (the Justice) in delivering a separate judgment spoke more generally as follows

> "Problems such as arose here are inherent in the use of conspiracy charges. Many warnings have been issued by courts against the over-use of conspiracy charges (for example see Verrier v. Director of Public Prosecutions (12)). The allurements of conspiracy charges are very great. The imprecision of the charges, the vagueness of the evidentiary rules, the tendency for committal hearings to turn into fishing expeditions, often prove attractive to prosecutors. A cogent objection is that advanced by Glanville Williams in Criminal Law: The General Part, 2nd ed. (1961), p.684:
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> > "The real objection, it is submitted, is to the use of a conspiracy count to give a semblance of unity to a prosecution which, by combining a number of charges and several defendants, results in a complicated and protracted trial. The jury system is unworkable unless the prosecution is confined to a relatively simple issue which can be disposed of in a relatively short time."
>
> "The overzealous use of conspiracy charges proves embarrassing and costly not only to the accused but ultimately to prosecuting authorities and the courts. It brings the administration of criminal justice into disrepute. This is happening in Australia. History shows that the administration of justice will be well served if courts keep a tight rein on the spawning of conspiracy charges."

I draw the attention of the Committee to the last sentence in that passage.

The evidence in Ryan's committal proceedings was completed

on 18 December 1981 and counsel addressed on the 22 December 1981. No finding was made by the learned magistrate on that day. Shortly thereafter, during the last week of December and before the Magistrate had made his decision, the Justice telephoned the Chief Magistrate. As a result, the Justice and Mrs Murphy were invited by the Chief Magistrate and Mrs Briese to dine at the latter's home on 6 January 1982. Some attempt on behalf of the Justice was made during the evidence to establish that there were other guests present at that dinner. The attempt failed and I accept the evidence of the Chief Magistrate and Mrs Briese that the Justice and Mrs Murphy were the only guests.

What was said to have been said on the telephone and what was said to have been said at the dinner requires some analysis.

In his written statement to the prior Committee, the Chief Magistrate said that the Justice telephoned him in January 1982 and said that he had a matter that he would like to discuss but not on the phone. The Chief Magistrate says that he suggested that the Justice could come to his place for dinner and he also invited Mrs Murphy to come if she was free. The Justice accepted. That evidence is contained in exhibit 1A. No further light was thrown on that in the oral evidence of the Chief Magistrate before the prior Committee.

Before this Committee the Chief Magistrate corrected the

date of the telephone call from early January 1982 to the last week in December 1981. His version of the conversation is substantially the same as that in exhibit 1A. In particular there is the repetition of the Justice's wish to discuss a matter "but not on the phone". There is a difference in that the Chief Magistrate says that he asked the Justice where he would like to meet and asked whether they should meet at a restaurant in the city "or somewhere" to which the Justice replied "no, I don't think so". The Chief Magistrate then asked him and Mrs Murphy to dine at his home.

The Chief Magistrate's account of this matter in exhibit 1A was given in narrative form. His account of the matter before us was reconstructed into direct speech. Both accounts are over two years after the event and I would not be prepared to accept that the version in direct speech is word perfect. It is however understandable that in conversion to direct speech there would be rather more precision and accuracy of detail in conveying the meaning which the hearer believed it had. The cross-examination on this revealed nothing different and nothing more. I accept the Chief Magistrate's account of the matter as given to us.

The Chief Magistrate after consultation with Mrs Briese in due course telephoned the Justice and arrangements were made for dinner at the Chief Magistrate's house on the 5th or 6th January 1982.

The Chief Magistrate's account of what was said at the dinner in exhibit 1A is also largely in narrative form. He said that the Justice began to talk about the social security conspiracy case and that the Justice criticised the use of conspiracy charges in that case. The Justice then said (and this is in direct speech) "and I will tell you about another wrong case of conspiracy too, and that's against Morgan Ryan". The Chief Magistrate said in narrative that he had the impression from what the Justice was saying as he went on to criticise this conspiracy charge, that he must have read the evidence. The Chief Magistrate asked him if he had read the evidence and he said that he had. The Chief Magistrate said that he received the impression from the Justice that in his view the evidence did not support the charge of conspiracy or that it was very weak. The Chief Magistrate asked who the magistrate was who was hearing the matter and the Justice answered that it was Jones. The Chief Magistrate said that he indicated that because of the Justice's concern he would make some inquiries and see what the situation was.

Before the prior Committee the Chief Magistrate was examined on this matter by Senator Chipp, but this examination was directed to questions relating to the Chief Magistrate's subsequent inferences from the conversation. It did not throw any more light on the content of it.

Before us the Chief Magistrate converted his narrative into direct speech. As I have already oberved this is unlikely to be word perfect. The qualification "or words to that effect" in my opinion has to be added to everything that was said. In respect to the Chief Magistrate's "impression" he was, I conclude, honestly reconstructing the direct speech which conveyed the impression. In direct speech the matter comes out in more detail, but the Chief Magistrate's account of it is substantially the same as in exhibit 1A. He said that the direct speech in exhibit 1A was very close to the exact words that the Justice used. As to what was wrong with the Morgan Ryan case, the Justice said "the evidence is very weak and it doesn't support a charge of conspiracy". The difference between this and the narrative form in exhibit 1A, is trivial. This is the kind of small difference which one might expect in the translation from narrative to direct speech. There then followed another translation by the Chief Magistrate into direct speech. He said: "Lionel, you're really concerned about this case, are you?" and he said: "Yes". I said: "well I don't know anything about the case..... I'll make some inquiries and see what the situation is". The Justice made no reply.

In cross-examination the Chief Magistrate agreed that it could well have been that the reference to the social security conspiracy case arose out of a question that the Justice put to him concerning the workload in his court.

The Chief Magistrate was closely cross-examined by Mr Hughes, Q.C., leading for the Justice, but the Chief Magistrate's evidence was not shaken in any material particular. I accept it. It is right to say that there is no evidence of any direct suggestion by the Justice that the Chief Magistrate should try to influence Magistrate Jones in any way relating to the committal proceedings over which he was presiding and that the Chief Magistrate did not attempt to do so.

There is another matter arising out of the conversations at this dinner. That involves evidence that the Justice said to the Chief Magistrate that he might be able to do something for him about an official government car. I am satisfied that there was some conversation about this topic, but I do not pause to examine it in detail because although it is possible to infer that the Justice was offering the Chief Magistrate some inducement, it is equally possible to conclude that the talk about the car arose only because of a courteous offer of some help by the Justice without any sinister implications at all. To some extent the conversations were treated in cross-examination as being relevant to the credibility of the Chief Magistrate. It is sufficient to say that nothing I heard caused me to think that the Chief Magistrate's evidence should not, on material matters, be accepted.

On 27 January 1982 the Justice telephoned the Chief

Magistrate and it was agreed that they would speak together that evening at a reception at the State Office Block. Again what was said on the telephone and what was said at the reception requires some analysis.

In exhibit 1A, the Chief Magistrate, again speaking in narrative, said that a few days later (after the dinner) there was a phone call to his office from the Justice. The Chief Magistrate asked the Justice if he was attending the function at the State Office Block that afternoon and, upon receiving an affirmative reply, he said that he would see him there. In the narrative, the Chief Magistrate did not say what it was that the Justice had telephoned about or whether the Justice had said what it was. Clearly, however, he must have telephoned about something and it is fanciful to think that he did not say what he was telephoning about. Nothing was said about this telephone call at the hearing by the prior Committee but, before this Committee, the Chief Magistrate again translated the narrative of the conversation into direct speech. This was to the effect that " "Clarrie, have you made those inquiries yet about the Morgan Ryan case?" I said: "Yes". I said: "Are you going to the State - to that function at the State Office Block this afternoon?". He said: "Yes". I said: "Well, I'll see you there". That was the end of that conversation."

The Chief Magistrate was again closely cross-examined about this telephone conversation. He agreed that he should, in

his narrative, have included what it was that the Justice had said that he was telephoning about. The cross-examination did nothing to cause me to think that the Chief Magistrates verbatim account of the matter to us was not accurate. Indeed the omission of some detail in exhibit 1A is quite understandable. That document was prepared in the form of a report to a commitee sitting in camera and before which the Chief Magistrate was to appear to fill out the matter so far as necessary by oral evidence (see exhibit 2).

I accept the Chief Magistrate's account of this telephone conversation.

The Chief Magistrate's account of the meeting at the State Office Block function may be read from exhibit 1A. In an attempt at more brevity I do not repeat it in full. The effect of it is that the Chief Magistrate said to the Justice that it was his guess that the committing magistrate would probably commit Ryan for trial. To this the Justice remarked, that "the little fellow will be shattered". The Chief Magistrate said that he was sorry, but that was the situation, and went on to mention that Ryan's counsel could try to persuade the magistrate not to commit, under the provisions of section 41 of the Justice's Act, or that there could be an application for a "no bill".

This was touched upon by the first Committee in some questions from the Chairman and from Senator Chipp. There

was quite a "hubub" at the reception. The Chief Magistrate, before us, putting everything into direct speech, confirmed his account of this matter in exhibit 1A. In cross-examination the Chief Magistrate did not agree that the Justice might not have heard what he said. There is no reason why the Chief Magistrate's account of this conversation at the State Office Block should not be accepted.

On 29 January 1982, Jones, S.M. found a prima facie case against Ryan on the charges of each of forgery and of conspiracy. He adjourned the proceedings to 8 March without then committing for trial. On that same day the 29 January, or possibly the day before, the 28 January, the Justice telephoned the Chief Magistrate. That telephone conversation, too, requires some analysis.

The Chief Magistrate's account of the matter in exhibit 1A is to the effect that the Justice telephoned him at his home and told him that Frank Walker (the New South Wales Attorney) had assured him that he was going ahead with legislation for independence of the magistracy. After some further discussion along the same lines the Justice then said (in direct speech): "and now what about my little mate". The Chief Magistrate inferred that he was referring to Morgan Ryan and said that he then explained again what the position was along the same lines as he had explained at the State Office Block.

In exhibit 1A, the Chief Magistrate did not refer to the emphasis or tone with which the "little mate" remark was made. Before the prior Committee the Chief Magistrate was questioned about exactly what was said, and the tone and emphasis, by both the Chairman and Senator Chipp. He indicated the emphasis to the Chairman and, after having the importance of the matter explained to him by Senator Chipp, he insisted that there was some emphasis but agreed that the remark was capable of more than one interpretation.

In evidence before this Committee, the Chief Magistrate said that the precise words used were: "and now what about my little mate". Then, upon the invitation of counsel, he attempted to reproduce in repeating the words, the emphasis and tone. The members of the Committee saw and heard the

witness and will reach their own judgment about this. My own opinion is that the words used in their context and with the emphasis and tone which the Chief Magistrate placed upon them are capable of leading to the conclusion that the Justice was suggesting to the Chief Magistrate that he ought to do something to assist Morgan Ryan, or ought to have done something to assist him, in repayment for what the Justice had done for the Chief Magistrate in relation to the independency of the magistracy. I say "capable of". I would not have drawn a conclusion if the matter stood entirely alone. The cross-examination of Mr Hughes does not affect my view about this. The Chief Magistrate said: "Well, Lionel, I thought I've already explained to you what the situation is". He did agree that in then using words "he'll just have to use normal procedures" he was giving the gist of what he said.

On the 8 March 1982 Ryan's case was mentioned before the magistrate and adjourned to 22 March. On that date, after further argument, Ryan was committed for trial on both charges - forgery and conspiracy.

On 23 March, Ryan's solicitors applied for an early trial.

Very shortly after this (late March or early April 1982) Ryan saw Mr Justice McClelland and requested him to ask Chief Judge Staunton of the District Court about an early trial. Mr Justice McClelland telephoned the Chief Judge and

passed on the request. Shortly after that the Justice himself telephoned Mr Justice McClelland about something else. The Ryan matter came up and the Justice said "the poor little bugger's worried out of his mind. He ought to get it on and over with as soon as possible". There are two things to be said about this. First that he sometimes referred to his friend in the diminutive, and, second that he must have been in touch with Ryan (or somebody who knew him) in order to know that Ryan was worried.

Later in April the Justice telephoned Chief Judge Staunton and said that Ryan wanted to be tried as quickly as possible and he addressed some argument to the Chief Judge about it. Again there is the continuing interest, this time coupled with a degree of persuasion.

During the same month (April 1982) there is a visit by the Justice to the chambers of the District Court Judges. The Justice visited the chambers and spoke to Judge Foord at some length and briefly to Chief Judge Staunton. There was no evidence that he mentioned the Ryan trial to either of those judges. Judge Foord was able to verify the month and year by a case discussed. Staunton C.J.D.C. thought that it was in April 1983. Had it been in 1982 one would have expected the matter of expediting the trial to have been mentioned. Perhaps there were two visits to Judge Foord and only the 1983 one involved Judge Staunton. I am unable to draw any conclusion from these visits.

On the 29 April 1982 Chief Judge Staunton fixed as a special date for the Ryan trial the 19 July 1982 and stood it over for mention to 18 June 1982. It was mentioned on the 18 June 1982. As it happens that was the same day upon which Choi, who had been separately indicted for conspiracy with others (not including Ryan) pleaded guilty and was sentenced by Judge Foord to a fine of $400 and released on a bond to be of good behaviour for five years. Nothing turns on this coincidence.

Ryan's trial was due to start on 18 July 1982 but on that day no indictment was presented because an application had been made for a "no bill" or nolle prosequi.

The application for a nolle was not successful and on the 30 November 1982 - the "Chronology" is wrong - Ryan's case was fixed for trial for the 9 May 1983.

Sometime in April 1983 Chief Judge Staunton, after making inquiries among his judges, assigned Judge Flannery to preside over the trial. He orally notified the Solictor for Public Prosecutions, Mr Roach, of the assignment.

About 1 May, after consultation with Chief Judge Staunton the trial list for May 1983 was fixed by the list clerk. It is dated 2 May and shows Ryan's trial to be presided over by Judge Flannery for 9 May. As shown on the face of it, the

list was to be distributed to six other officials about the court. No formal publicity was given to the name of the trial judge but it was not a secret. Normally inquiries would be directed to the list clerk.

From the master list a daily list was prepared. Usually the day before the next day's listing, a copy was sent to the Sydney Morning Herald for the court list of the newspaper. A copy was published on the notice board of the appropriate court room on the day in question. The publication of Ryan's trial (naming him) before Judge Flannery in the Sydney Morning Herald for 9 May was proved.

Shortly before 9 May Ryan telephoned Judge Foord and asked him to be a character witness for him which request the Judge rightly declined. The point about that is that Ryan and Foord were close enough for the request to be made. It also illustrates Ryan's attitude to the judiciary.

On 9 May Ryan's trial, notwithstanding its advertisement, had not been reached by Judge Flannery. It was stood over for mention to 18 May. There is no evidence to suggest that anyone might think that Judge Flannery had ceased to be the assigned trial judge. The trial was fixed for 11 July 1983. Ryan said he thought it likely that Judge Flannery would be the trial judge.

Judge Flannery gave evidence. He was not contradicted.

The Justice and Judge Flannery had been professional acquaintances since about 1956. They met professionally and at professional social functions. They were not family friends and neither had ever visited the home of the other. They saw little of each other after 1972 when the Justice became Attorney-General for the Commonwealth. Such occasions had already become less frequent after 1961 when the Justice became a Senator. They had spoken at the Bench and Bar dinner in Sydney on 24 June 1983 and prior to that at two functions in October 1982 and again at another function in November 1982; and possibly in a casual way at other gatherings in that year. The Justice had not telephoned Judge Flannery about a social engagement or about any matter within the ten years preceding 1 July 1983. Judge Flannery knew for certain that he was to continue as the trial judge at the Ryan trial at least a week before that date.

Judge Flannery went to Brisbane for a conference of District Court Judges on Thursday, 30 June 1983. The day after he arrived, namely, Friday 1 July, he was telephoned by the Justice who was also himself in Brisbane. We do not know how the Justice knew that Flannery was there. The Justice asked when could they get together and suggested dinner that evening. Judge Flannery explained that he and his wife were going to a dinner for the District and County Court Judges at the invitation of the Queensland Attorney-General. The Justice remarked that these were usually fairly boring

functions. Judge Flannery said that they had been invited and they would like to go. The Justice said that "they" were having dinner at Milanos and asked Judge Flannery to "join us after the dinner". Judge Flannery said that they would if the dinner didn't finish too late. In fact Judge Flannery was not able to join the Justice after the dinner.

The next morning, Saturday 2 July, before 9 a.m., the Justice telephoned Judge Flannery again. He asked if Judge Flannery ever went to Canberra to which the Judge answered in the negative. There was some discussion about whether they could meet in Brisbane, but their various commitments did not permit that. Judge Flannery said he would telephone the Justice in Canberra after he returned to Sydney.

Judge Flannery returned to Sydney on Monday, 4 July. Later in the week he telephoned the Justice and as a result was invited to dine at the Justice's home unit at Darling Point Road, Sydney, on Saturday 9 July 1983. Mr and Mrs Flannery arrived at the Justice's unit at 7.30 in the evening and left about 12.30 a.m. There were only the Justice and Mrs Murphy and the Judge and Mrs Flannery present.

During the dinner there was general conversation including reference to legal matters. In particular, the Street Royal Commission concerning the proceedings against Kevin Humphreys was mentioned. The Justice said that it was unfair

that a person can give evidence about what another person said about a third person. The Justice mentioned the reported case of the Queen v. Hoar. He asked Judge Flannery whether he had read Hoar's case and said that he had written a judgment in that case. The Justice mentioned conspiracy and the unfair use of what somebody said about somebody else. The conversation along those lines lasted for some time. Morgan Ryan was not mentioned and neither was his forthcoming trial.

During the trial Judge Flannery met the Justice at a judge's night at the Sydney University Law School. Nothing was said about the Ryan trial.

When the trial opened on 11 July the indictment presented was only for conspiracy, the forgery count having been dropped. The jury returned a verdict of guilty of conspiracy on 2 August 1983. On 5 August 1983, Judge Flannery fined Ryan the sum of $400 and released him on a good behaviour bond for five years, being the same order which Judge Foord had imposed upon Choi. As it happens Ryan appealed successfully to the Court of Criminal Appeal and a new trial was ordered. A majority in the Court of Appeal considered the case against Ryan to be strong but the appeal was allowed on a misdirection in relation to certain evidence about the identity of Ryan as the caller in a relevant telephone call. I do not conclude that the opinion of the Appellate Court as to the strength of the case throws any

light on the matters in issue before this Committee. To compare that opinion with the opinion of the Justice derived from the depositions requires me to form my own opinion which might not be any more valuable than the others for the purposes of this matter.

In the meantime the Justice and Judge Flannery had met once again on a social occasion at EJ's restaurant. Judge Flannery said to the Justice "your mate didn't do any good, why did he have Bruce Miles?" and the Justice replied "he had a death wish". Before us there was some discussion by counsel about the word "mate". It matters not. The reply of the Justice is consistent with Ryan's evidence that the Justice had tried to persuade him to engage Silk.

It is useful to refer to that. Ryan implies that the first such conversation was before the committal proceedings; the second, after the committal and before the trial (in Martin Place); and the third, a group of telephone conversations also implicitly before the trial. If Ryan is to be believed it is clear that the Justice knew that his advice about the trial was not acceptable. As to the committal it had been accepted in a way. On 18 December 1981, during the examination of Lewington and the Crown address, Gormley Q.C. and Kilduff of counsel were present with Mr Miles for the defence (see E 14 Master Tape History Sheets).

Before leaving this I mention that Ryan told the Justice in

Martin Place (or perhaps at some other time) that "I can't get a fair trial" and in a stumbling way he said why. Compare this with what the Justice said to Judge Flannery.

The Justice's counsel has strongly submitted that there was no evidence that the Justice knew that Judge Flannery was the trial judge when he sought him out in Brisbane and subsequently invited him to dine at his home in Sydney two days before the trial. There is no direct evidence, but the circumstancial evidence is so strong that it would be fanciful to draw any other conclusion. The Justice was at various times taking a close interest in Ryan's committal and trial. Having regard to the fact that Judge Flannery had been assigned to the trial continuously from early May, I do not consider that any reasonable conclusion is open but that the Justice knew that Judge Flannery was Ryan's trial judge and that he knew the date of the trial. As to Ryan's knowledge of the date see the blue bail notice on E 14. The consequences of this finding can now be considered.

It is remarkable that a Justice of the High Court or any Judge, should seek out another Judge who was about to try his friend for a crime, and seek to entertain that Judge. In this case the Justice communicated with Judge Flannery with that in view not once but twice. What might have happened if Judge Flannery had not performed his promise to telephone the Justice is a matter of mere speculation and leads nowhere. He did so and the Justice repeated the invitation

to dine. It was accepted.

For the Justice to allow the conversation at dinner to begin to touch upon evidentiary matters which would be likely to arise during the trial of the Justice's friend before the Judge to whom he was speaking, is even more remarkable. The mention by the Justice of the unfairness that can arise in a conspiracy charge and the reference by him to his own judgment in Hoar's case leads me to the inevitable conclusion that the Justice entertained Judge Flannery, and spoke to him as he did, with the intention of influencing Judge Flannery against the Crown in the Ryan trial and in favour of Ryan, and that what the Judge did and said had a real tendency to so influence the trial.

I find that to be so beyond reasonable doubt. No other reasonable conclusion is open.

Judge Flannery himself thought that the Justice had made an attempt to influence him. What Judge Flannery thought does not matter and indeed is irrelevant. The decision about it is for the Committee, not Judge Flannery. The Judge's remark to the Justice at EJ's restaurant is consistent with the Judge's expressed belief but that is all.

This attempt by the Justice to influence the course of justice in relation to Ryan falls outside the facts in issue. It is a fact relevant to the facts in issue because

it provides evidence of the intent of the Justice in relation to the facts in issue. It is admissible and relevant for that purpose. This is not a case where it is sought to prove one objective fact by evidence of another similar objective fact. It is not a case where any "striking similarity" between the fact to be proved and the proving fact is required (see Martin v. Osborne (1936) 55 C.L.R. 367 per Evatt J. as he then was at p. 398). In my opinion this evidence is also admissible and relevant as tending to establish design by the Justice to do what he could to help Ryan by the use of his influence on the committal and on the trial. That is a secondary ground.

A comment may be made about the effect of the election of the Justice not to give evidence, and as to his reasons for making that decision. The reasons included political matter connected with the coming Federal election. As to politics they probably have a tendency to cause the "political football" to bounce higher than it otherwise would. There was also reference to the "constitutional position of the Court" and his liability to be cross-examined by counsel for witnesses.

There is a certain type of case where the failure of the defendant to give evidence may tend to strengthen the case made against him. The logical ground for this is difficult to justify and harder to explain, but this case is not such a case. There is a middle ground where, if the failure of a party to give evidence is not explained, this might serve to

indicate that the party fears to do so because the giving of evidence by him would or might expose facts unfavourable to him. At a lower level again the inference could be drawn that the party was, at the least, unable truthfully to say anything which could help his case. Assuming at least a speck of credibility in the reasons given by the Justice then in this case the failure of the Justice to give evidence certainly does not have of itself any tendency to strengthen the evidence against him. That evidence stands or falls on its own weight, uncontradicted, and unquestioned except by challenges mounted from within the evidence itself. It goes without saying that the proponent must prove his case.

If, however, the reasons are fragile (as I consider they are) then one must consider whether there is not really a more compelling reason, namely that the Justice feared to give evidence, because, if he did it might make his position worse. For my part I would give him the benefit of the doubt about this. I do, however, advise that it should be inferred that his real reason for not giving evidence was that to do so would be unlikely to make his position better. (The authorities on this subject are usefully summarised in Edwards: Cases on Evidence in Australia p. 162 et. seq. p. 180 et. seq.)

This is of some importance because if the Justice had an

innocent explanation for his conduct then a few words from him on oath or affirmation could have secured his complete exoneration. Was it more important to him not to become a "political football" or to risk the "constitutional position" of his Court by speaking to a Senate Committee, than it was to dispose of the matter once and for all, preserve public confidence in him and his Court, and walk away with honour?

The Justice's counsel likened this hearing to a criminal trial. The analogy is not complete but, speaking in that way, the "defence" of the "accused" comprised nothing more than an attack on the credit of the chief "prosecution" witness which, having failed, left nothing but a theatrical blend of adversary tactics and rhetoric, topped with some reasons for not giving evidence which could be only slightly raised above the level of humbug by straining credulity to the limit. The "categorical denial" through counsel was not a privilege that could have been extended to an accused in the Australian Capital Territory. He would have had to speak in person in Court.

I return to the question of intent.

As with any other fact it is possible to draw an inference of intent from an accumulation of circumstances where no one circumstance if standing alone would carry that inference. In this case I have been able to make a positive finding

about the Flannery instance alone. This makes the task of drawing an inference from that together with other circumstances less difficult. The relevant inference is that of the intent of the Justice when he spoke to the Chief Magistrate in the way in which he did. I will now examine that question.

It is apparent that the Justice was taking a continuing interest in the committal proceedings and in the trial of his friend Morgan Ryan. This is understandable. It is also understandable that he should endeavour to use his high office to endeavour to effect a subtle influence on those proceedings in a manner favourable to Ryan his old friend - a friend in need. This would be understandably humane but it is not excusable. In a judicial officer, let alone a Justice of the High Court of Australia, it is inexcusable. The question is whether the Justice did fail in this way. This question is resolved by deciding why the Justice spoke to the Chief Magistrate about Morgan Ryan's case in way in which he did.

One view is that the Justice intended and hoped that the Chief Magistrate would convey the Justice's views about conspiracy generally and the weakness of the case against Ryan to the committing magistrate, Jones, S.M.

The first consideration is well put by Mr Simos, Q.C., at TS 1322 (bottom) and 1323 (top) as follows:

"To recapitulate then that conversation, the essential factors are: Mr Justice Murphy said to Mr Briese, (1), that the Morgan Ryan conspiracy case was wrong; (2), that he had read the evidence; (3), that the evidence was very weak and did not support a charge of conspiracy; and (4), that he, Mr Justice Murphy, was really concerned about the case.

"On one view the Committee may think that those remarks were calculated in the legal sense of likely to produce the result that they did, namely, to cause Mr Briese to say that he would make some inquiries..... In the present case, however, although on one view Mr Briese could make proper inquiries, there would be nothing he could properly do to put the matter right if, in fact, it was wrong."

See also Simos Q.C. last para. p. 1316 to top of 1317.

Mr Bennett, Q.C., the second leader for the Justice, submitted that this was not a case where the Chief Magistrate could have sat on the case himself. It was a case where both men knew Ryan, and the discussion took place between them in the privacy of the Chief Magistrate's own home. The difficulty about the clandestine nature of the meeting, having regard to my acceptance of the Chief Magistrate's evidence in relation to the telephone call to arrange it ("not on the phone"), is said to be met because the confidential matter might have been in relation to something else. On the other hand an examination of the evidence does not reveal that anything else of a confidential nature was discussed. This puts counsel's submission into the realm of speculation against positive evidence that Morgan Ryan's case was discussed.

In my opinion there is no inference reasonably open but that the reference of the matter to be discussed on the telephone was Morgan Ryan's case.

It was submitted that the reason for not going to a restaurant might be that it was the Chief Magistrate's turn to return the hospitality. This is too thin to be convincing in the sense of being a reasonable explanation.

Further, "not on the phone" cannot be explained by the suggestion that the subject matter was merely too lengthy to be discussed on the telephone, because that does not explain why the suggestion of the discussion taking place at a restaurant is rejected.

A further submission was that if the subject was the Ryan matter then it was more likely that this would have been raised by the Justice soon after his arrival as being the principal reason for him being there. This again is merely speculative. It is more likely that the Justice waited until the subject could be appropriately introduced. An appropriate opening was provided by the discussion about the Greek conspiracy case. Compare the opening provided by the Humphries case during the discussion with the trial judge.

It is said that the discussion that did take place about Morgan Ryan's case was no more than the kind of discussion

which Judges between themselves might conduct at any time about a case, and even one which is currently being heard. The matter cannot be swept aside in that way. The two men were not fellow Judges, one was a Justice of the High Court of Australia and the other was the Chief Magistrate of the Court of Petty Sessions. For the Justice to express the opinions about the case, which he did, to the Chief Magistrate, it being a case involving a man who was known by the Chief Magistrate to be a friend of the Justice, was improper in itself and the Justice must have known that it was improper. Why then did he do it? To that there can only be one reasonable answer. It cannot be accounted for by the suggestion that the Justice was merely "sounding off" in relation to a conspiracy charge of the kind which he would feel strongly about in any event. If that were so there would be no reason for the "not on the phone" condition. One would have to conclude that the Justice's comments might have occurred spontaneously and almost by accident. What then was the confidential matter? I am satisfied, not forgetting the onus and standard of proof, that that is not a possibility which is reasonably open.

The Justice did not expressly suggest that the Chief Magistrate should make any inquiries of Jones, S.M. On the other hand when the Chief Magistrate said that he would the Justice did not, as one might expect, immediately demur. One would expect the Justice to demur in emphatic terms, having regard to his friendship with Ryan.

If the Justice wanted to find out only about the progress of the case there would have been nothing to prevent him telephoning the Magistrate's clerk or some other official at the court. If he wanted to find out only whether the Magistrate was likely to find a prima facie case or not, why did he want to know that? The answer lies not in inference but in speculation.

It should be noted that by the 5 January 1982 the hearing of evidence was over and addresses had been completed. The Justice had read the evidence and found out the name of the Magistrate. The hearing stood adjourned for judgment as to whether there was a prima facie case. There was nothing that the Justice could lawfully do about any information the Chief Magistrate might give him. He had not said merely that the case was weak. He had said or implied that it was not strong enough to support the charge of conspiracy - the very question then under consideration by Jones, S.M.

Further, if the Justice only wanted to find out how Jones S.M. was looking at the matter, because of a concerned interest in the fate of his friend, then why did he not openly ask the chief Magistrate on the telephone to find out for him. There was no need for circumlocution at a private dinner, and no need to wait for two weeks after the end of the hearing of the evidence.

That the Justice in fact wanted the Chief Magistrate to communicate with Jones S.M., in the hope that in the course of doing it he would convey the Justice's views about the weakness of the case to Jones S.M., is a conclusion which is very probable. Whether I should be satisfied of it beyond reasonable doubt is not merely a matter of logic but involves a matter of judgment based on the evidence and on the totality of ones own experience. I will return to that.

Accepting as I do that on the 27 January 1982 the Justice asked the Chief Magistrate whether he had yet made the inquiries about the Morgan Ryan case, it is plain that the Justice not only expected an inquiry to be made but he expected an answer. If it was an answer only going to the progress of the case in the timeous sense, this is an answer which, as I say, could easily have been obtained by telephoning a clerk at the court or better still, asking his clerk or associate to do that, or telephone Ryan's solicitors.

At the function at the State Office Block that evening, the Justice was told by the Chief Magistrate that Jones S.M. would probably commit and he was referred to the two possible courses which Ryan might take, either under section 41 of the Justice's Act or make an application for a "no bill". That should have been the end of the matter. It was not.

On 28 or 29 January the Justice telephoned the Chief Magistrate again and after giving him some good news about the progress of the independence of the magistracy, said again in the emphasis I have discussed "and now what about my little mate". That he raised the matter of Ryan's case again when it should have been closed off by the previous conversation, fortifies the view that he expected and wanted something to be done, or expected that something had been done, about his "little mate" by the Chief Magistrate.

It is not certain whether the Justice then knew that Jones, S.M. had found a prima facie case, as he did on 29 January. If the Justice did not know, then the question related to the prima facie case aspect. If he did know then the question related to the operation of section 41. I am satisfied that the question as asked was a sequel in an on-going design by the Justice to use his status and prestige as a Justice of the High Court to influence the lesser judiciary in favour of Ryan.

Having found the facts as deposed to by the Chief Magistrate the central question is the intent of the Justice in acting and speaking as he did, and in the circumstances in which he did, to the person to whom he spoke. There was no certainty that the Chief Magistrate would convey the Justice's views to the committing magistrate, but having regard to all the evidence and the absence of any reasonable explanation consistent with the Justice's innocence, and coupled with

the decision I have made about the Judge Flannery incident, I am satisfied beyond reasonable doubt that the Justice at the material times intended that the Chief Magistrate would convey the Justice's views to the committing magistrate, and hoped that those views would be conveyed, and intended that those views if conveyed would influence the committing magistrate against the prosecutor and in favour of Morgan Ryan.

I am also of the opinion that what the Justice did carried with it an actual tendency and a real risk that Jones, S.M., would become subject to the influence intended. I will try to say why.

For the Justice to approach the trial Judge it was necessary that he should be sufficiently acquainted with him to be able to organise a comparatively private conversation without the trial Judge immediately becoming suspicious. The matter also had to be handled with considerable circumspection. No heavy-handed approach would do. What was required was the sowing of the seed. For this purpose any conversation, although relevant to the real topic, had to be peripheral to it. The Judge Flannery case is an example of this.

By contrast, in the case of Jones, S.M., the Justice did not know him personally. He would need to know a suitable third person who could be spoken to in private in order that a

private discussion could be organised between that third person and Jones. S.M. without suspicion. That person would need to know Jones S.M., so that the matter could be mentioned privately to Jones S.M. That person would preferably need to be a professional colleague of Jones S.M., who could without alarming Jones S.M., mention a matter relating to his work. That person would need to know that the accused Ryan was a friend of the Justice. It would be beneficial if that person felt under some obligation to the Justice. It would also be beneficial if that person believed, rightly or wrongly, that the Premier might be anxious to help Morgan Ryan. The Chief Magistrate admirably met all those requirements.

The fact that he was the Chief Magistrate was an added bonus because it placed him in the position of being the superior officer of Jones S.M., and having some legitimate interest in the administration of his court. If one adds to that the remarks of the Chief Magistrate at the Ryan dinner, now commonly referred to as his "policy statement", the picture is complete.

It is not the case that the chance of the Justice's approach to the Chief Magistrate being successful is fanciful. Its success might still not have been "odds-on" but with this background it was very real indeed. The most that the Justice could safely do was to sow the seed of bias in a channel fertile for its transport to the field intended.

There was a real chance that this seed would not fall on stony ground. That it did says something for the integrity of the Chief Magistrate.

Some of the matters I have just mentioned are also material to the intent of the Justice. Indeed, the transparency of the attempt is in part measured by the subtlety of it.

Beyond reasonable doubt there was a real intent in the mind of the Justice, and a real tendency in what he did, to influence the outcome of Ryan's committal proceedings.

I do not find it necessary or desirable to classify the conduct of the Justice as constituting a named crime or crimes. That is a matter for a jury after trial of the Justice upon indictment or, if no indictment is presented, then a matter for each of the Houses of Parliament if those Houses consider that the case is sufficiently serious to take it further. I add that if the elements of intent and tendency can in some way be removed from the conduct which I have found, then that conduct nevertheless constitutes serious unjudicial behaviour falling within the meaning of misbehaviour as defined in the opinion of Mr Pincus, Q.C.

Since drafting this advice I have had the advantage of reading in draft the advice of Commissioner Connor and, of course, we have closely discussed between ourselves many aspects of the case. Although our modes of expression

sometimes differ we differ in substance only in the matter of final judgment. I respect the judgment of my learned colleague. It is my misfortune that I am compelled to recommend a different judgment.

If each member of the Committee makes a judgment it will be made "without fear or favour, affection or ill-will" in the same terms as the judicial oath. I advise members (no doubt unnecessarily) that in coming to judgment each is in the position of an independent judge sitting in a judicial capacity.

The ultimate judgment will be pronounced either by the Parliament of our people (to which the Justice proposes to appeal) or by a common jury chosen from among our people.

My advice to the Committee is

(1) That the conduct of the Justice could amount to misbehaviour in accordance with the interpretation of the meaning of "misbehaviour" contained within paragraph (2) of the summary of the opinion of the Solicitor-General of the Commonwealth, and also within the opinion of C.W. Pincus, Q.C. both of which are attached to the report of the Select Committee on the Conduct of a Judge.

(2) That that conduct which could amount to misbehaviour within each of the two opinions has been proved beyond reasonable doubt.

I add this. My advice is reached on the basis that the Justice intended that the Magistrate should be influenced in his decision. Even if this was not so it could still be the case that the Justice intended to pervert the course of justice by interfering in the course of it by seeking to obtain advance information of the Magistrate's deliberations. Without more, this, if successful, would have lead to a serious irregularity "in the course" of justice - not going to the result but going to the process (see Burt C.J. in Rabey v. The Queen 1980 W.A.R. p. 84 at 88). For example if a juror was seen talking to a stranger, or even the trial judge, during the deliberations of the jury, the chance of any verdict being quashed would be high. They would be not much lower if it was demonstrated that nothing had been said about the case. The course of justice would have been perverted because the process had been violated.

Putting it at its lowest the Justice attempted to have something done which would have violated the process of committal of Morgan Ryan. If successful "there would have been a serious departure from the essential requirements of the law" (see also The Queen v. Hall 1971 V.R. 293 at 299).

[redacted]

24 October 1984

Senator M.C. Tate,
Chairman,
Senate Select Committee on
Allegations Concerning a Judge,
Parliament House,
CANBERRA A.C.T. 2600

Dear Mr Chairman,

In accordance with paragraph (19) of the resolution of the Senate of 6 September 1984 appointing the Select Committee on Allegations Concerning a Judge, I submit herewith my advice upon the matters into which the Committee was to inquire and upon which the Committee is to report.

Yours sincerely,

[redacted]

(Xavier Connor)
Commissioner Assisting
the Committee

ADVICE TO THE SELECT COMMITTEE ON ALLEGATIONS CONCERNING A JUDGE

To Senator Tate, Chairman
Senator Bolkus
Senator Haines
Senator Lewis

Mr Chairman and Members of the Select Committee, on 6 September 1984 the Senate resolved that a select committee be appointed to be known as the Select Committee on Allegations Concerning a Judge. The Senate resolution of 6 September 1984 was amended by the Senate on 2 October 1984. A copy of the resolution, as amended, appears as appendix A to this advice. It is referred to hereafter as "the resolution".

Paragraph 3 of the resolution provided that the Committee should consist of four Senators. Senator Tate was appointed Chairman of the Committee and Senators Bolkus, Haines and Lewis were appointed members. Paragraph 10 provided that two Commissioners Assisting the Committee be appointed by resolution of the Senate. On 11 September the Senate resolved that the Hon. John Leonard Clifton Wickham, Q.C. and myself be appointed the Commissioners Assisting the Committee.

The resolution required the Committee to inquire into and report upon the allegations made by Mr C.R. Briese, the Chairman of the Bench of Stipendiary Magistrates of New South Wales, concerning Mr Justice Murphy of the High Court of Australia before the Select Committee on the Conduct of a Judge and referred to in appendix 5 of the Report of that Committee. Appendix 5 is as follows:-

> "1. Mr Briese first met Mr Justice Murphy at a dinner at the home of Morgan Ryan on 10 May 1979. This was a small dinner party attended by Mr Murray Farquhar, who was then Chief Stipendiary Magistrate of New South Wales, and Mr Mervyn Wood, then Commissioner of Police of New South Wales.
>
> 2. The nature and purpose of the dinner have been the subject of considerable evidence before the Committee. The only significance of this dinner in relation to the issue now remaining before the Committee is the fact that Mr Briese and Mr Justice Murphy engaged in lengthy conversations about various subjects concerned with the courts and the law including the administration of justice in New South Wales until 2 or 3 a.m. Mr Briese made the most of what he saw as an opportunity to seek the views of a High Court Judge for whom he had the highest respect.
>
> 3. Mr Briese and Mr Justice Murphy met again on several occasions at a Sydney restaurant, at the High Court and at Mr Justice Murphy's Canberra home over the period 1980-81, during which the principal topic of conversation was the question of independence for the New South Wales Bench of Magistrates, which Mr Briese was anxious to obtain and for which Mr Justice Murphy expressed his support. Mr Briese sought Mr Justice Murphy's intervention with the Premier and the Attorney-General of New South Wales. Mr Justice Murphy said he would take the opportunity of doing so.
>
> 4. Although one or two statements were made by the judge in the course of these various conversations to which Mr Briese now ascribes

some significance to matters before the Committee, we do not believe that they are relevant to the question which the Committee must now decide.

5. Early in January 1982, Mr Briese received a telephone call at his home from the judge who, according to Mr Briese, said he had a matter which he would like to discuss, but not on the telephone. The judge denies this and explains the telephone call as being in response to several messages he had received from Mr Briese reminding him of a standing invitation to return his hospitality.

6. Mr Briese denies this but agrees that in response to the call from the judge he invited the latter and his wife to dinner with him and his wife at their home in Sydney. Prior to dinner being served, while Mrs Briese was engaged in its preparation, the judge, his wife and Mr Briese had a discussion in the lounge room. According to Mr Briese the judge raised the question of the social security conspiracy case, and crticised it in strong terms.

7. There is again some conflict between Mr Briese and the judge as to how this subject arose, but it is common ground that the judge criticised the case in strong terms, although there is no suggestion that any request was made by the judge to Mr Briese that he should communicate the judges's views to the magistrate who was hearing that case.

8. The judge states that Mr Briese said that he had not discussed this case with the magistrate handling it, and that he had made it an invariable rule never to discuss any case with a magistrate unless that magistrate came to him for advice. The judge claims he responded that this was the proper course. Mr Briese denies this conversation.

9. Mr Briese says that the judge then said to him "and I will tell you about another wrong case of conspiracy too and that is against Morgan Ryan". The judge denies this, saying that Mr Briese first mentioned the Morgan Ryan case.

10. The judge admits that he criticised the Crown for its habit of "tossing in (a) conspiracy (charge) if a case is not very strong". Mr Briese states that he had the impression frcm the judge that he had read the evidence and that it was very weak. The judge denies indicating anything more than a reading of newspaper accounts.

11. There is no suggestion that Mr Justice Murphy requested Mr Briese to speak with the magistrate hearing the Morgan Ryan case. Nevertheless Mr Briese indicated he would make some inquiries about the matter to see what the situation was. He says that he did so because he felt that he was under pressure to take some action in relation to the case because of the possibility of some wrong happening in his court.

12. Prior to the judge's departure from his home that evening, Mr Briese alleges that the judge told him that he might be able to do something about obtaining an official government car for his use. This embarrassed Mr Briese to the extent that he told the judge that he already had one, which was not the case. The judge denies that any such conversation occurred.

13. Shortly after this visit by the judge to Mr Briese's home, Mr Briese asked the magistrate hearing the case about the strength of the evidence against Morgan Ryan, and was told that there was enough for a prima facie case, although it was not that strong. Mr Briese did not tell the magistrate that any inquiries had been made of him about the matter, and emphasised to the magistrate that the case was one entirely for his own judgement.

14. A few days later, Mr Briese received another telephone call from the judge who, he says, asked him about the inquiries he had promised to make about the Ryan case. The judge denies this and said he rang Mr Briese to thank him for the dinner, though Mr Briese does not recall that. He questioned the likelihood of this because a huge bouquet of flowers had been delivered at his home the morning following the judge's visit.

15. Mr Briese asked the judge whether he would be attending a reception at the State office

block that evening, and told the judge that he would see him there. At the reception Mr Briese told the judge that it was his impression that the presiding magistrate seemed to have a different view of the Ryan case than the judge and it was Mr Briese's guess that Ryan would probably be committed for trial. Mr Briese says that the judge responded "the little fellow will be shattered". Although the judge denies that he used the expression "the little fellow" he admits commenting that "Ryan would be shattered".

16. Mr Briese then went on to suggest two possible ways that Ryan had of getting around the problem. First, he could try to persuade the magistrate not to commit him under "the second leg of section 41", which is a reference to a section of the New South Wales Justices Act under which a charge may be dismissed if the magistrate is of the view that even though there is a prima facie case it is not of sufficient strength to commit for trial. The second matter mentioned by Mr Briese was an application for a "No Bill", which Mr Briese and the Judge then proceeded to discuss.

17. Several days later the judge again rang Mr Briese and told him that he had discussed the question of the independence of the magistracy with the New South Wales Attorney General, and that the government was going ahead with legislation to give effect to it. The judge states that he told Mr Briese that his conversation with the Attorney-General had taken place at the reception. Mr Briese does not recall this.

18. Mr Briese says the judge then said to him "and now what about my little mate?". In evidence Mr Briese was unsure of the exact opening words of the inquiry ("and" or "now" or "and now"), but was adamant that the question was asked with such emphasis as to suggest a link between the inquiry and the preceding conversation.

19. The judge's recollection is that he did not use the expression "my little mate", but that, not having heard the exact reference at the reception, he did make an inquiry about the section of the Justices Act there referred to by Mr Briese.

20. Mr Briese and the judge agree that Mr Briese then simply repeated the general advice he had offered at the reception.

Paragraph 17 of the resolution provided that the Committee, after receiving recommendations from the Commissioners Assisting, should determine procedures and rules for the examination of witnesses. The procedures and rules ultimately determined by the Committee and the Senate are set out in appendix B to this advice. The procedures and rules follow completely the recommendations of the Commissioners. The Committee, on the casting vote of the Chairman, originally omitted rules 13(c) and 14. The matter was referred to the Senate which restored them on 2 October 1984.

The Committee sat on 24 September 1984 and heard counsel's submissions concerning procedure. Counsel for Mr Justice Murphy foreshadowed an objection to Senators Tate, Bolkus and Lewis on the grounds that they had been members of the previous Select Committee on the Conduct of a Judge. Subsequently this objection was not pressed.

Counsel assisting the Committee provided a statement of issues which was adopted by the Committee. It reads as follows:-

> "The issues upon which the Committee is required to make findings of fact are as follows:-
>
> Whether Mr Justice Murphy spoke and acted as alleged by Mr Briese in the allegations of Mr Briese contained in Appendix 5 to the Report of the Senate Select Committee on the Conduct of a Judge or in some other, and if so what, way or ways on the occasions referred to in those allegations, in an attempt to, and/or with the

intention of, obstructing, preventing, perverting, defeating, interfering with and/or influencing the due course of justice in relation to the committal proceedings against Morgan Ryan or with any other, and if so what, intention?

Particulars

Subject to all proper objections to be determined by the Committee, counsel assisting the Committee proposes to adduce in evidence before the Committee the evidence contained in the proofs of evidence of witnesses and the documents, copies of which have been furnished or will be furnished to counsel for Mr Justice Murphy."

All the evidence was heard in public on the following days: 4, 5, 8, 9, 10 and 11 October 1984. Closing addresses of counsel were heard on 12, 15, 17 and 18 October 1984. The rules of evidence were strictly followed throughout the hearing. On all questions of procedure and admissibility of evidence the Committee adopted the advice of the Commissioners.

The principal witness was Clarence Raymond Briese. He was appointed Chief Stipendiary Magistrate of the State of New South Wales on 28 May 1979. His predecessor in that office was Mr Murray Farquhar. It had been publicly announced in the month of March or April 1979 that Mr Briese had been selected to succeed Mr Farquhar.

On 10 May 1979 Mr Briese dined at the home of Mr Morgan Ryan in Neutral Bay, a suburb of Sydney. Mr Ryan was a solicitor practicising in Sydney. The invitation to the dinner was conveyed to Mr Briese by Mr Farquhar. The other persons at the dinner were Mr Justice Murphy of the High Court of Australia and

Mr Mervyn Wood who was then the Commissioner of Police in the State of New South Wales. This was the first time Mr Briese had met Mr Justice Murphy and Mr Briese took the opportunity to discuss a number of legal topics with him.

Mr Briese next spoke to Mr Justice Murphy towards the end of 1979 at the Central Magistrates Christmas function in Sydney. Mr Justice Murphy told Mr Briese that be thought that the magistrates should be independent. Mr Briese agreed. Mr Justice Murphy said "Well, we ought to have a talk about it one day". Mr Briese said "By all means, I'll give you a ring one day.".

In early January 1980 Mr Briese phoned Mr Justice Murphy, told him he would like to discuss the independence of magistrates and arranged to have lunch with him at a restaurant in Sydney on 10 January 1980. The luncheon was held and the matter of independence was discussed, including the likely attitude of the Attorney-General of New South Wales.

Some 16 months passed before Mr Briese spoke to Mr Justice Murphy again. This was at a memorial service in Sydney to the late Mr Justice John Sweeney in May 1981. In the previous month Federal police officers had visited the home of Mr Morgan Ryan, who was well known to Mr Justice Murphy over a period of some 35 years. They interviewed him about a matter in respect of which he was ultimately charged in August 1981. There is no evidence that Mr Justice Murphy, when he spoke to Mr Briese at the memorial

service in May, was aware that the police had interviewed Mr Ryan in the previous month. At the service Mr Justice Murphy asked Mr Briese how he was getting on with independence and Mr Briese said that things were coming to a bit of a standstill. Mr Justice Murphy asked whether Mr Briese had seen the High Court building yet. Mr Briese said that he had not and Mr Justice Murphy invited him to Canberra and offered to show him over the building. Mr Briese said that he would like to do that but that he would also like to discuss his latest position paper on the independence of the magistracy.

A few days later Mr Briese rang Mr Justice Murphy and arranged to visit Canberra towards the end of May or early June. He did so. He took his paper with him and discussed it with Mr Justice Murphy in his chambers at the High Court. They had a discussion about independence of the magistracy in the course of which Mr Briese said that he had been to see the Premier (of New South Wales) about it in the previous year and that the Premier was in favour of the principle of independence. At the end of the conversation Mr Justice Murphy said that he would get in touch with the Premier and get the matter moving.

Mr Justice Murphy then arranged for a member of his staff to show Mr Briese over the High Court and afterwards Mr Briese had lunch with Mr Justice Murphy in the judges' dining room. In the afternoon Mr Justice Murphy invited Mr Briese to his home in Canberra where he spent a couple of hours between 4 p.m. and 6 p.m. during which he met Mrs Murphy.

Mr Briese did not speak to Mr Justice Murphy again until about six months later. In the meantime on 7 August 1981, Mr Ryan was charged with being knowingly involved in forging a letter deliverable to the Department of Immigration and Ethnic Affairs. On 5 November 1981 the committal proceedings began in Sydney before Mr R.M. Jones, S.M. On that day a further charge was made against Mr Ryan that he conspired with Messrs Choi, Mason and divers other persons to effect a lawful purpose by unlawful means. The hearing continued on 6 November 1981 and was then adjourned to 16 December 1981.

On 4 December 1981, during this adjournment of the committal proceedings, the High Court handed down its decision in the case of The Queen v Hoar (1981) 148 CLR 32. Gibbs C.J., Mason, Aickin and Brennan JJ, delivered a joint judgement in which, amongst other things, they said:-

> "In exceptional cases the element of concert may justify a more severe penalty for conspiracy than for the substantive offence which the conspirators commit (see Verrier v Director of Public Prosecutions [1967] 2 A.C. 195 at p.223), but where a court, imposing a penalty for conspiracy, takes into account the overt acts of the conspiracy, it would be wrong to impose a further penalty in respect of those acts.
>
> Indeed the Crown has adopted a course of proceeding which is calculated to cause the maximum amount of prejudice to the defendants and the greatest difficulty to the courts in determining what is a proper penalty. If the Crown's belief was that it had effective charges for the substantive offence then it should have proceeded with those charges and sought on

conviction an order for forfeiture which the Court would have been authorized to make. If there had been some real basis for doubting that the offence had been committed the Crown may perhaps have been justified in alleging an attempt or a conspiracy. Generally speaking, it is undesirable that conspiracy should be charged when a substantive offence has been committed and there is a sufficient and effective charge that this offence has been committed. As Lord Pearson observed in Verrier [1967] 2 A.C. at pp.223-224, the addition of a charge of conspiracy in the same indictment "will tend to prolong and complicate the trial". There is even less justification for charging conspiracy and the substantive offence separately and for maintaining the prosecution in respect of the substantive offence after securing a conviction for conspiracy.".

Murphy J., in a separate judgement, said:-

"I agree with the criticism of the way in which the prosecution has been conducted. The problem arises out of the amorphous nature of conspiracy. The essence of conspiracy is sometimes regarded as the agreement, sometimes as the partnership in crime which results from the agreement. The vagueness extends to what evidence may be used to establish this slippery concept; it extends also to what should be taken into account on sentencing. The problem is acute where, as here, the Crown charges not only a conspiracy to commit offences but also the commission of those offences. We have a long tradition of resistance to double jeopardy and double punishment. Dangers of these arise when commission of offences and of conspiracy to commit those offences (or offences including those offences) is charged.

The application is for leave to appeal against sentence only. The applicant was in the business of committing offences against the Fisheries Act 1965 (N.T.). The illegal fishing was extensive and highly organized, and the conviction calls for a substantial sentence. The difficulty in fixing a penalty is that it would be artificial to ignore the fact that the conspiracy was carried out by persistent offences against the Act. That is why the existence of pending charges for such offences is an embarrassing

complication. The problem of double sentencing can be met in practice if the sentences for conspiracy and for substantive offences are pronounced at the same time. The methods adopted by the Crown have made this impossible. The refusal of the Crown to state whether it would proceed with the charges for the substantive offences is hard to understand. If the charges are persisted with and result in convictions, any court dealing with them will be aware that the carrying out of the conspiracy has been taken into account in the substantial sentence, which would not have been warranted if the conspiracy had not been implemented. In these circumstances, I agree that the application should be refused.

Problems such as arose here are inherent in the use of conspiracy charges. Many warnings have been issued by courts against the over-use of conspiracy charges (for example see Verrier v Director of Public Prosecutions [1967] 2 A.C. 195 at p.223-224). The allurements of conspiracy charges are very great. The imprecision of the charges, the vagueness of the evidentiary rules, the tendency for committal hearings to turn into fishing expeditions, often prove attractive to prosecutors. A cogent objection is that advanced by Glanville Williams in Criminal Law: The General Part, 2nd ed. (1961), p.684:

> "The real objection, it is submitted, is to the use of a conspiracy count to give a semblance of unity to a prosecution which, by combining a number of charges and several defendants, results in a complicated and protracted trial. The jury system is unworkable unless the prosecution is confined to a relatively simple issue which can be disposed of in a relatively short time."

The overzealous use of conspiracy charges proves embarrassing and costly not only to the accused but ultimately to prosecuting authorities and the courts. It brings the administration of criminal justice into disrepute. This is happening in Australia. History shows that the administration of justice will be well served if courts keep a tight rein on the spawning of conspiracy charges.".

The committal proceedings against Mr Ryan resumed on 7 December 1981 and continued on 17, 18, 22 and 29 December 1981.

By then there had been addresses on the evidence but no ruling had yet been given whether a prima facie case had been made out on either charge.

It was while the committal proceedings were at this stage that Mr Justice Murphy rang Mr Briese at his home. The transcript (pp. 109-110) regarding the conversation reads as follows:-

> "He said: It's Lionel here, Clarrie. I've got a matter that I'd like to talk with you, or I'd like to discuss with you, but not on the phone.' I said: 'All right. Where would you like to meet? Would you like to go - should we meet at a restaurant in the city somewhere?'. He said: 'No. I don't think so.' I then said: 'Well, what about coming up here for dinner?'. He said: 'All right.'. I said: 'And if your wife is free, why doesn't she come too?'. He agreed. I said: 'Well, I'll talk with my wife and we'll fix a date.'".

A short time later Mr Briese rang Mr Justice Murphy and made arrangements for a dinner at the home of Mr Briese on 6 January 1982.

On that date Mr Justice Murphy and Mrs Murphy arrived in a Commonwealth car at the Briese residence in St. Ives, a suburb of Sydney, at about 7 p.m.

Mr Briese said that during the evening there was a conversation which is recorded in the transcript (pp. 113-114) in the following terms:-

> "Mr Briese - Yes. The conversation turned at one point to the Greek social security case.

Mr Simos - Yes. Just tell me what you recall of that conversation. Who said what?

Mr Briese - Mr Justice Murphy criticised the laying of---

Mr Hughes - I object to that.

Mr Simos - Yes. Could you put in words of the first person the substance and effect of the conversation as you recall it.

Mr Briese - I think I said something to the effect: 'The magistrate has already been on that case for years and it's causing considerable inconvenience to our backlog of arrears'. Mr Justice Murphy said: 'Those conspiracy charges that were laid in that case are really quite outrageous. In my view, the magistrate hearing those charges should dismiss them. In my view, he would be a hero in the community if he dismissed those charges, and what he should do for special emphasis is to dismiss them in one short paragraph for special emphasis'.

Mr Simos - Did you made any response to that?

Mr Briese - I said: 'Well, I haven't spoken to the magistrate about those charges and I don't know anything about them. However, my impression, from incidental remarks I have overheard him make, is that he will probably be committing - he will probably be finding a prima facie case against some of the defendants'.

Mr Simos - Yes; what happened after that, or what was said after that?

Mr Briese - Mr Justice Murphy then said: 'Anyway, I'll tell you about another wrong case of conspiracy, too, and that's the Morgan Ryan case'.

Mr Simos - Now, just as to those, what is your recollection? Is it your recollection that they're the very words he used or are they the substance and effect or----

Mr Briese - They are very close to the exact words that he used.

Mr Simos - Yes; what did you say?

Mr Briese - I said: 'Yes, well, what's, what's wrong with it?'. He said: 'The evidence is very weak and doesn't support a charge of conspiracy'.

Mr Simos - Did you make any reply?

Mr Briese - I said: 'What, have you read the evidence?'. He said, he said: 'Yes'. I said: 'Who's the magistrate that's hearing the case?'. He said: 'Jones'.

Mr Simos - Were you aware at that time who the magistrate was?

Mr Briese - Yes, I was aware that it was Jones who was hearing the case.

Mr Simos - All right. What further conversation was there, if any?

Mr Briese - There was further, further indic----, and I suppose I must say it in the first person, there was further discussion from Lionel about the matter and I said 'Lionel, you're really concerned about this case, are you?' and he said: 'Yes'. I said: 'Well, I don't know anything about the case. I haven't spoken to the magistrate' or 'the magistrate hasn't spoken to me about it. I'll make some inquiries and see what the situation is'.

Mr Simos - And did he make any reply to that?

Mr Briese - I don't think so."

Mr Briese said there was another segment of conversation concerning the use of an official car by Mr Briese. The matter was mentioned again as the Murphys were leaving at about 11 p.m. Mr Justice Murphy said: "Clarrie, I think I can do something for you about a car if you'd like" and Mr Briese said: "No, don't worry about it. I've got one out there already."

Following this Mr Briese said that he spoke to Mr Jones and asked him what his view was about the strength of the evidence in the Morgan Ryan case. Mr Jones, according to Mr Briese, said: "Well I think there's enough for a prima facie case but the evidence is not all that strong." Mr Briese said that Mr Jones

then began as if to give him a resume of the evidence and Mr Briese said that he did not want to discuss the case with him and that the case was one entirely for his judgement as he was the one who was hearing the case - see exhibit 1A p. 141.

Mr Jones was not called to give evidence but, by consent, a statement made by him was tendered and marked exhibit 17. In the course of that statement Mr Jones said:-

> "Although I have read one newspaper account of what Mr Briese says he said to me in a conversation concerning this matter [the Morgan Ryan committal proceedings] I personally have no recollection whatever of any such conversation. However I am not in a position to deny that any such conversation took place for the reason that, as I have said, I have no recollection of it.
>
> I can also say there was no discussion between me and any other person concerning these committal proceedings.
>
> I simply heard the evidence and addresses and then dealt with the matter on its merits."

Mr Briese gave evidence that three weeks later on 27 January 1982 Mr Justice Murphy phoned him at work and said: "Clarrie, have you made those inquiries yet about the Morgan Ryan case?". Mr Briese confirmed that Mr Justice Murphy was going to an official function hosted by the Attorney-General at the State Office Block that afternoon and said that he would see him there.

At the function Mr Briese spoke to Mr Justice Murphy in terms recorded in the transcript (pp. 118-119) as follows:-

"Mr Briese - I said: 'Lionel, about the Morgan Ryan case, the magistrate seems to have a different view than you about the evidence. My guess is that if things remain as they are he'll probably be committing him for trial.'

Mr Simos - And did Mr Justice Murphy make any response?

Mr Briese - Mr Justice Murphy said - and these are the exact words: 'The little fellow will be shattered.'

Mr Simos - Yes, and what did you say?

Mr Briese - I said: 'Well, look, I am sorry about that Lionel, but that is the situation. But of course, as you would know, you have still got two screens to use. There is the second leg of section 41 and there is always a no bill if you do not agree with the magistrate.'"

The reference to the second leg of section 41 is to a provision in the Justices Act, 1902 as amended which, according to Mr Briese, enables a defendant, even after a magistrate has ruled that there is a prima facie case, to submit that nevertheless the magistrate should not commit for trial.

The next day or, the day after, that is, on either 28 or 29 January, Mr Briese said that Mr Justice Murphy rang him again. The conversation is recorded in the transcript (pp. 121-122) as follows:

"Mr Briese - Mr Justice Murphy said to me: 'Clarrie, I have just been talking to, or I was talking to, Frank Walker and he assures me that he is going ahead with legislation for independence.' I said: 'Well, that's great.' He said some other things related to independence and I said: 'Well, all of this sounds really good and I'm very pleased to hear this.' He then said to me: 'And now what about my little mate?'

Mr Simos - Do you remember those precise words, or are you stating the substance in effect of what he said?'

Mr Briese - In my view they are the precise words.... He said it with some emphasis.'

Mr Briese - I said: 'Well Lionel, I thought I've already explained to you what the situation is.' I said: 'You'll have to' or 'he'll have to, he'll just have to follow normal procedures - and I think I may have said, although I'm not sure: 'He'll just have to use the second leg of section 41 or make an application for a no bill if he thinks the magistrate's wrong."

On 29 January 1982, which was either the day of or the day after the above conversation Mr Jones, S.M. ruled that there was a prima facie case against Mr Ryan on both charges.

On 2 February 1982 Mr Briese spoke briefly to Mr Justice Murphy at a Law Society dinner but there was no discussion of the Morgan Ryan case. The same thing happened on two other occasions, the latter being in February 1984; and they are the only occasions on which Mr Briese has spoken to Mr Justice Murphy since February 1982.

This was the evidence in chief of Mr Briese. It was given strictly in accordance with the rules of evidence which govern court proceedings. The name of Mr Neville Wran, the Premier of New South Wales, was not mentioned in the evidence, nor was there any attack on the character of Mr Ryan or Mr Farquhar. Those matters were introduced into the hearing for the first time by various counsel in the course of cross-examination. Counsel would have been perfectly entitled to take the course they did in court proceedings and they had every right to follow the same course in this hearing. Some public criticisms suggested that the Committee was roaming far and wide from the issues before it and permitting

unsubstantiated attacks on the character of various persons. I think it should be made clear, in fairness to the four Senators who comprise the Committee, that no evidence emerged during the hearing which might not also have emerged in a court dealing with the same issues.

A wide-ranging, sustained and vigorous attack on Mr Briese's credibility was mounted by counsel for Mr Justice Murphy. In general, it was suggested that he was obsessed with a wild and unsubstantiated conspiracy theory, that he was filled with unjustified suspicion and consequently was a thoroughly unreliable witness. In view of the unusual importance of this matter, I have considered going through, one by one, the detailed criticisms made of the evidence of Mr Briese and the detailed answers which have been made to those criticisms. I have come to the conclusion, however, that no really useful purpose would be served by doing so. The members of the Committee have seen and heard Mr Briese giving evidence over many hours and have heard the criticisms made of him and the answers advanced to those criticisms. You are at least as well equipped as I am to assess Mr Briese's credibility. It is the kind of task which is performed in this country every working day by large numbers of jurors. Moreover, in the end, the assessment of the credit of a witness is often largely a matter of impression. For these reasons, to go into the details of the criticisms and replies made to them in respect of Mr Briese's evidence is not likely to help persons who did not have the opportunity to see or hear him as a witness. I think it is enough to say that my firm impression overall was that Mr Briese was an

honest and reliable witness and a man of considerable moral courage. I think that oral accounts of conversations which occurred some time ago, particularly when unsupported by notes taken at or about the time, should always be very closely scrutinized before being accepted. Any doubts I entertained initially as to the general accuracy of Mr Briese in this regard were resolved when Mr Justice Murphy, the only person who could have contradicted him, declined to give evidence. I deal hereafter with other aspects of the credibility of Mr Briese when I come to discuss the conspiracy theory.

Evidence was also given by His Honour Judge Staunton, the Chief Judge of the District Court of New South Wales. He gave evidence that he had known Mr Justice Murphy for some 35 years. To understand his evidence it is necessary to state that on 22 March 1982 Mr Jones, S.M. had committed Mr Ryan for trial in the District Court. The following day Mr Ryan's solicitors wrote to the Solicitor for Public Prosecutions requesting an early trial for Mr Ryan on the ground that he was a solicitor and had practically left his legal duties awaiting the outcome of the proceedings.

While matters concerning Mr Ryan's forthcoming trial were at this stage Mr Justice Murphy rang Chief Judge Staunton probably some time in the first half of April 1982. The conversation is set out in the transcript at pp. 266-267 as follows:-

"Mr Simos - What was the substance and effect of that conversation?

Judge Staunton - Again doing the best I can, he used words to this effect: 'Morgan Ryan wants to be tried as quickly as possible. With the trial hanging over his head his practice is disrupted'. And I think he mentioned that he had other difficulties. Mr Justice Murphy said: 'Can you do something about it?'. And I replied in words to the following effect: 'Jim McClelland has already been in touch with me about this and I told him to tell Ryan to get his solicitors to make application to the Solicitor for Public Prosecutions. I am not fully cognisant with the list position but I would expect that the lists' - meaning the criminal lists - 'are full for the next several months and they would not be justified in taking a trial out in order to put Ryan's trial in'. I said: 'Indeed this is only the second time that I've known of such an application to be made. The other was that of Ian Sinclair and his trial was expedited because he had been stood down from the Cabinet and was a public figure'. I might interpolate that the application was not made to me by Mr Sinclair. The application was made to the Clerk of the Peace in the usual way or the Solicitor for Public Prosecutions and referred to me. However Mr Justice Murphy responded: 'Ryan is a public figure. He is a solicitor and solicitors are all public figures. They are handling the public's affairs'. And I replied: 'Well, be that as it may, he still has to make his request in the usual way, when consideration will be given to it by the Solicitor for Public Prosecutions and no doubt the Commonwealth Crown Solicitor. If there are no problems with witnesses it may be that a vacant date can be found'. That is, to my recollection, the whole of that conversation with Mr Justice Murphy."

Chief Judge Staunton's evidence was not challenged. I advise the Committee that in my opinion it is relevant and admissible evidence for a quite limited purpose and only for that purpose. It is open to you to regard it as tending to show that Mr Justice Murphy was prepared in April 1982 to intervene actively on behalf of his old friend, Mr Ryan, and to advance arguments on

is behalf in favour of his obtaining an early trial. If you took hat view of the evidence it would be open to you to regard it as vidence tending to show that Mr Justice Murphy's discussion of he two conspiracy charges with Mr Briese at the latter's house, ome three months earlier, was something more than a professional hat between two lawyers about the subject of conspiracy in eneral or merely something which had come up fortuitously in the onversation. It would be open to you to infer that if r Justice Murphy was prepared to intervene on behalf of Mr Ryan ith Chief Judge Staunton, even on an administrative matter such s the fixing of a trial date, he may well have been prepared to ntervene on behalf of Mr Ryan with Mr Briese to have some nquiries made about the committal proceedings. The evidence is hus relevant as throwing light on the intent with which r Justice Murphy spoke to Mr Briese on 6 January 1982 concerning r Ryan's committal proceedings.

About this time Mr Justice Murphy spoke on the phone to r Justice J.R. McClelland, Chief Judge of the Land and nvironment Court of New South Wales. In a general discussion the yan matter came up and Mr Justice McClelland gave evidence that r Justice Murphy said of Mr Ryan something to the effect of "The oor little bugger's worried out of his mind. He ought to get it n and over with as soon as possible."

Evidence was also given by His Honour Judge Flannery of the istrict Court of New South Wales to the following effect.

He first met Mr Justice Murphy in 1956. The next year he went to the Bar in New South Wales and took chambers on the fourth floor of Wentworth Chambers where, shortly afterwards, Mr Murphy, as he then was, became head of Chambers. He remained there until 1973. From 1957 until 1961 he saw Mr Murphy as members of the same floor would do. In 1961 Mr Murphy became a Senator and was seen less on the floor. After Senator Murphy, as he then was, became Attorney-General towards the end of 1972 he saw him very little; and then he, Flannery, left the floor in 1973. He was appointed a Judge of the District Court in August 1982. Before 1983 he had never been a guest in Mr Justice Murphy's home nor had Mr Justice Murphy been a guest in his home. When he saw Mr Justice Murphy socially it was at fourth floor functions, Bar functions, Bench and Bar dinners and the like.

In April 1983 Chief Judge Staunton enquired of Judge Flannery whether there was anything to preclude him from conducting the trial of Mr Ryan. When it appeared that there was not, he was allocated the trial which was fixed for 9 May 1983. It was not reached on that day and subsequently was refixed for 11 July 1983. Judge Flannery remained the trial judge. Mr Ryan always assumed that Judge Flannery would be his trial judge. In addition, Mr B.L. Roach, the Solicitor for Public Prosecutions in New South Wales, gave evidence that inquiries from members of the public or members of the profession as to which judge has been allocated to a particular trial were normally directed to the list clerk and were quite commonly made.

On either Thursday, 30 June or Friday, 1 July 1983, Judge lannery went to Brisbane in order to attend an Australian onference of District and County Court judges. On 1 July 1983 r Justice Murphy, who was in Brisbane for another purpose, rang udge Flannery in his room at Lennon's Hotel asking "When are we oing to get together?....what about tonight?". He replied that he nd his wife were going to a dinner at Lennon's for the District nd County Court judges at the invitation of the Queensland ttorney-General. Mr Justice Murphy said "These are usually fairly oring functions." Judge Flannery said they had been invited and ould like to go. Mr Justice Murphy said "We are having dinner at ilano's, [a restaurant close to Lennon's] would you care to join s after dinner?". Judge Flannery said "Yes, if the dinner esn't finish too late." In the event, the Flannerys did not join e Murphys that night.

Judge Flannery said that Mr Justice Murphy rang him again the xt morning at Lennon's before 9 a.m. and asked him whether he er went to Canberra. He said "No.". There was then discussion om which it emerged that their various commitments would not ermit them to meet in Brisbane. He said that when he returned to ydney he would ring Mr Justice Murphy in Canberra.

Judge Flannery at first gave evidence, about which he was ite positive, that the days on which the two phone calls curred were Saturday 2nd and Sunday 3rd of July. After ncluding his evidence in Canberra and returning to Sydney he scovered his error after counsel for Mr Justice Murphy had

indicated to counsel for Judge Flannery that there was documentary evidence showing that Mr Justice Murphy had returned to Sydney on the Saturday. Judge Flannery returned to Canberra and gave further evidence correcting the dates. Apart from the question of the reliability of Judge Flannery's recollection, the difference in the dates as between the first and second of July and the second and third of July was not material.

Judge Flannery returned to Sydney on Monday, 4 July 1983 and during that week he rang Mr Justice Murphy and arrangements were made that he and his wife would go for dinner to Mr Justice Murphy's unit at Darling Point on Saturday, 9 July 1983. Mr Ryan's trial was fixed for Monday, 11 July 1983 before Judge Flannery.

Judge Flannery and his wife arrived at Mr Justice Murphy's unit at 7.30 p.m. and left at about 12.30 p.m. During this time Mrs Murphy was also present. Judge Flannery said that at the time the Street Royal Commission was in progress and, arising out of a discussion of it, Mr Justice Murphy said that it was unfair that a person could give evidence about what another person said about a third person. Mr Justice Murphy also mentioned a reported case of the Queen against Hoar, asking Judge Flannery whether he had read it. When Judge Flannery said that he had read it but could not remember what it was about, Mr Justice Murphy said that he had written a judgement in that case. Mr Justice Murphy mentioned the word "conspiracy". There was no mention of Mr Morgan Ryan or of his forthcoming trial or that Judge Flannery was to be the trial judge.

The trial of Mr Ryan commenced on the following Monday and idge Flannery said that the legal representative of Mr Ryan ibmitted that the indictment should be quashed, placing very eavy reliance on Mr Justice Murphy's judgement in Hoar's case.

I advise you that in my opinion this evidence of idge Flannery, like that of Chief Judge Staunton, is relevant and imissible in this inquiry for a quite limited purpose and only or that purpose. If you thought it amounted to an attempt to ervert the course of justice you cannot use it against Justice Murphy as evidence of propensity. Nor in my view can ou use it as similar fact evidence in the way you have heard it ntended for by counsel for Judge Flannery. You may use it only you think it throws some light on Mr Justice Murphy's state of nd when he spoke to Mr Briese about the committal proceedings. ne allegations by Mr Briese contained in appendix 5 to the evious report are set out on pages 2 to 6 above and it will be served that they do not refer to the actual trial of Morgan Ryan but only to the committal proceedings. The same is ue of the statement of issues set out on pages 6 and 7 above.

It is for you to make an assessment for yourselves of the redibility of Judge Flannery, just as you have to do for Briese. I considered that he was a truthful witness and, apart om the mistakes about the dates, an accurate witness. He is also uncontradicted witness. Counsel for Mr Justice Murphy have said erything which could be said in an effort to persuade you that

this episode should bear an innocent interpretation. There is, for instance, no direct evidence that Mr Justice Murphy knew that Judge Flannery was to be the trial judge. Having carefully considered the submissions of counsel for Mr Justice Murphy, the uncontradicted evidence of Judge Flannery as well as the surrounding circumstances, I have come to the conclusion that Mr Justice Murphy was aware on the night of 9 July 1983 that Judge Flannery was to be the trial judge for Mr Morgan Ryan and that he would have known from one source or another that the trial was imminent. In these circumstances, he nevertheless made a pointed reference to Hoar's case.

The evidence of Chief Judge Staunton and Judge Flannery, as well as the evidence of Mr Briese, leads me to reject firmly any suggestion that Mr Justice Murphy's discussion with Mr Briese on 6 January about the two conspiracy cases was simply a professional chat between lawyers or that it arose by the way in the course of an innocuous conversation, or that it did not betoken any concern for Mr Ryan on the part of Mr Justice Murphy.

I pass next to consider the significance you are entitled to place on the fact that Mr Justice Murphy declined the invitation of the Committee to give evidence. The Senate Select Committee on the Conduct of a Judge (Parliamentary Paper No. 168/1984) is exhibit 20 before this Committee. It contains as appendix 6(i) a submission made to the previous Committee by counsel for Mr Justice Murphy. The submission (at page 43 of exhibit 20) contains the following passage:-

"At the very least it is submitted that the following are basic prerequisites for the observance of natural justice:

(a) the right of access to all evidence prejudicial to the Judge (as is recognised in Clause 17 of the Committee's Guidelines);

(b) the right to cross-examine any witness or person who gives evidence which could reflect upon him adversely;

(c) the right to have any case prejudicial to the Judge closed before he answers any questions himself;

(d) the right to make full submissions by counsel and, if the Judges wishes, to give evidence on his behalf;

In a case where the Judge voluntarily furnishes a statement at the request of a Committee, the Judge's statement should not be shown to any other witness before the Judge's counsel has an opportunity to cross-examine that witness.

In the absence of these it would be a denial of justice to require the Judge to submit himself for interrogation by the Committee."

The conditions laid down in counsel's submissions were met in ubstance by the Senate in setting up the present Committee. When r Justice Murphy was invited to give evidence on this occasion is counsel made a statement which is recorded at pp. 1002-1005 of he transcript in the following terms:

"CHAIRMAN - Then in accordance with paragraph (18)(c), the Committee hereby issues an invitation to Mr Justice Murphy to give evidence to the Committee.

Mr Hughes - I seek the leave of the Committee to make a statement by way of response to that invitation, which will be a short statement.

CHAIRMAN - In that case, we'll take it now. Is leave granted? There being no objection, leave is granted.

Mr Hughes - Mr Chairman, the context in which this Committee has been conducting this inquiry has undergone an essential change as a result of political events which have occurred during the last week. The present Parliament is now within a fortnight of its expiry as a total entity. The House of Representatives last night adjourned indefinitely and is to be dissolved on 26 October next. These in a practical sense are unalterable political facts. One result of these events is that it is now impossible, even if misbehaviour were found, for the procedures envisaged by section 72 of the Constitution to be implemented before the forthcoming election. This is because section 72 requires that an address for the removal of a Federal judge must be passed by both Houses in the same session. Unless that happens, the Governor-General in Council has no power of removal. It follows that, with all respect, the Senate, as presently constituted, could be seen to be acting inappropriately if it were to contemplate an address for removal before the expiry of the present Parliament. Again with respect, I say that any attempt so to do could be seen as a futile step taken solely for political reasons. Further persistence by the Senate, as presently constituted, in requiring this Committee to bring in a report on its terms of reference may be seen to be, without any fault whatsoever on the part of this Committee, an unjustifiable attempt based upon political considerations to pre-empt the proper role of the new Parliament. When the new Parliament assembles next year the Senate will be constituted differently inasmuch as its numbers will be increased from 64 to 76 as from the date of its first sitting. It will be a different Senate.

Also, without any fault on the part of this Committee - and I wish to emphasise that as strongly as I can - there has been another alteration in the context in which this inquiry is being conducted. It has become quite clear that its proceedings are being conducted in a highly politicised environment and are being treated as a factor in the opening stage of an election campaign. If the judge gives evidence, it is virtually inevitable that he may become a political football in the election. This would be intolerable. I emphasise that if it were to happen it would be quite unavoidable so far as this Committee is concerned.

In these circumstances, coupled with another to which I shall refer in a moment, our client

takes the view that it would be altogether inappropriate for him to appear as a witness before this inquiry. It would be incompatible, in our submission, with the position of the Court of which our client is a member that he should give oral evidence before this Committee. Few things could be more detrimental to the constitutional position of the court than that one of its justices, not charged with any alleged offence and not the subject of any charge formulated by the Senate, should give evidence in the present circumstances. In this connection it should be remembered that the terms of reference of the Committee were altered so as to remove from its jurisdiction any power to make a finding on an issue whether there has been misbehaviour. That alteration was made, I think, by resolution of the Senate on 2 October.

Another, but I emphasise less important, factor that has influenced our client in making this decision is that an important safeguard proposed by this Committee was overruled by the Senate, which voted in this respect on party lines. In the result, our client has been deprived of a fundamental protection available to any sole defendant in a criminal trial - namely, protection from multiple cross-examination. I have covered this ground before, sir, and I shall not go over it again. Any participation on Mr Justice Murphy's part by testifying before this Committee will create a precedent, or would create a precedent, which, in our respectful submission, should never be tolerated in the relation between the judiciary and the Parliament. No judge should be subjected to this and my client will not lend his aid to such a procedure. For these reasons the Committee's invitation is respectfully declined. I am instructed finally to say, so that it is quite clear, that Mr Justice Murphy categorically denies any misbehaviour and will, if necessary, insist on exercising his constitutional rights under section 72 of the Australian Constitution in the next Parliament. I thank you, sir."

Putting to one side any consideration of the merits of this statement, it is clear that Mr Justice Murphy voluntarily chose not to give evidence. His failure to do so was not involuntary, as sometimes occurs when a witness is overseas or seriously ill or

has died since the occurrence of the events about which he could testify. Mr Justice Murphy was free to give evidence if he had chosen to do so. If a person against whom an accusation is made voluntarily refuses to give evidence in reply he must be prepared to live with the comment that the evidence against him is uncontradicted; and the comment may have particular force when the accused person is the only person who could have given the evidence in reply.

Apart from this consideration I do not think in this matter that you should attach any other significance to Mr Justice Murphy's failure to give evidence. Such a failure cannot be used to fill any gaps, if there be any, in the evidence; nor can such a failure in any way change the onus of proof. There is no obligation upon an accused person to go into the witness box to prove his innocence; and I think this may be lost sight of if too much emphasis is placed upon a failure to give evidence. In common law countries it is the duty of the prosecution to prove the guilt of the accused beyond all reasonable doubt. This has been referred to as the golden thread in the web of the criminal law. Accordingly in common law countries juries are discouraged from placing reliance on the failure of an accused person to give evidence. If they were to do so it might tend to devalue the presumption of innocence and give insufficient weight to the heavy onus of proof borne by whoever seeks to prove that another has committed a crime.

I pass now to what is plainly the most difficult part of this

advice, namely a consideration of the issues. I approach this task on the footing that I accept the uncontradicted evidence of Mr Briese, Chief Judge Staunton and Judge Flannery as to what Mr Justice Murphy said to them as set out above.

There are two constituents of the offence of attempting to pervert the course of justice. There must be an intention to pervert the course of justice and there must be some overt act, having a tendency to pervert the course of justice, done in an attempt to effectuate the intention. Sometimes the intention may have to be gathered in whole or in part from the overt act. The expression "the course of justice" means the due process of justice whereby trials before courts are conducted; almost invariably in public. Evidence is adduced by the process of examination and cross-examination of witnesses before the Court in the presence of the parties. Submissions concerning the applicable law are made publicly in the presence of the court and the parties. It is interference with this due process which constitutes perversion ~~of~~ the course of justice and an attempt to interfere with it which constitutes attempting to pervert the course of justice. It may take many forms such as bribery of the court or legal practitioners or witnesses, or bringing physical or other pressure to bear on them or by communicating secretly with the court. The common element in these examples is that something outside the due process of the law is done with the intention of affecting the outcome of the proceedings and which has a tendency to do so.

The law, as I understand it, regards an act as having a tendency to pervert justice if the person performing that act has done enough for there to be a risk, without further action by him, that injustice will result. It is enough if there is a possibility that what he has done "without more" might lead to injustice. He does not have to complete the whole process himself if there is a risk that what he has initiated may be carried, even quite innocently, to the point of perversion by others - see R v Murray (Gordon)[1982] 1 W.L.R. 475 at p.479, a decision of the Ccurt of Appeal.

If you are satisfied that because of what Mr Justice Murphy did there was a risk that Mr Briese might convey, even quite innocently, to Mr Jones, the magistrate conducting Mr Ryan's committal proceedings, that Mr Justice Murphy had read the depositions and was of the opinion that "the evidence is very weak and doesn't support a charge of conspiracy", that would constitute an act on the part of Mr Justice Murphy having the tendency to pervert the course of justice. It may have resulted in a private communication to the magistrate about which the prosecution would have known nothing. That communication would have conveyed the opinion of a justice of the court which is at the pinnacle of the Australian legal system. It would have been communicated to the magistrate by the Chief Magistrate of his own court. It would have been well calculated to have caused Mr Jones to find that there was no prima facie case, particularly if Mr Jones was of the view that it was a weak case. That may have been the end of the Ryan matter so far as the courts of law were concerned. What

Mr Justice Murphy initiated may thus have developed into a decisive perversion of the due process of justice. In fairness to Mr Briese and Mr Jones, I do not suggest for a moment that either of them would consciously have behaved improperly. In the event we know that they did not. It is not, however, a necessary ingredient of an attempt to pervert the course of justice that the attempt should succeed.

I do not have any difficulty in finding that Mr Justice Murphy performed an act which had the tendency to pervert the course of justice. The crucial question, as it was argued before the Committee, is whether Mr Justice Murphy intended Mr Briese to convey to Mr Jones, the stated opinion of Mr Justice Murphy about the case. There are considerations in favour of the proposition that Mr Justice Murphy did so intend. At a time during the pendency of the committal proceedings he initiated a phone call to Mr Briese telling him there was a matter which he wished to discuss with Mr Briese but not on the phone or in a restaurant. Apart from the Ryan matter, Mr Briese did not give evidence of any other matter discussed by him and Mr Justice Murphy on 6 January 1982 which could not have been discussed on the phone or in a restaurant; nor was any other matter suggested to him in cross-examination. Mr Ryan was a longstanding friend of Mr Justice Murphy and the evidence of Chief Judge Staunton and Judge Flannery demonstrates that he was actively interested in the outcome of the proceedings. Mr Justice Murphy's remark to Mr Briese "the little fellow will be shattered" and his remark to Mr Justice McClelland "the poor

little bugger's worried out of his mind" indicate a compassionate concern for Mr Ryan on the part of Mr Justice Murphy. This confirms what Mr Justice Murphy said to Mr Briese on 6 January 1982 in answer to a question, namely that he was really concerned about the case. Mr Briese's response to this is significant:- "I don't know anything about the case. I haven't spoken to the magistrate or the magistrate has not spoken to me about it. I'll make some inquiries and see what the situation is." In context this could be interpreted as a reasonably clear indication that Mr Briese intended to speak to Mr Jones. Mr Justice Murphy, according to Mr Briese, did not demur. Mr Justice Murphy later indicated that he would be prepared to do something for Mr Briese about a car, thus perhaps placing Mr Briese under some kind of an obligation to him. Mr Justice Murphy then initiated a further call to Mr Briese on 27 January 1982 asking whether he had "made those inquiries yet about the Morgan Ryan case"; thus indicating his continuing interest in the matter. Finally on 28 or 29 January Mr Justice Murphy initiates yet another call to Mr Briese telling him that the Attorney-General for New South Wales was going ahead with legislation for independence, a subject known by Mr Justice Murphy to be dear to the heart of Mr Briese. After Mr Briese had expressed his pleasure at the good news he was immediately confronted with the remark from Mr Justice Murphy made with some emphasis "And now what about my little mate?".

In the light of these considerations, if you come to the conclusion that Mr Justice Murphy intended to pervert the course of justice, I would not be prepared to say that it was not open on

the evidence for you to do so. It plainly is so open. There are other considerations, however, against the proposition that Mr Justice Murphy intended that Mr Briese should convey his opinion about the Ryan case to Mr Jones. The alternative view is that Mr Justice Murphy was doing no more than inquiring as to how things stood in the Morgan Ryan proceedings. That is something which he should not have done but it was not argued by any counsel before the Committee that it would constitute an attempt to pervert the course of justice. This hypothesis is consistent with Mr Justice Murphy's wish not to discuss the matter with Mr Briese either on the phone or in a restaurant. Even on that basis it was a delicate matter. In favour of this hypothesis is the fact that Mr Briese said to Mr Justice Murphy "I'll make some inquiries and see what the situation is." That does not carry with it any suggestion by Mr Briese that he proposed to convey Mr Justice Murphy's opinion of the case to Mr Jones; and the manner in which Mr Briese expressed himself may provide a reasonable explanation why Mr Justice Murphy, on the footing that he believed Mr Briese was merely going to make inquiries about the case from Mr Jones, did not demur. It may also be asked why Mr Justice Murphy should have assumed that Mr Briese would make any improper attempt to influence Mr Jones. In fact Mr Briese made no such attempt, as appears directly from his own evidence and indirectly from the statement of Mr Jones. The fact that Mr Justice Murphy did not ask him to do so and the fact that he did not do so are both consistent with Mr Briese thinking that Mr Justice Murphy was not inviting him to do so. Mr Justice Murphy's phone call of 27 January 1982 to Mr Briese

asking whether Mr Briese had "made those inquiries yet about the Morgan Ryan case" is consistent with this hypothesis. At their later meeting that day at the official function when Mr Briese told Mr Justice Murphy that the magistrate was of a different view it evoked the response "The little fellow will be shattered." There is no query from Mr Justice Murphy as to whether Mr Briese had informed Mr Jones of his view of the case. Mr Justice Murphy's remark may well be taken as a sad acceptance of Mr Briese's promised report on the situation. The final phone call on 28 or 29 January 1982 with the news about magisterial independence is not incapable of innocent explanation having regard to the central position the topic had occupied in the discussions between Mr Justice Murphy and Mr Briese in the previous two years or so. The remark by Mr Justice Murphy "And now what about my little mate?" must be considered because of the light it is capable of throwing on Mr Justice Murphy's intent when he spoke to Mr Briese on 6 January 1982. On one interpretation it could be seen as fatal; on another as innocuous. Mr Briese conceded before the previous Committee that he was not sure whether the word "and" or the word "now" was used. Without derogating in any way from the opinion I have previously expressed about the probity of Mr Briese, it is nevertheless clear that there must be a measure of reconstruction, albeit honest reconstruction, about the precise words used by Mr Justice Murphy some two and a half years ago. Acknowledging that this evidence is not contradicted, it nevertheless depends, if it is to be put against Mr Justice Murphy, on an intonation of voice. On the evidence it is not possible to exclude that this remark was made on the very day that

Mr Jones had ruled that there was a prima facie case against Mr Ryan. If Mr Justice Murphy was aware of the ruling he may well have used one of a variety of intonations to describe his feelings about the matter, which he would have regarded as bad news. I bear in mind also that the remark was made on the telephone and that Mr Briese could not observe any accompanying facial expression which may have thrown some light on how the remark should have been interpreted.

I have wrestled with the two competing interpretations of the evidence and confess to a degree of wavering. In the end I think that the latter interpretation affords a reasonable hypothesis consistent with innocence and for that reason I am not satisfied beyond reasonable doubt that Mr Justice Murphy intended to or attempted to pervert the course of justice by having his view of the Ryan case conveyed to Mr Jones. To find otherwise would in my view involve attaching too little weight to the presumption of innocence. In Australia it is not necessary to be a member of the High Court to attract the golden thread. It is enough to be a member of the human race. As the onus of proof on the balance of probabilities, where criminal conduct is in issue, is so close to the standard of proof beyond reasonable doubt, I am not satisfied on the balance of probabilities that Mr Justice Murphy intended to pervert the course of justice by having his view of the Ryan case conveyed to Mr Jones. In those circumstances, I do not consider that there was any conduct which could amount to misbehaviour in accordance with the interpretation of "misbehaviour" contained in the opinion of the Solicitor-General of the Commonwealth.

There is another basis on which an attempt to pervert the course of justice might have been put. On the evidence Mr Justice Murphy plainly enough intended that Mr Briese should inquire of Mr Jones what his decision was likely to be and that Mr Briese should inform Mr Justice Murphy accordingly. This in fact was done. It would be naive indeed to conclude that he was doing this merely in order to satisfy his curiosity. At every stage of the matter he had shown deep concern for Mr Ryan and it would be difficult to resist the inference that he would pass on to Mr Ryan or Mr Ryan's legal advisers any information he obtained from Mr Briese. Even on this limited basis there was arguably an attempt to pervert the course of justice. A judge of the High Court was obtaining information from a magistrate concerning the decision he was likely to make in a matter which was then part heard. He was doing this through the agency of the Chief Magistrate of the court in question. He was doing it for the benefit of a personal friend who was the defendant. The information was being obtained privately without the knowledge of the prosecution. As a matter of principle this conduct in itself may well constitute an attempt to pervert the course of justice. The course of justice includes the whole process whereby justice is regularly done. To seek to obtain privately on behalf of one party to litigation the view of a magistrate in a case which is either part heard or reserved is plainly a serious irregularity. I am disposed to think it should also be characterised as an attempt to pervert the course of justice, although I am not aware of any reported decision where such conduct or similar conduct has been so characterised. I desist from pursuing this aspect of the matter

further for two reasons. I would be extremely diffident in a matter of this gravity to base advice on a point which was not argued. Furthermore I would be diffident in present circumstances to characterise as an attempt to pervert the course of justice conduct which, as far as I am aware, has not been so characterised previously. I would be much less reluctant to do so were I presiding over a criminal trial in a Supreme Court. In that situation there would be two courts of appeal to which a convicted person could go to seek correction of errors of law in the summing up of a trial judge. Here that basic safeguard is not available.

It remains to consider whether there was conduct which could amount to misbehaviour in accordance with the interpretation of the meaning of "misbehaviour" contained in the opinion of Mr C.W. Pincus, Q.C. That calls for an examination of Mr Justice Murphy's conduct on the footing that it was not criminal. What Mr Justice Murphy did was to seek an indication in advance as to what Mr Jones' decision might be about the committal proceedings at a time when they were part heard. Neither Mr Justice Murphy nor anyone else was entitled to do that. Plainly he should not have asked the head of Mr Jones' court to do it on his behalf. By doing so he lent 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 while the proceedings were part heard. To involve himself thus, without warrant or necessity, in the affairs of a lower court was in my opinion a significant impropriety on the part of Mr Justice Murphy. It was well calculated to give rise to

mischievous misunderstandings. It placed Mr Briese in a most invidious position. If such conduct on the part of a senior judge were the norm it would bring the administration of justice into disrepute and interfere with the independence of lower courts. 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 Australian Capital Territory and in 6 years on the Federal Court of Australia, I have not encountered anything comparable. It would be unfortunate if Parliament or the public were to gain the impression that it was expected or normal judicial behaviour. The relevant terms of the Pincus opinion are as follows:-

> "I think it is for Parliament to decide whether any conduct alleged against a judge constitutes misbehaviour sufficient to justify removal from office. There is no 'technical' relevant meaning of misbehaviour and in particular it is not necessary, in order for the jurisdiction under s.72 to be enlivened, that an offence be proved."

On this footing, once it is clear that there is unworthy conduct, I think it would be a usurpation of the role of Parliament to attempt to say whether or not the conduct was serious enough to merit the one sanction which Parliament has, namely removal from office with its accompanying disgrace. I think there is no alternative but to say that there is conduct which could amount to misbehaviour. Consequently, in the terms of paragraph 2 of the resolution, I indicate that in my opinion there is proof beyond reasonable doubt of conduct which could amount to misbehaviour in accordance with the interpretation of the meaning of "misbehaviour" contained in the opinion of Mr C.W. Pincus, Q.C.

There are two other matters which should be mentioned, first the question of contempt of court and secondly the matter which was referred to as Mr Briese's conspiracy theory.

In his very helpful final address Mr Simos, Q.C., senior counsel assisting the Committee, submitted that contempt of court might be considered as an alternative finding to an attempt to pervert the course of justice. One consequence of treating the matter as contempt of court may have been to dispense with the necessity of proving mens rea in the form of an intention to pervert the course of justice and to impose strict liability so long as some act was proved which was calculated to interfere with the course of justice - see Odhams Press Ltd,. ex parte A-G. [1957] IQB 73. It was said that contempt was contained in the statement of issues (set out on pp.6 and 7 above) by reason of the final expression "or with any other, and if so what, intention." However, in the kind of contempt under consideration the element of intention is unnecessary. Consequently, I do not think that the statement of issues includes or was meant to include contempt. The dictates of natural justice require that a statement of issues in a matter such as this should leave no doubt as to what was to be alleged against Mr Justice Murphy. The question of contempt of court first arose in any substantial way after the evidence was concluded. Had it been clearly indicated in the statement of issues it is not fanciful to suppose that certain aspects of the examination and cross-examination may have been different and the statement of Mr Jones may not have been admitted by consent. For these reasons I advise that you should not consider the matter of contempt of court.

The other matter is the conspiracy theory of Mr Briese. Counsel for Mr Justice Murphy and Counsel for Mr Farquhar have urged the Committee to deal with the conspiracy theory and declare it false. It is not a matter which is contained or even referred to in the statement of issues. There was not a word about it in the evidence in chief of Mr Briese. It was not part of the case against Mr Justice Murphy. It was introduced into the hearing by counsel for Mr Justice Murphy. In Mr Briese's mind the conspiracy theory has much to do with "The Age" tapes or transcripts of them. These were not referred to by Mr Briese in his evidence in chief. They, too, were first introduced into the hearing by counsel for Mr Justice Murphy as a major part of a massive attack on his credit, an attack which in my view was unsuccessful. Much was made of the fact that the previous Select Committee had been unable to authenticate "The Age" tapes. The fact that they have not been authenticated does not mean that they are fakes. I think Mr Briese acted responsibly in being concerned and suspicious by reason of much of the material in the transcripts of the tapes. However, until some person or body is given the requisite powers, the appropriate resources and sufficient time to investigate the tapes, it will remain in my view impossible either to affirm or deny Mr Briese's theory. I advise this Select Committee not to attempt to do so.

Before parting with the matter I would emphasise to all of you that this important inquiry is basically a question of finding facts, drawing inferences from them and deciding whether or not there is a reasonable doubt. In this field the tribunal which

stands above all others is the jury. That being so, I invite the members of the Committee not to be overawed by what I have said about the facts. If what I have said appeals to you as helpful then by all means use it in making up your own minds. If not, put it to one side and make your own assessment of the facts in accordance with your own individual consciences. I think there are some very difficult issues of fact in this inquiry. I have not found them easy; nor do I think that you will. I have had the advantage of reading the advice of my learned colleague Mr Wickham. Doing the best we can, we have not been able to agree about the question of intent. That in itself, illustrates some of the difficulties involved.

[redacted]

Commissioner assisting the Committee

04 October 1984

AUSTRALIAN SENATE

THE SENATE

SENATE SELECT COMMITTEE ON THE CONDUCT OF A JUDGE

REPORT TO THE SENATE

AUGUST 1984

SENATE SELECT COMMITTEE ON THE CONDUCT OF A JUDGE

MEMBERS OF THE COMMITTEE

SENATOR M.C. TATE (CHAIRMAN)
SENATOR N. BOLKUS
SENATOR THE HON. D.L. CHIPP
SENATOR R.A. CROWLEY
SENATOR THE HON. P.D. DURACK, Q.C.
SENATOR A.W.R. LEWIS

SENATE SELECT COMMITTEE ON THE CONDUCT OF A JUDGE

REPORT TO THE SENATE

1. This Committee was appointed by the Senate on 28 March 1984 to inquire into and report upon:

(a) whether any or all of the tapes and transcripts delivered by The Age newspaper to the Attorney-General on 1 February 1984 and relating to the conduct of a federal judge are authentic and genuine; and

(b) if the Committee is satisfied that the tapes and transcripts referred to in sub-paragraph (a) are authentic and genuine in whole or part, whether the conduct of the judge as revealed in the tapes and transcripts referred to in sub-paragraph (a) constituted misbehaviour or incapacity which could amount to sufficient grounds for an address to the Governor-General in Council from both Houses of the Parliament praying for his removal from office pursuant to section 72(ii) of the Constitution.

The full resolution of the Senate appointing the Committee is included in this report as Appendix 1, together with the text of section 72 of the Constitution.

2. The resolution required the Committee to report by 31 May 1984. The Committee sought a number of extensions of time to report, which were granted by the Senate. The Committee was mindful of the desire of the Senate that it should conclude its inquiry and report with as much expedition as possible, to avoid leaving a judge under question and inquiry for a lengthy period of time. The

Committee was also mindful, however, of the heavy responsibility imposed upon it in conducting the first inquiry in the 84 years of Federation to determine a question of whether action under section 72 of the Constitution was warranted, and believed that such a responsibility could not properly be discharged in haste. The Committee believes that it would not have been possible responsibly to conclude its inquiry and report to the Senate before now.

3. The Committee met on 22 occasions, and heard evidence at 7 of those meetings. This will indicate to the Senate that the Committee has spent a great deal of time in deliberation.

4. It was the Committee's view that the task entrusted to it was essentially one of gathering and considering evidence, interviewing persons, and investigating conduct which might amount to proved misbehaviour. In this it was acting in a way analogous to the workings of any other investigative agency, though with greater coercive powers. It was gathering, sifting and considering evidence. Although it was obliged to act fairly, in this investigative phase it was not bound by the rules for the conduct of judicial proceedings.

5. The Committee took the view that should it apply its understanding of the law as to proved misbehaviour to the facts as it had determined them in a way which put a judge in jeopardy of a report adverse to him, then it ought to move to a judicial phase of its inquiry, that is, to define the allegations against the judge and embark upon a hearing of relevant evidence subject to the rules for judicial hearings, encompassing the principles of natural justice.

6. This may not be strictly necessary, because the report of the Committee in no way binds the Senate, which must devise its own procedure to accord in the fullest way those rights derived from the principles of natural justice.

CONDUCT OF THE INQUIRY

7. Thus, the Committee undertook its investigative role in a manner which allowed the fullest consideration of evidence obtained by reception of materials and reports and the examination of witnesses.

8. Having received the evidence in this way, the Committee was able to narrow the matters on which it sought a response from the judge. Relevant evidence in relation to those matters was forwarded to him and a written response was received from him and considered by the Committee.

9. This process, in turn, led to a further narrowing of the matters still of concern to the Committee and a second examination of a particular witness followed.

10. The judge was then provided with the complete evidence of this witness and invited, through his counsel, to make submissions to the Committee concerning that evidence, section 72 of the Constitution and the Committee's method of proceeding. Such submissions were made by counsel for the judge, who declined to appear before the Committee, which then considered all of the material available to it.

The Rights of Individuals

11. The resolution appointing the Committee, in paragraph 8(A), enjoined the Committee, in general terms, to take care to protect the privacy, rights and reputations of individuals, to give witnesses adequate notice and the opportunity to make submissions in writing, to allow witnesses to be assisted by counsel, to give proper consideration to the desirability of hearing evidence in private session and to protect from undesirable disclosure the operational methods and results of investigations of law enforcement agencies.

12. The Committee constantly kept before it these injunctions by the Senate. In order to ensure that it conformed with these requirements, and to provide procedures whereby that was to be done, the Committee adopted a set of guidelines which set out in more detail its methods of protecting the rights of individuals. These guidelines are contained in Appendix 2. The guidelines are largely based upon practices adopted in the past by Senate committees. They were intended to be guidelines only, and not strict rules, but the Committee adhered to them throughout its inquiry, except upon one occasion for the purpose of protecting a witness.

13. The Committee also adopted a resolution relating to the disclosure of the identities of persons referred to in the materials specified in the Senate's resolution. This resolution reads:

> That, without derogating from the rights of the Senate;
>
> given the terms of the Committee's resolution of appointment, which require it to report upon whether the conduct of a judge as revealed in the tapes and transcripts provides grounds for an address under section 72 of the Constitution, and which enjoins the Committee to take care to protect the privacy and reputations of individuals (an injunction elaborated in the guidelines for proceedings adopted by the Committee);
>
> the Committee, in conformity with the resolution of appointment, will report to the Senate in such a way as not to identify any person mentioned in the materials given to the Attorney-General by The Age newspaper and supplied to the Committee.

14. The major consideration persuading the Committee

to adopt this resolution was the possibility of the grave injustice which could be done if the Committee in its report named individuals and the Senate subsequently determined that the report disclosed no basis for action under section 72 of the Constitution. It was the intention of the Committee in adopting the resolution not even to name the judge referred to in the materials supplied to the Committee. The resolution was expressed as not derogating from the rights of the Senate, so that, if the Senate came to the conclusion that the Committee's report did disclose a basis for action under section 72, the Senate could require the Committee to make a full report identifying the judge and any other individuals.

15. The Age materials have been the subject of extensive reporting in the media and the identity of the judge has been disclosed in privileged parliamentary proceedings. In addition unauthorized reporting of this Committee's proceedings have been published in a way which has claimed to expose the identities of certain witnesses before the Committee. In these circumstances it appears to the Committee that no injustice would be done in identifying the judge and certain of the principal witnesses to the limited extent necessary to enable the Senate to make a judgement on this report. As a consequence the Committee has amended its resolution.

16. The resolution of the Senate and the guidelines adopted by the Committee contemplated that the Committee might hold some of its hearings in public session. In fact the Committee has met at all times in private session. The Committee considers this course of action to have been fully in accordance with the intention of the Senate and the intention of the Committee in adopting its guidelines, because all of the evidence taken by the Committee had at least the potential unjustly to cause damage to individuals if the hearings were contemporaneously reported to the public.

17. The first witness heard by the Committee was the Director of Public Prosecutions, Mr Ian Temby, Q.C., who had possession of the "original" materials given to The Age newspaper in consequence of his appointment as special prosecutor in relation to the materials. Mr Temby explicitly requested that he be heard in public, on the grounds that he is a public officer and he considered that the matters before the Committee should be examined in public. Upon receiving a statement by Mr Temby, however, the Committee was forced to the conclusion that there was material in that statement which would cause unjustifiable damage to individuals if it were published. This brought home to the Committee at an early stage the need for the utmost caution in publishing documents or evidence laid before it.

18. The Committee intends to disclose the evidence laid before it only to the extent which it considers necessary to enable the Senate to make an appropriate judgement upon the report. The Committee recommends that there should be no further publication of its documents and evidence.

Illegal Origin of the Materials

19. The Committee is aware that the materials referred to it may have been obtained illegally, though this cannot be conclusively stated. As is indicated in this report, satisfactory evidence of the source of the materials is lacking. Even if it could be established that the tape recordings and documents are authentic records of conversations, (and, as is also indicated in this report, that is not established), in the absence of proof of the way in which they were obtained it cannot be concluded that they came about as the result of the interception, rather than recording, of telephone calls. Only proof of interception establishes an offence under the Telecommunications (Interception) Act 1979.

20. The Committee, having been entrusted with the materials by the Senate, has proceeded to a full consideration of them in accordance with the Senate's resolution. The danger of considering evidence illegally obtained is the encouragement which such consideration may give to breaches of the law and of individuals' privacy. The Committee in no way, however, intends that in considering the materials it should be seen to encourage the deliberate and persistent breach of the Act and of the privacy of individuals such as may have occurred in this case.

Advertisement for Submissions

21. The Committee placed an advertisement in the press, the terms of which are set out in Appendix 3 to invite any person who had any evidence relating to either of the paragraphs to come forward and give that evidence.

Appointment of Counsel

22. With the approval of Mr President, the Committee appointed as counsel to advise it Mr C.W. Pincus, Q.C., a distinguished senior member of the Brisbane bar and President of the Law Council of Australia. During a period of absence of Mr Pincus, Mr G.L. Davies, Q.C., also of Brisbane, acted as counsel to the Committee.

THE MATERIALS

23. For the Committee to pursue its inquiry it was necessary to obtain the materials referred to in the resolution of the Senate, that is, the tape recordings and transcripts given to The Age newspaper. The Committee asked the Attorney-General to supply the materials to it. The Attorney-General indicated that he would provide only the materials relevant to the Committee's inquiry, that is, those parts of the materials relating to a federal judge.

The Committee took the view that it should be able to judge for itself the relevance of the materials. After some correspondence, the Attorney-General provided to the Committee extracts from the materials he considered referred to a federal judge, and allowed the Chairman and secretary of the Committee to inspect or listen to the remainder of the materials at the Attorney-General's Department. As a result of that inspection and a comparison of the materials with those published in The Age, the Committee requested the Attorney-General to provide a copy of one purported transcript of a conversation which was not among the materials initially provided by him and which was not identified on its face as involving the judge, and that request was readily granted. At the Committee's request the Attorney-General also supplied the Committee with the aides memoires of his conversations with the judge on 15 and 24 February 1984.

24. When the Director of Public Prosecutions, Mr Ian Temby, Q.C., appeared before the Committee, he indicated that he was in possession of the "originals" of the materials given to The Age newspaper, and that he would make them available to the Committee if he were required to do so. The Committee ordered Mr Temby to produce the materials, and thereby gained possession of all of the documents and tape recordings which had been given to The Age and from which the extracts supplied by the Attorney-General had been taken. On the "originals" of the tape recordings there was one conversation which was not on the tapes given to the Attorney-General, and which was almost unrecognizable as a conversation because of the poor quality of the recording. All members of the Committee were then enabled to peruse all the written materials and listen to all the recordings.

25. As a result of this process the Committee had before it all parts of the materials relating to a federal judge.

26. The materials thus obtained by the Committee consist of six bundles of documents, amounting to some 524 pages, which on their face are purported to be transcripts of conversations and summaries of conversations, and three cassette tape recordings purportedly of conversations. It is important to emphasize that there are among the materials no tape recordings of the conversations purportedly recorded or summarised in the documents, that is, none of the documents are supported by tape recordings. Only a small portion of the materials relate to a federal judge. All of the alleged conversations and telephone calls of the judge involved Mr Morgan John Ryan, a Sydney solicitor, or Mr Ryan's wife.

The Documents

27. Among the documents are 4 purported transcripts of conversations between a person identified in the documents as Mr Justice Murphy of the High Court and other persons, 6 references to purported telephone calls between the judge and other persons, 14 purported summaries of conversations involving the judge, 2 purported transcripts of conversations in which the judge was mentioned, and 2 purported summaries of conversations in which the judge was mentioned. The purported transcripts and summaries bear dates within the years from 1976 to 1981. In addition, there is what appears to be a file note on the connection between the judge and Mr Ryan.

The Tape Recordings

28. Recorded on the tape recordings is one conversation purportedly between the judge and another person. None of the other conversations purportedly recorded on the tape recordings involved the judge as a party. There is one conversation in which the judge was mentioned. The Committee had available to it transcripts made by the Australian Federal Police of all the conversations purportedly recorded on the tape recordings. There is no internal evidence to

indicate the dates of the relevant recordings. The Committee, through the Parliamentary Reporter, made its own transcript of the tape recording porportedly of the one conversation involving the judge.

The Authenticity of the Materials

29. The Senate required the Committee to inquire into whether any or all of the materials are authentic and genuine and, if the Committee were satisfied as to the authenticity and genuineness in whole or in part of the materials, whether the conduct of a judge as revealed by the materials constituted misbehaviour or incapacity under section 72 of the Constitution. It was clearly the intention of the Senate that the Committee should inquire into the authenticity of the materials and proceed to the examination of the content of the materials only if satisfied as to their authenticity. As was indicated in debate on the resolution establishing the Committee, the making of a finding on the conduct of the judge as revealed in the materials would not be possible unless the Committee was satisfied as to their authenticity in whole or in part.

30. In practical terms, however, the questions of the authenticity of the materials and the significance of their contents could not easily be separated. One of the methods available to the Committee of determining authenticity was taking testimony from alleged participants in the conversations, and the taking of such testimony necessarily involved consideration of the interpretation to be placed on the alleged conversations and the significance of their content.

31. Conscious of the need to determine its report as speedily as possible, the Committee embarked upon a consideration of the contents of the materials as if they were authentic so that it could gain an understanding of the meaning of the materials, much of which was obscure, and so

that it would be well placed to deal with relevant questions should the materials be judged authentic in whole or in part. It is also clear from the terms of reference of the Senate's resolution that an examination of "conduct as revealed" would permit a wider examination of evidence than a consideration simply limited to the purported conversations. That is, the question was not merely whether the conversations constituted misbehaviour but also whether they were part of, or pointed to, activity or conduct which could constitute misbehaviour.

32. The Committee, therefore, in effect, pursued questions relating to the authenticity of the materials and questions relating to their content simultaneously.

33. This examination of the "conduct as revealed" in the materials and evidence obtained by the Committee was undertaken with a "no prejudice" acceptance of the interpretation placed on the meaning of "proved misbehaviour" by the Committee's legal adviser, Mr C.W. Pincus, Q.C. (see Appendix 4). That is, while every member of the Committee did not agree that that interpretation was correct, it was used as the guiding criterion for consideration of the content of the materials and evidence.

34. The Senate's resolution refers to the authenticity and genuineness of the materials. It is not clear whether these terms were regarded by the Senate as synomyns or whether the Senate intended different meanings to be attached to the two terms. Whilst the Committee took genuineness to refer to the question of whether the materials are what they purport to be, that is, tape recordings, transcripts and summaries of actual conversations, and authenticity to refer to the question of whether the materials faithfully record the matters which they purport to record, for the purposes of its inquiry and for simplicity of reference the Committee has used the word "authenticity" to refer to both of those questions.

35. In seeking to determine the authenticity of the materials the Committee had available to it the following methods:

(a) seeking to establish the source of the materials;

(b) examining the materials themselves to see what light the character of the materials might throw upon their authenticity;

(c) seeking the results of investigations of other agencies, particularly the Australian Federal Police and the New South Wales Police, in relation to the materials;

(d) questioning the alleged participants in the conversations purportedly recorded and summmarised in the materials, to establish whether such conversations took place; and

(e) questioning persons referred to in the purported records of conversations, to see if they could throw any light on the accuracy of the purported records.

36. The Committee pursued each of these methods, and this report will now describe how this was done and the conclusions reached by the Committee in respect of the authenticity of the materials as a result of these methods.

(a) The Source of the Materials

37. It is obvious that both tape recordings of conversations and transcripts of tape recordings may easily be falsified, and that they cannot necessarily be accepted at face value. The courts may admit tape recordings and transcripts of tape recordings as evidence provided their accuracy is proved and the voices of those participating are

properly identified. In most cases, the accuracy of such materials is proved by testimony, usually of the persons who made the tape recordings or composed the transcripts, establishing the process by which the materials came into existence. It is for the party seeking to adduce the materials as evidence to provide the necessary proof. In respect of the materials before the Committee, such testimony was not available.

38. The Committee was supplied with Mr Temby's reports to the Attorney-General, in which, in the absence of proof, Mr Temby declined to express a view as to whether the materials or any part of them were prepared by elements within the New South Wales Police Force.

39. The Committee took evidence from the person who supplied the materials to The Age newspaper. That evidence, which was not available to Mr Temby, was to the effect that the materials were composed by officers of the New South Wales Police Force as part of operations of surveillance of persons believed to be associated with criminal activities. It appears that the police selected certain persons as "targets" for this surveillance, and that the records of conversations were intended for the purpose of gathering intelligence which would facilitate the further investigations of criminal activities. It was said that the tape recordings were obtained by means of devices, operated by police officers, which intercepted and recorded telephone conversations, and that the purported transcripts and summaries were composed by police officers as they listened to such tape recordings. It was claimed that Mr Ryan was a person of interest to the police and that he was subjected to interception and recording of his telephone conversations, and that is why those purported conversations appear in the materials.

40. In order to reach firm conclusions as to the source of the materials, however, the Committee would have

to obtain admissions by the police officers who actually took part in the interception and recording of telephone conversations and who composed the transcripts and summaries. The evidence available to the Committee sufficiently indicated that such admissions have not been forthcoming and all efforts by the Committee to pursue such admissions produced no useful results.

(b) Examination of the Materials

41. The Committee submitted the materials before it to such examination as was likely to cast some light upon their authenticity.

The Tapes

42. The tape recordings were provided to a recognized expert in sound recording technology, Sergeant P. Jones, the head of the audio-visual section of the Victorian Police, who produced a report upon them for the Committee. The Committee also had access to other technical reports compiled by Louis A. Challis and Associates Pty. Ltd. for the Government and supplied to the Committee by the Attorney-General.

43. In respect of the authenticity of the tape recordings, these technical reports express grave misgivings. The technical evidence suggests that the recordings are not uninterrupted and unedited recordings of whole conversations. The report provided to the Committee states:

> "With respect to the actual recording of the telephone conversation [the one conversation involving the judge], it was found that the recording is composed of at least three and probably four different levels. At the points where these changes take place, (Pages 4; 7 and 8 of the transcript) there is a considerable signal loss in each case. Such is the level of noise at these points to suggest the possibility of the use of a Pause control in a recording process. There is no evidence of switching transients at these points such as might be found if a recorder has been disengaged by means of the STOP button."

44. In particular, the one tape recording purportedly of a conversation involving the judge, which is of much less clarity than the other tape recordings among the materials, may well have been subjected to editing. The report presented to the Government states:

> "There is a possibility that the recording of the "Murphy" conversation has been interfered with."

The report provided to the Committee concludes:

> "The evidence presented by this portion of Tape 3 is such as to negate the possibility of it being original material. Further, in my opinion, it would be dangerous to suppose that the recording, accepting that it is a copy, is the copy of an uninterrupted recording."

45. Moreover, it is clear that the tape recordings are not original recordings but are copies, and probably not first generation copies. In respect of the one conversation involving the judge, the report presented to the Committee concludes that it is "most likely at least a third generation tape".

46. No conclusion can be drawn as to whether the copying and editing which appears to have taken place was done for the purposes of falsification of conversations.

The Documents [for which there are no tape recordings]

47. In relation to the purported transcripts and summaries of conversations, they are photocopies of documents which have been very roughly typed, the visual clarity of the text varying from fair to illegible. Some of the transcripts appear to contain only parts of longer conversations, and the conversations purportedly recorded and summarised in many cases have the appearance of being disjointed and incomplete. The text is replete with alterations, spelling errors and apparent guesses by the

transcribers as to names and meanings of words and phrases. The meaning of many of the conversations purportedly recorded is extremely obscure. The character of the purported transcripts is consistent with the account which the Committee has been given of their probable compilation, namely, that they were typed by police officers as those officers listened to tape recordings of telephone conversations. No stronger conclusion can be drawn about their authenticity by an examination of them.

48. It was interesting to compare the transcripts produced by the Australian Federal Police of the tape recordings available to the Committee with the tape recordings themselves and with an accurate transcript of one tape recording produced by Hansard for the Committee. The Australian Federal Police transcripts contain many obvious and significant errors of transcription. In some cases these errors impinge upon the interpretation to be placed upon the conversations. For example, the transcript of the one alleged conversation involving the judge left part of that conversation open to an interpretation of sinister motives, an interpretation which was dissipated by the addition of a word which was clearly audible on the tape recording but which the Australian Federal Police transcriber omitted from the transcription. This experience of such inaccuracies finding their way into a transcript prepared in good faith by the Australian Federal Police alerted the Committee to the grave danger of accepting as accurate transcripts for which no tapes exist.

(c) Reports of Investigations by Other Agencies

49. The Committee had available to it a report on investigations of the materials by New South Wales police officers, which was provided on the Committee's request by the Premier of New South Wales. The Committee also had available to it the interim and final reports of the Special Prosecutor and records of interviews and reports resulting

from the investigations under his direction, which were provided by that officer and by the Attorney-General. The final report of Mr Temby concluded that it is not possible to prove that the tapes or transcripts or any part of them are records of actual telephone conversations, and that the materials have no present probative value.

50. These reports of investigations by other agencies do not allow the Committee to affirm the authenticity of the materials before it.

(d) Questioning of Alleged Participants in Conversations

51. The Committee has taken evidence from the principal participants in conversations involving or relating to the judge. The outcome of this process is that there have been no admissions on the part of alleged participants of the accuracy of either the tape recordings or the purported transcripts and summaries.

52. In relation to the one purported tape recording of a conversation involving him, the judge has stated:

> "My belief is that it represents the putting together of selected pieces of conversations to make an amalgam. I believe that what is on the tape is a tampered-with telephone conversation, or more likely an amalgam of tampered-with telephone conversations between myself and Mr Ryan."
>
> "I am firmly of the view that the tape and the purported transcripts [the Committee's transcript and the Australian Federal Police transcript] are not authentic and genuine records of any actual conversation or conversations."
>
> "During 1979 and perhaps into 1980 I did discuss on the telephone a number of times with Mr Ryan, who was acting as Dr Cairns' solicitor, the prospect of the institution of an action for damages against those persons who were concerned in the prosecution conducted during 1975 to 1979 against the Hon. E.G. Whitlam, Q.C., the Hon.

Dr J.F. Cairns, the late Hon. R.F.X. Connor and myself."

53. The judge has denied the authenticity of the transcripts and summaries in the following terms:

"My belief is that these are not authentic and genuine records of any conversation in which I have participated. The purported transcripts are pieces of paper produced by some anonymous person or persons. The brevity and incoherence of some of the purported transcripts proclaim that they have been manufactured."

54. Mr Ryan acknowledged discussing with the judge some of the matters referred to in the materials, but did not admit the accuracy of any particular purported conversation contained in either the tapes or transcripts.

(e) Questioning of persons referred to in purported records of conversations

55. In making a decision on which persons named in the materials should be questioned, the Committee was influenced by its estimate of the likelihood of such persons being able or willing to give useful evidence and the nature of particular conversations purportedly recorded in the transcripts which referred to such persons. The Committee took evidence from one person, the Chairman of the Bench of Stipendiary Magistrates of New South Wales, Mr C.W. Briese, who was mentioned in the purported transcripts of conversations, and who, it was believed, might be able to throw some light on the meaning of the transcripts. The evidence taken did not cast a great deal of light on the authenticity of the materials, except to suggest that part of one conversation purportedly recorded in a transcript may have taken place.

Conclusions Concerning the Authenticity of the Materials

56. The Committee is unable to conclude that any or all of the tape recordings and transcripts delivered by The Age newspaper to the Attorney-General and relating to the conduct of a federal judge are authentic or genuine in whole or in part except to the extent that limited acknowledgements have been made to the Committee as mentioned in this report.

57. The Committee now sets out its conclusions relating to the content of the materials.

The Tape Recordings

58. On the tape recordings available to the Committee there is only one alleged conversation involving the judge as a party and there is one reference to the judge in alleged conversations between other parties. The conversation purportedly recorded on the tape recordings involving the judge is entirely concerned with legal proceedings which were proposed to be commenced. It is the conclusion of the Committee that even if the tape recording is a complete and unaltered record of the conversation as it actually took place, such conversation contains nothing which could amount to, or provide evidence of, any misbehaviour on the part of the judge, whatever interpretation of misbehaviour under section 72 of the Constitution is accepted. The one reference to the judge in another conversation purportedly recorded by the tape recordings is a passing reference and no conclusions whatsoever may be drawn from it.

Transcripts and Summaries

59. In respect of conversations between the judge and other parties purportedly recorded in the transcripts and summaries, the Committee, having examined the documents and

pursued all reasonable inquiries into them and matters referred to in them, has concluded that no facts have been established in respect of conduct revealed by them which constitute misbehaviour under section 72 of the Constitution, whatever interpretation of misbehaviour is accepted.

OTHER MATTERS

60. This report will now deal with the two further matters which arose in the course of the Committee's inquiry.

Alleged Conversation Recalled by a Police Officer

61. It has already been mentioned that the Committee had available to it records of interviews conducted by Australian Federal Police officers, under the direction of the Director of Public Prosecutions, concerning the tape recordings and documents given to The Age. It emerges from those records of interview that Australian Federal Police officers had access to tape recordings of conversations which were probably obtained from New South Wales police and which were intended to be used for criminal intelligence purposes. In one of the interviews a member of the Australian Federal Police Force stated that he recalled listening in 1981 to a tape recording of a conversation between a person whose voice he believed to be that of the judge and another person whose voice he believed to be that of Mr Ryan. Given the alleged serious content of the conversation, and in the light of subsequent events the Committee felt obliged to investigate the allegation that such a conversation had occurred and had been recorded.

62. The officer concerned firmly believes that he heard the tape recording and that the voice on the recording was that of Mr Justice Murphy. The Committee has no doubt that the officer is sincere in this belief.

63. The Committee sought evidence of the existence of the tape recording and corroboration of the officer's recollection. In the course of its investigations the Committee heard evidence from the police officer concerned and from other Australian Federal Police officers, and pursued other inquiries concerning the existence of the tape recording which the police officer recalled hearing.

64. Efforts to bring before the Committee a former police officer who may have been able to assist it failed because he was outside the jurisdiction.

65. No other evidence of the existence of the tape recording has come to light, and the tape recording has not been produced. The primary evidence of the alleged conversation is therefore lacking.

66. No other person corroborates the evidence of the alleged conversation given by the police officer. Another officer who listened to tape recordings with him has testified that he has no recollection of hearing a recording of the conversation concerned. The officer's identification of the voice on the tape recording as that of Mr Justice Murphy was not reported to his superior officers. Those superior officers and other police officers do not corroborate the evidence concerning the alleged conversation. The recollection of the officer therefore stands alone.

67. There are no admissions by the alleged participants in the conversation that it took place. Mr Justice Murphy denies having such a conversation, as does Mr Ryan.

68. Consequently the Committee is unable to conclude that the alleged conversation took place and therefore finds no facts arising from the evidence of the Australian Federal Police officer such as could amount to misbehaviour on the part of the judge.

Alleged Conversations between the Judge and the Chief Stipendiary Magistrate of New South Wales

69. Among the materials referred to the Committee is a purported transcript, dated 31 March 1979, of a conversation between persons who are identified on the face of the transcript as Mr Justice Murphy and Mr Morgan Ryan. The purported transcript concerns a future dining engagement at which "this bloke that is replacing Murray" and the judge would be present and at which, it is suggested, the judge could make some assessment of Murray's successor.

70. The Committee took "Murray" to mean Mr Murray Farquhar, the former Chairman of the Bench of Stipendiary Magistrates of New South Wales, who retired on 25 May 1979, and "this bloke that is replacing Murray" to be Mr C.R. Briese, Mr Farquhar's successor as Chairman of the Bench of Stipendiary Magistrates, who was Chairman-elect from 16 March 1979. Mr Ryan, in his evidence, acknowledged that he had discussed with the judge a dinner at which Mr Briese would be present. The Committee invited Mr Briese to appear before it to ascertain what light if any he could throw upon the alleged conversation.

The Reception by the Committee of the Evidence of Mr Briese

71. Mr Briese tendered a written statement to the Committee and gave sworn verbal evidence in elucidation of the statement. It detailed a series of conversations between the judge and Mr Briese in the period between May 1979 and January 1982 in personal meetings or over the telephone.

72. After consideration of that evidence the judge was invited to appear before the Committee and to respond to relevant extracts from Mr Briese's statement which had been forwarded to him.

73. The judge declined to appear on the advice of

counsel that any attempt to interrogate the judge would be an intrusion upon the independence of the judiciary, a misconception of section 72 of the Constitution, and a denial of natural justice, particularly in so far as by cross-examination. The Committee considered this premature and inappropriate whilst it was in its investigative stage, and in any case was not empowered to permit it (Standing Order 304 - Appendix 1). Instead he replied by way of a written statement signed by him. This was received in evidence by the Committee and was considered. In parliamentary terms such a statement is regarded as evidence, with the same protection as oral evidence and subject to the same sanction in case of any falsehood. Although the Committee would have preferred for the judge to personally appear at that stage, it deliberated on his written response, attaching the weight properly due to it.

74. The judge's statement agreed with the sequence of meetings and telephone calls between the judge and Mr Briese over the period. The judge confirmed the general content of conversations which took place. He denied that certain particular statements attributed to him by Mr Briese were in fact made, and, by way of supplementing the recall by Mr Briese of the conversations, placed certain words in a wider context of discussion.

75. After consideration of the judge's response, Mr Briese was again called before the Committee. Under oath, he dealt with such questions as the Committee put to him. Mr Briese had not been provided with a copy of the judge's written response to his earlier evidence.

76. Having heard Mr Briese on this second occasion the Committee resolved to again write to Mr Justice Murphy inviting him to appear before the Committee to discuss the evidence of Mr Briese. Solicitors for the judge indicated that he would not consider attending in person without a preceding opportunity to engage in [some form of] cross-

examination of Mr Briese. The Committee was once again unable to accede to such a procedure. The Committee agreed to accept verbal submissions from the judge's counsel on relevant questions of law and on the evidence. All of the evidence of Mr Briese was made available to the judge's counsel.

77. The Committee would have preferred the judge to appear before it, but was not prepared to resort to its coercive powers to compel his attendance and the giving of answers, because the rules of natural justice allow only that the opportunity be given to the judge to appear.

78. At the end of this process of gathering and considering evidence, therefore, the Committee had before it one written submission and two transcripts of evidence given under oath by Mr Briese, a written response from the judge and submissions from his counsel.

79. The Committee did not need to conclude that misbehaviour unrelated to the duties of office must always be constituted by an offence against the general law. However, the Committee agreed that since the allegation of Mr Briese, if sustained by the evidence, was that the judge had engaged in conduct which constituted the offence of attempting to pervert the course of justice (s. 43 of the Commonwealth Crimes Act 1914), its proper inquiry was whether the evidence established the commission of such an offence.

80. At every step in these proceedings of the Committee it considered itself to be conducting an inquiry, i.e., to be in an investigative phase of its proceedings.

81. As is indicated in paragraph 5, if the Committee considered the judge to be in jeopardy of a report adverse to him it ought to define the allegations against the judge and embark upon a hearing of the relevant evidence subject

to the rules for judicial hearings, and encompassing the principles of natural justice.

82. To reach that point, the Committee considered it would need to conclude, in a preliminary way, after an assessment of the evidence considered by it, that the judge had engaged in conduct which could constitute the offence of attempting to pervert the course of justice.

83. That is, the judicial phase of its proceedings could not be triggered if the Committee concluded at this stage that the evidence did not disclose the commission of an offence.

84. The Committee was of the view that whilst at the end of its investigative phase it could conclude that the evidence did not disclose the commission of an offence, it should not in its investigative stage in a definitive manner conclude that an offence had been committed.

Consideration of the Evidence

85. Without derogating from the rights of the Senate to determine for itself the appropriate standard of proof required to establish the commission of the offence, the Committee adopted for the purpose of this stage of its inquiry the civil standard of proof, i.e., proof upon the balance of probabilities and having due regard to the gravity of the offence. (Rejfek v McElroy, 112 CLR 517, Re Evatt 67 SR (NSW) 236). Not all members agreed with this lesser standard of proof, which falls short of the criminal standard of proof requiring that the offence be proved beyond reasonable doubt.

86. The Committee then reviewed the evidence to see whether it was sufficient to establish on the balance of probabilities that Mr Justice Murphy had engaged in conduct which constituted an offence.

87. The Committee was of the view that Mr Briese gave his evidence sincerely and honestly, and to the best of his recollection as to actual events and conversations and the interpretation he placed on them at the time.

88. The first task facing the Committee was to determine whether Mr Briese's recollection of events was entirely accurate. At several crucial points, his recounting of elements of admitted conversations was at variance with the judge's recollection. An outline of some of the significant discrepancies in the evidence is to be found in Appendix 5. In particular, there is no agreement as to the use of key words in the final telephone conversation.

89. The second task confronting the Committee was to distinguish alleged recalled facts from the interpretation placed upon those facts by Mr Briese. It also had to carefully distinguish Mr Briese's recollected belief that he was being subjected to some sort of pressure from the question of whether the judge was intentionally applying such perceived pressure with a view to affecting the outcome of certain proceedings before the Magistrates' Courts.

90. There was no specific occasion or instance recalled by Mr Briese in which the judge expressly requested or indicated that any step should be taken by Mr Briese in relation to the case. Any such intention would have to be inferred from the words used in certain conversations.

91. Many words of crucial significance are themselves disputed and, in particular, as is evident from paragraphs 16 to 19 of Appendix 5, the conversation takes on a quite different colour and significance depending on which words were used.

92. The Committee, on the balance of probabilities, is unable to conclude that the words attributed to the judge were in fact used, or that Mr Briese's recollection is total

in its recounting of the full conversation.

93. In any case, in the opinion of the Committee the words cannot, on the balance of probabilities bear the weight which is alleged by Mr Briese to attach to them.

94. The admitted conversation involved the discussion of the independence of the magistracy, which was a common thread in many of the conversations held between the two men. There was also a repetition of advice which Mr Briese proffered in a manner he considered entirely proper, concerning steps which could be taken by Morgan Ryan in relation to his committal proceedings. There is nothing sinister or improper in such conversations.

95. The full weight of Mr Briese's allegation against the judge therefore depends on the meaning to be attributed to the [disputed] words "and now what about my little mate".

96. The Committee, looking at this query posed by the judge in the context of the entirely proper surrounding elements of the conversation cannot, even on the balance of probabilities, draw an inference from those words adverse to the judge. The Committee is sustained in its view by the acknowledgement made by Mr Briese that there is an innocent interpretation which can be attached to the words, even though he drew an inference of pressure consistent with his interpretation of a pattern of conspiracy which in the Committee's view was not made out.

97. Thus at one stage in the examination of Mr Briese by the Committee Senator Chipp asked:

> "You had no doubt then that he was saying: 'Okay Clarrie, I have done something for you, one for you, what about one for me, what about my little mate'?
>
> "Mr Briese - I do not think you could necessarily interpret it that way but he was....."

98. The Committee is unable to satisfy itself that certain crucial words were in fact uttered by the judge, or alternatively is unable to draw an inference that the judge intended to influence the outcome of proceedings against Morgan Ryan by the uttering of such words.

99. The Committee did not conclude that the evidence of Mr Briese was of sufficient strength to establish a prima facie case of misbehaviour by the judge. The Committee therefore does not find proved misbehaviour on what is before it.

100. The Committee, having concluded in that manner and not adversely to the judge at the end of this investigative phase of its proceedings, decided, in accordance with its determination outlined in paragraph 5 above, not to proceed to a judicial phase of proceedings.

101. The Committee therefore, having considered the evidence of Mr Briese, reports to the Senate that no conduct of the judge is proved such as would constitute misbehaviour within the meaning of section 72 of the Constitution.

102. The Committee found it unnecessary to come to conclusions on questions of law arising in respect of section 72 of the Constitution. Appendix 4 contains the opinion submitted to the Committee by its legal adviser, Mr C.W. Pincus, Q.C. Appendix 6 contains written submissions made to the Committee by counsel for Mr Justice Murphy, and, for convenience, the opinion of the Commonwealth Solicitor-General which was presented to the Senate. It is hoped that a parliamentary paper on issues of law and procedure arising in respect of section 72 of the Constitution will be provided in the future.

Michael Tate

Chairman

[redacted]

24 August 1984

SENATE SELECT COMMITTEE ON THE CONDUCT OF A JUDGE

DISSENT

Prepared by Senator P.D. Durack, Q.C., & Senator A.W.R. Lewis

1. This report dissents from the Committee majority in regard to its assessment of the evidence presented by Mr Briese.

2. The decision to publish a minority finding was taken after a thorough and objective assessment of the facts and opinions presented and the extent to which they have been subjected to proper analysis.

3. It was not a decision taken lightly, having in mind the importance of the institutions involved and the desirability of maintaining public confidence in our system of justice.

4. We believe that the majority is wrong in not giving greater weight to Mr Briese's evidence and in not being prepared to recommend further action.

5. Our conclusions can be summarised as follows:

:: Mr Briese's allegations have been put under much more rigorous testing than Mr Justice Murphy's denials;

:: there is a prima facie case of misbehaviour against the Judge;

:: Mr Justice Murphy should be granted the opportunity to have Mr Briese cross-examined in his presence and in public;

:: the opportunity for the Judge to give evidence and face questioning should remain open;

:: the Senate should decide how and by whom such a hearing might be conducted.

The reasons that led us to these conclusions are set out below.

6. In addition to this assessment of the relative strength of evidence, we have attached an opinion giving our view of the Constitutional issues, particularly the definition of judicial misbehaviour and the proof required to establish it.

7. It cannot be over emphasised Mr Briese has given the Committee a written statement to which he has deposed on oath. On two occasions he has been extensively questioned on oath by members of the Committee in regard to that statement. He is a person who enjoys a high standing in the community and has no personal or political axe to grind.

8. It is our firm view that Mr Briese was not shaken by such questioning despite its length and, at times, vehemence. All members of the Committee agree that he was an honest and sincere witness.

9. On the other hand, the judge's version of these events is the subject only of a written statement which was made in answer to the relevant portions of Mr Briese's original statement. Subsequently the judge was given the full statement and full transcripts of the record of both Mr Briese's appearances before the Committee. Thereafter submissions were made to the Committee by his senior counsel, Mr Tom Hughes, Q.C., who appeared with Mr David Bennett, Q.C., and Mrs Annabel Bennett.

10. Although technically the judge's statement is evidence before the Committee it does not carry the weight of sworn testimony. In particular it has not been tested by any questioning by members of the Committee. Mr Pincus, Q.C., counsel assisting the Committee, advised the committee that Mr Briese's evidence remained uncontradicted. He said:

> "it really does make quite a difference whether the judge gives evidence or not, because if the judge does not give evidence ... - the evidence remains uncontradicted and it is all the more difficult to reject."
>
> (page 570).

He also said:

> "As to the suggestion you made Mr Chairman, that the case of uncontradicted evidence is altered if a written submission is made, I simply do not agree with it."
>
> (page 572)

11. We reject the view in the majority report that there is insufficient evidence to justify a finding of misbehaviour by Mr Justice Murphy.

12. Mr Pincus has advised the Committee that if the evidence of Mr Briese is accepted it has to be concluded that the judge made an improper approach to Mr Briese in an endeavour to assist Morgan Ryan as the defendant in a conspiracy case and that would constitute misbehaviour under Section 72 of the Constitution.

13. In his second opinion, Mr Pincus wrote:

> "But there is certainly evidence of questionable conduct on his part in respect of the prosecution against Ryan, and the matter which has concerned me is whether the judge's conduct constitutes 'proved misbehaviour' within the meaning of S.72".
>
> "I have come to the conclusion that it does. A practising lawyer is entitled, on behalf of a client, to argue in open court, in an attempt to secure a favourable decision. He is not entitled to do so by a back-door approach. It would be regarded as professional misconduct for a lawyer to attempt to secure, by a private submission, favourable treatment from a judge or magistrate for a client or friend. On what Briese says, it seems inescapable that the judge had such a purpose.
>
> It is not a mere lawyer in private practice against whom Briese's allegations are made. It is a member of the High Court, at the very pinnacle of the Court system of which Briese forms a part."

14. We have already referred to the consistent manner in which Mr Briese has given his sworn evidence, despite most rigorous questioning.

15. It is clear from that evidence that the judge had established a position of influence with Mr Briese who greatly respected his opinions and was grateful for the assistance the judge had given him in his quest for independence for the magistracy. Mr Briese felt that significant pressure was being brought to bear upon him by the judge to take some action which might be of assistance to Morgan Ryan as the defendant

in a case before another magistrate sitting in the court of which he was the Chairman of the Bench. Concern was created in his mind that there may be what he called a wrong happening in his court.

16. After he made enquiries and reported the result to the judge he felt that he was brought under more pressure to take more effective action. At this stage the pressure was even stronger because he felt he was being asked for a "quid pro quo" in respect of the efforts made by the judge to bring his quest for independence to a successful conclusion.

17. At page 449 of the evidence the following exchange occurred:

> "Senator Chipp - Now, I again ask you to go back to that telephone call, if you possibly can help us here. You have got no doubt in your mind that at that time, you believed that he was asking for a quid pro quo?
>
> Mr Briese - That is what it seemed to me.
>
> Senator Chipp - At the time?
>
> Mr Briese - At the time, yes."

18. It is our view that the evidence of Mr Briese is of sufficient strength to establish a prima facie case of misbehaviour by Mr Justice Murphy.

19. We stress that we are not finding that misbehaviour has been proved. It would not accord with the principles of natural justice to make such a finding at this stage.

20. In his submission to the Committee on 14 August, Mr Hughes said forcefully that the judge would not appear before the Committee unless and until it embarked upon a hearing which observed the requirements of natural justice. This, Mr Hughes submitted, involved a hearing of all the evidence against the judge in the presence of the judge and his counsel, submitting witnesses to cross examination and leaving the judge free to determine at that stage whether or not he would give sworn evidence and be subject to questioning by the Committee. Mr Hughes also said that this process should be held in public.

21. We accept that submission as a proper one in view of the circumstances which have arisen. At this stage the judge is entitled to the procedures in the terms submitted by his counsel.

22. The judge should be advised of the situation and given the opportunity of requesting a hearing according to the principles of natural justice as defined by his counsel.

23. This undoubtedly poses great problems for the Senate as such a hearing cannot be accommodated under existing Standing Orders and there may well be good arguments against such a hearing being conducted by Senators for a variety of reasons.

24. There is however a question of fact of enormous significance to be resolved. There are precedents for a parliamentary chamber to empower a committee to appoint a commissioner to conduct such hearings and to determine facts for it.

25. In all the circumstances this may well be a preferable course to the Committee or the Senate itself conducting such a hearing. The problem of how to proceed must be resolved by the Senate itself.

MEANING OF MISBEHAVIOUR

26. The Committee has been obliged to consider the meaning of misbehaviour in Section 72 of the Constitution and also the significance of the phrase "proved misbehaviour".

27. An opinion on this subject was obtained from Mr Pincus Q.C. His opinion differs markedly from that of the Solicitor General which was adopted by the Attorney General in the Senate Debates.

28. We do not accept the narrow view of misbehaviour as confined to misconduct in the office itself or an offence against the law of such a nature that warrants the conclusion that the person is unfit to hold office.

29. In our view misbehaviour in regard to a judge had at the time when the Constitution was passed acquired a meaning that embraced any substantial misconduct which in the opinion of Parliament rendered a judge unfit for office. A good example would be the active participation by a judge in the affairs of a political party and the public espousal of its policies.

30. The ultimate question to be decided is therefore whether the conduct of a judge if established according to the civil standard of proof amounts to substantial misconduct rendering a judge unfit for office.

31. If the conduct of the judge alleged by Mr Briese is established that would satisfy the test.

32. The use by a judge of his position for such an improper and probably illegal purpose would in our opinion clearly amount to misbehaviour.

33. The other Constitutional provision which has been addressed by the Committee concerns the requirement of establishing "proved" misbehaviour. In our opinion this simply means that the Parliament must act on evidence sufficient to establish the misbehaviour according to the civil standard of proof bearing in mind the gravity of the matter concerned.

34. Mr Pincus advised the Committee that the proper standard is the civil standard - i.e. "on the balance of probabilities". He gave as an analogy the standard that is adopted by the courts in the case of an application to strike a legal practitioner off the roll. That does encompass a consideration of the gravity of the matter.

35. Mr Hughes submitted on behalf of the judge that the nature of the proceedings under Section 72 which clearly affects the judge's legal rights under his commission and the existence of the word "proved" require that these matters of fact should be determined by a judicial, not a parliamentary, process. There is absolutely no support for such a view in the Constitutional Convention Debates. Indeed they suggest the exact opposite.

36. There is no precedent for such an approach since the Act of Settlement and there would seem to be real difficulties in ascertaining how such proceedings could be got on foot, although Mr Hughes did submit that the Attorney General of the Commonwealth or of any State could commence proceedings in the High Court.

37. However in our opinion, Mr Hughes' argument overlooks the long established practice of parliaments to establish facts either by summoning people to the bar of the House or establishing committees. They have long been familiar with the evidentiary process by which facts are proved. Parliament and, indeed, the executive frequently have to determine facts before decisions are made. These decisions often affect the rights of individuals.

38. Accordingly, in our opinion, there is no particular magic in either the nature of the question or the existence of the word "proved" which attracts the judicial power. The plain and ordinary meaning of the words in Section 72 assign the problem to parliament and it is clearly a task which parliament can perform.

SENATE SELECT COMMITTEE ON THE CONDUCT OF A JUDGE

DISSENT

BY

SENATOR THE HON. D.L. CHIPP

1. This Dissent has become necessary as a result of the distinctly different view I take from other members of the Committee on a number of issues related to Mr Briese's evidence, the Committee's findings at this stage of its investigations, and the action which should be taken next.

2. The Inquiry arose from the publication by the Melbourne 'Age' of tapes and transcripts which, if genuine in whole or in part, tend to reflect adversely on the conduct of a judge under scrutiny and, partly as a result, on the administration of justice in Australia.

3. During the conduct of the Inquiry and in reaching my dissenting opinion, I have been conscious of the rights of individuals facing the daunting process of public scrutiny. However, balanced against this, there must be the consideration that the administration of the law must be above reproach. If citizens find reason to distrust those who are charged with the duty to protect them against crime and corruption, the social fibre of our society is at risk and the future of this country is in jeopardy.

4. There is also the direct threat posed to law abiding citizens, judicial officers, politicians and honest policemen if the political system should prove itself too sluggish or too party-political to take effective action. The task accepted by the Senate to provide impartial scrutiny and a base for appropriate action thus reflects the growing responsibility and significance of the Senate as an effective

people's house of review.

5. In summary, it is my view that the refusal of the judge to appear before the Committee has handicapped it to such an extent that it is not in a position to leave a finding of no proved misbehaviour on what is before it as its final conclusion. For the same reason I believe the Committee is not in a position to find that a prima facie case for such proved misbehaviour has been established.

6. I do not agree with the proposition that it is a denial of natural justice to summon a witness to a hearing, even if he is the subject of the inquiry, as long as he retains the right to refuse to answer questions which might tend to incriminate him. It has never been disputed that this right may be exercised by anyone appearing before the Committee.

7. Accordingly, I believe that investigations must continue before even a preliminary finding can be made and that the judge must be summoned to appear. These investigations should be carried out in a manner which affords him the full protection of legal procedures and the principles of natural justice.

8. The handicap imposed on the Committee by the refusal of the judge to appear before it concerns mainly the written statement as well as verbal evidence and examination under oath by the Chairman of the Bench of Magistrates in N.S.W., Mr C.R. Briese. The allegations contained in this evidence remained unanswered except through a written unsworn statement by the judge and an appearance before the committee by his counsel.

9. The evidence given by Mr Briese gave expression to his belief that Mr Justice Murphy applied pressure to him in respect of a prosecution against Mr Morgan Ryan. If the Committee was to find on a balance of probabilities, that the

judge had intentionally applied pressure to Mr Briese with the aim to affect the outcome of certain proceedings before the Magistrate's Courts, it would be tantamount to an offence of attempting to pervert the course of justice (S.43, Commonwealth Crimes Act 1914) and would in turn constitute 'proved misbehaviour' under S.72 of the Constitution.

10. I note that the Committee did not feel obliged to decide whether misbehaviour unrelated to the duties of office must always be constituted by an offence against the law.

11. I concur with the Committee's decision that 'proved misbehaviour' under S.72 does not require conviction to constitute such misbehaviour and further that behaviour tantamount to such an offence can be established on the balance of probabilities.

12. I cannot agree that the Committee can allow to stand as its conclusive finding that "no conduct of the judge is proved such as would constitute misbehaviour within the meaning of S.72 of the Constitution". This finding may be reasonable on what is before the Committee now, but it ignores the fact that the judge declined to appear before the Committee.

13. I believe it is not possible for the Committee to come to any finding, even a preliminary finding, on the basis of the evidence before it without hearing the judge and that, since Mr Briese had twice been interrogated on oath in relation to the evidence which he had given, it was appropriate for the judge to attend and to answer questions on his written statement, and in particular the matters on which he differed substantially from the evidence of Mr Briese. If the matter were allowed to end there it would mean that the Committee has allowed its work to be affected by the refusal of a witness to appear before it even though it has power to summon witnesses.

14. I disagreed with the Committee's decision not to compel the attendance of the Judge before it. My motion requesting the Committee to extend yet another invitation to the judge and failing that, to issue a summons was lost. A further motion by me to suspend Standing Order No. 304 to enable the judge to cross examine other witnesses if he agreed to appear himself under Federal Court rules of evidence, was also lost.

15. I took the view that a man of acknowledged substance in the community - the Chairman of the Bench of Stipendary Magistrates of the largest State in the nation - had made allegations of the gravest and most serious nature on oath on two occasions. There were some inconsistencies in the evidence given during the two appearances before the Committee, but these inconsistencies were not fundamental in character. The overwhelming impression which was left with me was that he did not resile in any way from the grave and serious allegations that the judge had approached him with the intention to attempt to pervert the course of justice in one of the courts of New South Wales in a matter which involved a federal criminal offence.

16. In my view the questioning of Mr Briese by all members of the Committee was thorough, painstaking, unrelenting and complete.

17. When I was left with the substantive question - "Did Mr Briese resile from the view that the judge had intended that Mr Briese use his position to interfere with the committal hearing of Mr Morgan Ryan in one of the courts over which Mr Briese had jurisdiction as Chairman of the Bench of Stipendary Magistrates?" - I came to the view that he did not. Of course I could not at that stage find that any offence had been necessarily committed on the basis of this evidence unless I was given the opportunity to hear the judge's version and to test his evidence in the same manner as Mr Briese's evidence was tested - on oath and after

subjecting himself to questioning.

18. The fact that Mr Briese did not come forward with his statement until two years after the alleged offence diminishes the value of his testimony but not to the point where it can be disregarded on a balance of probabilities. It is entirely credible that Mr Briese was not prepared to take action on the basis of one instance even though, as he said in sworn evidence, he believed "at the time" that an attempt to put pressure on him was being made. On the balance of probabilities, I am prepared to accept that recent publicity caused him not so much to change his view of the significance of the events in 1982 related to one particular instance, but rather to come forward now when he found that it could be part of a pattern rather than a single incident involving a highly placed person he respected.

19. Mr Briese was also challenged on whether he was clear is his own mind at the time that the judge was making an attempt to apply pressure in relation to the Morgan Ryan case.

20. I questioned Mr Briese at some length on this point and while he admitted that an innocent interpretation was possible, as quoted in the report, he was adamant that he believed at the time that pressure was being applied. To demonstrate that point I quote from the transcript attached as an Appendix.

21. As is stated in the report, the judge relied entirely upon a letter he wrote to the Committee rejecting any charges of impropriety or misbehaviour on his part but refused on two occasions, and on a third occasion through his counsel, to personally appear before the Committee to be questioned on oath. (The Judge's reasons are contained in the report.)

22. Therefore I was left with the following situation:

The Committee had before it sworn evidence alleging misbehaviour which had not been able to be substantially broken down by members of the Committee in intensive cross examination of the witness. On the other hand there was the judge's letter. While the former had been tested on oath by the Committee, the latter had not. As mentioned elsewhere, Counsel for the judge appeared before the Committee.

23. I therefore came to, and still hold, the very strong view that notwithstanding the fact that the evidence of Mr Briese has not been and cannot be corroberated, the question on the conduct of the judge cannot be determined or put aside until he has appeared before the Committee or the Senate or a Commissioner appointed by the Senate. In these circumstances the rules of natural justice would of course have to apply and he would be entitled to adequate protection of counsel and the right for his counsel to cross examine appropriate persons.

24. My understanding of the legal advice given to the Committee is that the Committee should not in its investigative stage conclude that an offence had been committed unless the judge had appeared before the Committee. My understanding also is that if the Judge did appear before the Committee it was then open to the Committee to make a finding, still on a balance of probabilities.

25. I do not think that the Committee can reasonably come to the conclusion, stated in paragraph 93, that the words allegedly spoken by Mr Justice Murphy cannot on the balance of probabilities bear the weight attached to them by Mr Briese. I believe that Mr Briese's interpretation of those alleged words, i.e. that he was being subjected to pressure, would be a finding which the Committee could reasonably make, subject to consideration of contrary evidence by the judge.

CONCLUSION

26. I believe that the finding of the report is premature for reasons given above, and particularly because the Committee has been denied the opportunity of testing the Briese allegations about the judge due to the judge's repeated refusals to appear before the Committee to be questioned on them. Hence it is in my view impossible at this stage to determine conclusively the question of whether the judge acted in a way which constitutes proved misbehaviour under S.72 of the Constitution.

27. The gravity of the allegations and the consequences for the administration of justice in Australia are such that I believe that the Senate should seek to resolve the matter by making further investigations and to ensure that the judge is questioned on the allegations, and to enable him to be afforded the protection of the rules of natural justice in the process.

28. Because of the limited resources available to the Senate, and because of the natural and obvious difficulties which attach to a committee of parliamentarians engaging in investigative and deliberative functions concerning a judge, consideration should be given that these further investigations should be carried out by or with the assistance of a Parliamentary Commissioner appointed by the Senate.

[redacted]

DON CHIPP
SENATOR FOR VICTORIA

APPENDIX

Extract from transcript of evidence before the Committee, p. 448,449.

Mr Briese - It was as I have said it. There was some emphasis: 'And now what about my little mate?'.

Senator CHIPP - You had no doubt then that he was saying: 'Okay Clarrie, I have done something for you, one for you, what about one for me, what about my little mate'?

Mr Briese - I do not think you could necessarily interpret it that way but he was----,

Senator CHIPP - That is the way you just invited us to.

Mr Briese - Well, you can. As I say, that is one interpretation, but the other thing is to say: 'Well now, look, isn't there something going to be cleared up with regard to this wrong about Morgan Ryan'. I mean to say, I suppose you could look at it that way, but I did not take it that way. I took it really as meaning: 'Well, and now what is going to happen with Morgan Ryan?'

Senator CHIPP - Because of what I have done for you?

Mr Briese - Not necessarily what I have done for you, but everything is going along okay with independence, I have had a hand in it, everything is right, now what about Morgan Ryan?

Senator CHIPP - I, as a non-lawyer, can look at this two ways. We both know that Ryan and Murphy have been friends for 30 years. You would have known that at the time because of your discussions with Bottom, et cetera.

Mr Briese - I did not know that.

Senator CHIPP - Well, you would have known how close their friendship was after the first dinner. Now I can understand it would be improper, ill-advised, for a High Court judge to say to a chairman of magistrates,

'Incidentally, how is my little mate going?' That would be improper, ill-advised, whatever, but it would not be illegal. But if someone is saying to the Chairman of the Magistrates' Court, 'Look, I have done you a favour Clarrie, what about returning it by doing something about my little mate'. That to my knowledge, even as a non-lawyer, is an illegal act. It is an offence. Would you see it that way?

Mr Briese - I would see it that way, yes.

Senator CHIPP - Now, I again ask you to go back to that telephone call, if you possibly can help us here. You have got no doubt in your mind that at that time, you believed that he was asking for a quid pro quo?

Mr Briese - That is what it seemed to me.

Senator CHIPP - At the time?

Mr Briese - At the time, yes.

Acknowledgements

The Committee was greatly assisted in its deliberations by the support of its secretariat. Particular mention must be made of Mr H. Evans, Clerk-Assistant (Committees), whose knowledge and experience was invaluable as the Committee pursued this unprecedented inquiry. Andrew Snedden and Robert Walsh provided the Committee with assistance of a high order and a tribute should be paid to Mrs Peggy Grossbechler and other secretarial staff for helping prepare this report for presentation to the Senate.

APPENDICES

1. (i) Resolution of the Senate of 28 March 1984
   (ii) Section 72 of the Constitution
   (iii) Standing Order 304

2. Guidelines for Proceedings

3. Advertisement for Submissions

4. Opinion of Mr C.W. Pincus, Q.C.

5. Evidence of Mr Briese - summary

6. (i) Written Submission of Counsel to the Judge
   (ii) Opinion of the Solicitor-General

SELECT COMMITTEE ON THE CONDUCT OF A JUDGE

RESOLUTION OF THE SENATE OF 28 MARCH 1984

(1) That a select committee, to be known as the Select Committee on the Conduct of a Judge, be appointed to inquire into and report upon -

(a) whether any or all of the tapes and transcripts delivered by The Age newspaper to the Attorney-General on 1 February 1984 and relating to the conduct of a federal judge are authentic and genuine; and

(b) if the Committee is satisfied that the tapes and transcripts referred to in sub-paragraph (a) are authentic and genuine in whole or part, whether the conduct of the judge as revealed in the tapes and transcripts referred to in sub-paragraph (a) constituted misbehaviour or incapacity which could amount to sufficient grounds for an address to the Governor-General in Council from both Houses of the Parliament praying for his removal from office pursuant to section 72(ii) of the Constitution.

(2) That the Committee consist of six Senators, as follows:

(a) three to be nominated by the Leader of the Government in the Senate;

(b) two to be nominated by the Leader of the Opposition in the Senate; and

(c) one to be nominated by the Leader of the Australian Democrats.

(3) That the Committee proceed to the despatch of business notwithstanding that all members have not been duly nominated and appointed and notwithstanding any vacancy.

(4) That the Committee elect as Chairman one of the members nominated by the Leader of the Government.

(5) That the Chairman of the Committee may, from time to time, appoint another member of the Committee to be the Deputy-Chairman of the Committee, and that the member so appointed act as Chairman of the Committee at any time when there is no Chairman or the Chairman is not present at a meeting of the Committee.

(6) That, in the event of an equality of voting, the Chairman, or the Deputy-Chairman when acting as Chairman, have a casting vote.

(7) That the quorum of the Committee be three members.

(8) That the Committee have power to send for and examine persons, papers and records, to move from place to place, to sit in public or in private, notwithstanding any prorogation of the Parliament or dissolution of the House of Representatives, and have leave to report from time to time its proceedings and the evidence taken and such interim recommendations it may deem fit.

(8A) That the Committee act in accordance with the following principles:

(a) that it at all times take care to protect, so far as it is possible to do so, the privacy, confidentiality, rights and reputations of individuals, whether appearing as witnesses before the Committee or otherwise;

(b) that it summon witnesses to appear personally only when satisfied that the circumstances demand it, that, so far as is possible, witnesses be given notice of the matters proposed to be dealt with, and that witnesses be given an opportunity to reply in writing before appearing to give evidence, and be entitled to be assisted by counsel;

(c) that it give specific consideration in the case of each proposed witness to the desirability of hearing evidence in private session, and that each witness be given an opportunity to apply for any or all of his or her evidence to be given in private; and

(d) that it ensure that the operational methods and results of investigations of law enforcement agencies, so far as possible, be protected from disclosure where that would be against the public interest.

(9) That the Committee be provided with all necessary staff, facilities and resources.

(10) That the Committee be empowered to print from day to day such papers and evidence as may be ordered by it, and a daily Hansard be published of such proceedings as take place in public.

(11) That the Committee report to the Senate on or before 31 May 1984.

(12) That the foregoing provisions of this Resolution, so far as they are inconsistent with the Standing Orders, have effect notwithstanding anything contained in the Standing Orders.

72. The Justices of the High Court and of the other courts created by the Parliament— Judges' appointment, tenure and remunefation.

(i.) Shall be appointed by the Governor-General in Council:

(ii.) 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:

(iii.) Shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.

The appointment of a Justice of the High Court shall be for a term expiring upon his attaining the age of seventy years, and a person shall not be appointed as a Justice of the High Court if he has attained that age. Paragraph added by No. 83, 1977, s. 2

The appointment of a Justice of a court created by the Parliament shall be for a term expiring upon his attaining the age that is, at the time of his appointment, the maximum age for Justices of that court and a person shall not be appointed as a Justice of such a court if he has attained the age that is for the time being the maximum age for Justices of that court. Paragraph added by No. 83, 1977, s. 2.

Subject to this section, the maximum age for Justices of any court created by the Parliament is seventy years. Paragraph added by No. 83, 1977, s. 2.

The Parliament may make a law fixing an age that is less than seventy years as the maximum age for Justices of a court created by the Parliament and may at any time repeal or amend such a law, but any such repeal or amendment does not affect the term of office of a Justice under an appointment made before the repeal or amendment. Paragraph added by No. 83, 1977, s. 2

A Justice of the High Court or of a court created by the Parliament may resign his office by writing under his hand delivered to the Governor-General. Paragraph added by No. 83, 1977, s. 2.

Nothing in the provisions added to this section by the *Constitution Alteration (Retirement of Judges)* 1977 affects the continuance of a person in office as a Justice of a court under an appointment made before the commencement of those provisions. Paragraph added by No. 83, 1977, s. 2.

A reference in this section to the appointment of a Justice of the High Court or of a court created by the Parliament shall be read as including a reference to the appointment of a person who holds office as a Justice of the High Court or of a court created by the Parliament to another office of Justice of the same court having a different status or designation. Paragraph added by No. 83, 1977, s. 2.

304. The examination of Witnesses before every Select Committee shall be conducted as follows, viz: the Chairman shall first put to the Witness, in an uninterrupted series, all such Questions as he may deem essential, with reference either to the subject referred to therein, or to any branch of that subject, according to the mode of procedure agreed on by the Committee. The Chairman shall then call on the other Senators severally by name to put any other Questions which may have occurred to them during his conduct of the examination; and the name of every Senator so interrogating a Witness shall be noted and prefixed to the Questions asked. All replies to Questions put shall be in writing; but if the Committee be attended by a short-hand writer, the notes of such shorthand writer shall be sufficient.

Examination of Witnesses

APPENDIX 2

SELECT COMMITTEE ON THE CONDUCT OF A JUDGE

GUIDELINES FOR PROCEEDINGS

(1) The Committee shall meet in private session unless it makes a determination, subject to these guidelines, that it is necessary for the purposes of the Committee's inquiry to hear particular evidence in public session.

(2) Evidence given in private session and materials submitted to the Committee shall not be published, and shall be disclosed only to

(a) members of the Committee;
(b) parliamentary officers assisting the Committee;
(c) personal staff of members of the Committee, for the purpose of assisting those members to perform their functions as members of the Committee;
(d) persons engaged to assist the Committee;
(e) witnesses giving evidence to the Committee, where it is necessary for the giving of that evidence for those witnesses to have access to evidence or documents submitted; and
(f) the Senate, in or in connection with the Committee's report, but not so as to identify persons referred to in materials given to the Attorney-General by The Age newspaper and supplied to the Committee.

(3) A prospective witness shall be invited to attend to give evidence. A witness shall be summoned to appear only where an invitation has been declined and the Committee has made a decision that the circumstances warrant the issue of a summons. A witness shall be

invited to produce documents or records relevant to the Committee's inquiry, and an order that documents or records be produced shall be made only where an invitation has been declined and the Committee has made a decision that the circumstances warrant such an order.

(4) A witness shall be given at least two clear days notice of a meeting at which he is to appear, and shall be supplied with a copy of the Committee's order of reference and a written statement of the matters expected to be dealt with during his appearance. Where appropriate a witness shall be supplied with a transcript of relevant evidence already taken.

(5) Every invitation or summons to a witness shall be accompanied by an invitation to make a submission in writing before appearing to give oral evidence, a statement that consideration will be given to any request that evidence be heard in private session, and a statement that witnesses may be accompanied by counsel under the terms of paragraphs (7) and (8).

(6) A prospective witness shall, as soon as practicable, be informed, in writing, of the nature of any allegations made against him of which the Committee has knowledge, and of the particulars of any evidence which has been produced in respect of him. The Committee shall extend to that prospective witness all reasonable opportunity to respond to those allegations in writing and in person before the Committee.

(7) A person appearing before the Committee may be accompanied by counsel, and shall be given all reasonable opportunity to consult counsel during that appearance..

(8) Counsel accompanying a witness shall be allowed to make a statement in writing or orally to the Committee, but shall not be allowed to cross-examine other witnesses, which would be contrary to the Standing Orders of the Senate.

(9) Witnesses heard by the Committee shall be heard on oath or affirmation.

(10) A witness shall be offered before giving evidence the opportunity to make application for any or all of his evidence to be heard in private session, and shall be invited to give reasons for any such application. The Committee shall consider the application in private session, and shall accede to it unless it considers that it is necessary for the purposes of the Committee's inquiry to hear the evidence in public session. If the application is not acceded to, the witness shall be notified of reasons for that decision.

(11) Before giving any evidence in private session a witness shall be informed that it is not the intention of the Committee to publish that evidence, but that it may be necessary to disclose the evidence in the Committee's report, and that the Senate has the authority to order the production and publication of undisclosed evidence.

(12) The Committee shall take care to ensure that all questions put to witnesses are relevant to the Committee's inquiry and that the information sought by those questions is necessary for the purpose of that inquiry.

(13) Where a witness objects to answering any question put to him on any ground, including the ground that the question is not relevant or that his answer may incriminate him, he shall be invited to state the ground upon which he objects to answering the question.

The Committee shall then consider in private session whether it will insist upon an answer to the question, having regard to the relevance of the question to the Committee's inquiry and the importance to the inquiry of the information sought by the question. If the Committee determines that it requires an answer to the question, the witness shall be informed of that determination and the reasons for the determination, and shall be required to answer the question in private session unless the Committee determines, subject to paragraph (14), that it is essential to the Committee's inquiry that the question be answered in public session. Where a witness declines to answer a question to which the Committee has required an answer, the Committee shall report the facts to the Senate.

(14) A witness shall not be required to answer in public session any question when the Committee has any reason to believe that his answer may incriminate him.

(15) A witness who objects to answering a question on the ground that his answer may incriminate him shall be informed that evidence given before the Committee is not admissible as evidence in any prosecution.

(16) Where a witness gives evidence reflecting upon a person and the Committee is not satisfied that that evidence is relevant to the Committee's inquiry, the Committee shall give consideration to expunging that evidence from the transcript of evidence, and to forbidding the publication of that evidence if it has been given in public session.

(17) Where evidence is given which reflects upon a person and the Committee is satisfied that that evidence is relevant to the Committee's inquiry, the Committee shall provide reasonable opportunity for that person to have access to that evidence and to respond to that evidence by written submission or appearance before the Committee.

(18) Reasonable opportunity shall be afforded to witnesses to make corrections in the transcript of their evidence and to put before the Committee additional material supplementary to their evidence.

(19) Where the Committee has any reason to believe that any witness has been improperly influenced in respect of evidence before the Committee, or has been subjected to or threatened with any penalty or injury in respect of any evidence given, the Committee shall take all reasonable steps to ascertain the facts of the matter. Where the Committee is satisfied that those facts disclose that a witness may have been improperly influenced or subjected to or threatened with penalty or injury in respect of his evidence, the Committee shall report those facts and its conclusions to the Senate.

(20) In respect of materials supplied to the Committee by the Government, when the Committee has completed its report the materials as so supplied and no copies thereof shall be retained in secure storage, and any copies of or extracts from such materials made for the purposes of the Committee shall be returned to the secretary and destroyed.

[ADVERTISEMENT]

CREST

SENATE SELECT COMMITTEE ON THE CONDUCT OF A JUDGE

The Senate has appointed this Committee to inquire into and report upon -

(a) whether any or all of the tapes and transcripts delivered by The Age newspaper to the Attorney-General on 1 February 1984 and relating to the conduct of a federal judge are authentic and genuine; and

(b) if the Committee is satisfied that the tapes and transcripts referred to in sub-paragraph (a) are authentic and genuine in whole or part, whether the conduct of the judge as revealed in the tapes and transcripts referred to in sub-paragraph (a) constituted misbehaviour or incapacity which could amount to sufficient grounds for an address to the Governor-General in Council from both Houses of the Parliament praying for his removal from office pursuant to section 72(ii) of the Constitution.

Persons who wish to offer any evidence in relation to those matters are invited to make submissions to the Committee.

Submissions should be sent to

The Secretary
Senate Select Committee on the
Conduct of a Judge
Parliament House
CANBERRA A.C.T. 2600

so as to be received not later than 20 April 1984.

Consideration will be given to any request that a submission be treated as confidential.

APPENDIX 4

OPINION OF MR C.W. PINCUS, Q.C.

The first problem is the legal question of the meaning of "misbehaviour" in s.72 of the Constitution which reads, in part, as follows:

> "The Justices of the High Court and of the other courts created by the Parliament -
> (i) shall be appointed by the Governor-General in Council:
> (ii) 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".

The suggestion has been made that "misbehaviour" has a technical meaning which significantly limits the power of removal. This view is adequately summarised in an opinion from the Solicitor General of 24th February 1984 with which I am briefed:

> "The conferring of exceptional jurisdiction to find proved misbehaviour is not equated to vesting jurisdiction in Parliament to define misbehaviour constituting breach of condition of office. The general power for Parliament to address for removal where there is not technical misbehaviour is negated by Section 72. ... Misbehaviour, as a breach of condition of office in matters not pertaining to the office, has a meaning relating to offences against the general law of the requisite seriousness to be described as infamous..." (para. 19)
>
> "In matters not pertaining to office, the requirement is not conviction for offence in a court of law. Inasmuch as Parliament considers the matter, the question is whether there is proved offence against the general law 'of such a nature as to warrant the conclusion that the encumbent is unfit to exercise the office'. Parliament is not at large to define proved misbehaviour by reference to its own standards or views of suitability for office or moral social character or conduct. The Parliamentary enquiry is whether commission of an offence is of the requisite quality and seriousness is proved". (Para. 21).

Since, as will appear, I do not agree with the Solicitor General, it will be necessary to examine in detail the authorities on which he relies. Before I come to do so it is convenient to mention briefly the position with respect to removal of judges under the United States Constitution.

UNITED STATES.

In many respects the Australian Constitution was modelled upon that

of the United States. As to the removal of Federal judges, however, the language used here departed significantly from that which had, by 1900, produced a number of removals of judges in the U.S. Under Article III, Section 1, of their Constitution, judges hold office during good behaviour. The power to remove is by a process of impeachment on the ground of "Treason, Bribery and other High Crimes and Misdemeanours". When our Constitution was framed, there was at least an arguable view in the U.S. that the expression "High Crimes and Misdemeanours" required proof of indictable offences: see in particular the work, written in 1891, by H.L. Carson: "The Supreme Court of the United States - Its History". If it had been intended, by our draftsmen, to require the commission of a defined offence against the law of the land, one might have expected the use of the American phrase "Treason, Bribery and other High Crimes and Misdemeanours" or some adaptation of it. Instead, the simple word "misbehaviour" was used - a word which does not, to the mind innocent of any "technical" meaning, suggest the necessity of proof of an offence.

It is significant, also, that in this century it seems to have become accepted in the United States that in no case is proof of a specific violation of a statute necessary for removal. In 1972 there was published by the Congressional Research Service of the Library of Congress a work "The Constitution of the U.S. - Analysis and History". At p.578 the (unknown) authors suggest that the Constitution allows -

> "... the removal of judges who have engaged in serious questionable conduct although no specific universal statute

This point is elaborated by W. Wrisley Brown in a useful note in Vol.26 of the Harvard Law Review at p.684; he points out that the process of impeachment, which is that used to remove Federal judges (and Presidents) was taken over from an ancient English parliamentary process, the scope of which was not confined to crimes against the ordinary law of the land. An example (not referred to by Wrisley Brown) of the use of this process in England was the attempted impeachment of Warren Hastings for "high crimes and misdemeanours". As to the type of behaviour enlivening the Senate's jurisdiction the author says at p.692:

> "An act or a course of misbehaviour which renders scandalous the personal life of a public officer shakes the confidence of the people in his administration of the public affairs, and this impairs his official usefulness, although it may not directly affect his official integrity or otherwise incapacitate him properly to perform his ascribed function. Such an offence, therefore, may be characterised as a high crime or misdemeanour, although it may not fall within the prohibitory letter of any penal statute. Furthermore, an act which is not intrinsically wrong may constitute an impeachable offence solely because it is committed by a public officer... For example, a judge must be held to a more strict accountability for his conduct than should be required of a marshal of his court...".

This exposition appears to me persuasive.

I refer also to the note in 51 Harvard Law Review p.335 to the effect that the words "Treason Bribery and other High Crimes and Misdemeanours" apply to matters other than indictable offences, relying on the decision in Ritter v. U.S., noted in 300 U.S. 668. It will be observed that the Supreme Court refused to entertain an appeal from Judge Ritter, who complained that the broad view of the meaning of "High Crimes and Misdemeanours" to which I have referred was applied against him by the Court of Claims.

Insofar as the American law provides any help, then, it gives no support to the view expressed by the Solicitor General. Of much more importance, however, are the law and practice in England and its colonies prior to 1900, and to those subjects I now turn.

ENGLAND.

Two hundred years before our Constitution was enacted, it had been the law in England (established by the Act of Settlement 1700) that judges held office during good behaviour "but upon the address of both Houses of Parliament it may be lawful to remove them". See Wade & Phillips "Constitutional Law" 8th Ed. (1970) pp. 8, 9. The effect of this enactment was, in my opinion, to permit removal of a judge in respect of matters done in his private capacity and not necessarily constituting an offence. The plainest case is that of Judge Kenrick referred to by Shimon Shetreet in his work "Judges on Trial" at p.143. In 1826 the judge was charged with prosecuting a poor man for theft in order that he might get possession of his house and then trying to persuade the man to plead guilty, promising to ask for leniency. Shetreet says:

> "The important principle established in this case was that 'by the Act of Settlement it was the duty of the House to examine the conduct of the judges, if notoriously improper, even on matters that affected their private character'. Although it was generally agreed that misconduct of a judge in his private life may justify an address for removal, in the absence of clear evidence of corrupt motives, the House refused to interfere".

Just as importantly, there appears to be no trace, in the removal cases after the Act of Settlement, of the notion that in such questions the English Parliament was restricted by the pre-1700 decisions as to what

constituted "good behaviour". If the draftsmen of our Constitution knew of the practice of the English Parliament with respect to removal of judges, and intended to depart from it so significantly, it is remarkable that they made that intention so unclear.

Dr. Griffith Q.C. refers to Halsbury's Laws of England 4th Ed. Vol.8 para. 1107 and the acceptance there of the passage in Ch.12 of Volume 4 of Coke's Institutes, p.117 -

> "The Chief Baron is created by letters patent, and the office is granted to him quandiu se bene gesserit, wherein he has a more fixed estate (it being an estate for life) than the justices of either bench, who have their offices but at will: and quamdiu se bene gesserit must be intended in matters concerning his office, and is no more than the law would have implied, if the office had been granted for life and in like manner are the rest of the barons of the Exchequer constituted, and the patents of the Attorney General, and solicitor are also quamdiu se bene gesserit".

If this passage was intended, in the 17th century when it was written, to convey that a judge might misbehave as scandalously as he pleased in matters not concerning his office, without risking that office, it is hard to believe that it could be correct. Coke does not say anything about offences committed by a judge in such matters. However it came to be accepted that an office held during good behaviour (quamdiu se bene gesserit) could be terminated in respect of matters not concerning office and the leading case which established that was R. v. Richardson in 1758 reported in 1 Burrow 517. The officer whose conduct was in question in that case was a "postman" of the town of Ipswich - what we would call today an alderman. In view of the weight which this decision must carry if the view against which I argue is to be held correct, it is worth quoting the relevant part of Lord Mansfield's judgment in full:

"There are three sorts of offences for which an officer or corporator may be discharged.

1st. Such as have no immediate relation to his office; but are in themselves of so infamous a nature, as to render the offender unfit to execute any public franchise.

2d. Such as are only against his oath, and the duty of his office as a corporator; and amount to breaches of the tacit condition annexed to his franchise or office.

3d. The third sort of offence for which an officer or corporator may be displaced, is of a mixed nature; as being an offence not only against the duty of his office, but also a matter indictable at common law.

The distinction here taken, by my Lord Coke's report of this second resolution, seems to go to the power of trial, and not the power of amotion: and he seems to lay down, 'that where the corporation has power by charter or prescription, they may try, as well as remove; but where they have no such power, there must be a previous conviction upon an indictment'. So that after an indictment and conviction at common law, this authority admits, 'that the power of amotion is incident to every corporation'.

But it is now established, 'that though a corporation has express power of amotion, yet, for the first sort of offences, there must be a previous indictment and conviction'.

By the date of R. v. Richardson the removal of judges was governed by the Act of Settlement referred to above and not by the general law with respect to removal of officials set out in R. v. Richardson. The case therefore had no bearing upon the removal of English judges. Further, the judgment of Lord Mansfield did not purport to be an interpretation of the expression "misbehaviour", which is not to be found in the report; nor, indeed, is "good behaviour" mentioned; the case is really about the inherent power of a corporation to dismiss its officers. It does not appear to me to follow, logically, from anything said in Richardson's case that the power of Parliament to remove judges is restricted in any such fashion as there laid down. Further, the case has never (as far as I have been able to ascertain), been regarded in England as having anything to do with the removal of judges, in the more than 200 years since it was decided.

Looking at the matter more broadly, I find it unlikely that the

fathers of our Constitution intended to make the relatively simple language of s.72 able to be construed only by reference to such ancient English texts. It should be kept in mind that what the delegates were confronted with was the task of making a constitution for a new nation. I do not understand why it should be thought that they intended what they said to be read down by reference to what was said by Lord Coke about the tenure of the Barons of the Exchequer in 1628. It is more probable that what our constitutional draftsmen had in mind, as to the law about removal of judges, was English practice, or that with respect to colonial judges, in the 19th century.

THE PRIVY COUNCIL - COLONIAL JUDGES

There is a number of reported instances of removal or attempted removal of colonial judicial officers. Of these two went from Australia to the Privy Council in the middle of the 19th century.

The first case was Willis v. Gipps in 1846, reported in Volume 5 of Moore P.C. 379 (13 E.R. 536). That was decided under the statute of 22 Geo.III c.75, Section 2 of which gave a power of removal expressed, so far as relevant, in these terms:

> "And... if any person or persons holding such office shall be wilfully absent from the colony or plantation wherein the same is or ought to be exercised, without a reasonable cause to be allowed by the governor and council for the time being of such colony or plantation, or shall neglect the duty of such office, or otherwise misbehave therein, it shall and may be lawful to and for such governor and council to amove such person or persons from every or any such office...".

Although the statute did not say so, the Privy Council held that the "amoval" could not lawfully be effected without giving the judge in question an opportunity to be heard. It is partly on the basis of that decision that

I have advised (above) that the power under s.72 cannot, as a matter of law, be exercised ex parte but only after affording such an opportunity. The other, perhaps lesser, importance of the case is in the interposition of Baron Parke at p.391 of the report, which appears to be founded on the view that the law as to removal at common law was relevant under the statute.

In the second of these cases, Montague v. Lieutenant Governor and Executive Council of Van Diemen's Land (1849) 6 Moore P.C. 489, 13 E.R. 773, the same statute was in question, with respect to a Tasmanian judge. One of the complaints made about him was that he incurred indebtedness and frustrated attempts to recover, on the part of the creditor, by misuse of his judicial office. At p.493 it is said that the Colonial Secretary wrote to the judge informing him that the matters in question "seriously affected his character and standing as a judge of the Supreme Court". This, to my mind, suggests a broader and less technical view of the basis of removal of a judge than that based on R. v. Richardson (above). Sir F. Thesiger Q.C., who appeared against the judge, explained to the Board:

> "The chief grounds of complaint against him are, first obstructing the recovery of a debt, justly due by himself; and secondly, the general state of pecuniary embarrassment in which he was found to be in".

There is no trace, here, of the judge's position being protected, as to matters outside the exercise of his duties, by any requirement that an offence be proved; it was not an offence to get into debt, however heavily. Counsel also said that the behaviour complained of "tended to bring into distrust and disrepute the judicial office in the Colony". The judge's removal was upheld, despite the presence of an irregularity; the proceeding brought

against him had been expressed to be with a view of a suspension, not removal.

Although no reasons other than formal ones were given, it is noteworthy that no-one appears to have thought that there was a difficulty in accusing the judge of being in a "general state of pecuniary embarrassment". The statute said "neglect the duty of such office, or otherwise misbehave therein", words suggestive of the law as laid down by Coke. Yet it appeared to be accepted in the Privy Council that any sort of misbehaviour might suffice to justify removal. The Montague case tends against the applicability of Coke's view, in modern times, and against the notion that R. v. Richardson applies to the interpretation of our s.72.

In the same volume of Moore there is an Appendix consisting in a memorandum of members of the Privy Council on the removal of colonial judges. (See 16 E.R. 828). Again, the "technical" doctrine I am attacking is not reflected in it:

> "When a judge is charged with gross personal immorality or misconduct, with corruption, or even with irregularity in pecuniary transactions, ... it would be extremely improper that he continue in the exercise of judicial functions...".

The expression "gross personal immorality" is surely not intended to be confined to commission of offences. To take a simple example, one would be confident that the authors of the memorandum would have regarded it as ground for removal if it were found that a judge had been conducting a brothel, whether or not his doing so was prohibited by statute in the place in which he held office. There is reference to moral misbehaviour, also, in Lord Chelmsford's observations on the memorandum which are to be found at p.16

of the Appendix, referring to his view that certain matters should be decided in the first instance by the Privy Council:

> "These observations do not apply to grave charge of judicial delinquency, such as corruption; or to cases of immorality, or criminal misconduct".

In these expressions, the word "immorality" refers to conduct which is not of a judicial character and which is not criminal.

CONVENTION DEBATES

Having read the relevant parts of the debates in Adelaide in 1897 and Melbourne in 1898, I am somewhat doubtful of the usefulness of the remarks made by the delegates, as a guide to the proper construction of s.72. The discussion was sometimes a little confused, the delegates' notions as to the likely effect of the proposed provisions were not by any means all the same and it is unsafe to assume that those who did not speak out necessarily agreed with those who troubled to voice their opinions. All that having been said, in my view it is impossible to extract from the records evidence that any single delegate believed that the operation of s.72 would be limited in the fashion suggested by the learned Solicitor-General. The closest approach to such an expression of view which I have been able to find was the speech of Mr. Isaacs (later Isaacs J.) on 20th April 1897 (pp. 948-9) which is also referred to by the Solicitor-General. At one stage in this address (in the left-hand column of p.948) Isaacs implied that the word "misbehaviour" in this context is absolutely confined to misbehaviour as a judge, but he did not say that he favoured limiting the power of removal to that narrow ground. He seemed to commend to the other delegates a power of removal in terms of

the then Victorian Constitution, which he summarised as follows:

> "So that a judge holds office subject to removal for two reasons - first, if he is guilty of misbehaviour, and, secondly, if the Parliament thinks there is good cause to remove him, when they may petition the Crown to do so".

He then quoted the passage from Todd set out in paragraph 5 of the Solicitor-General's opinion. It has been observed by another, and I agree, that the critical sentence in Todd commencing "Misbehaviour includes" is hardly suggestive of an exhaustive definition. At p.949 Isaacs quoted further from Todd:

> "But, in addition to these methods of procedure, the Constitution has appropriately conferred upon the two Houses of Parliament - in the exercise of that super-intendence over the proceedings of the courts of justice which is one of their most important functions - a right to appeal to the Crown for the removal of a judge who has, in their opinion, proved himself unfit for the proper exercise of its judicial office.... This power is not, in a strict sense, judicial; it may be invoked upon occasions when the misbehaviour complained of would not constitute a legal breach of the conditions on which the office is held".

Note that the word "misbehaviour", where last used, plainly refers to misbehaviour other than that which would at common law have operated to put an end to an office held during good behaviour. Reading the remarks of Isaacs as a whole, there seems to me no solid ground for saying that he thought that the use of the word "misbehaviour" in the Constitution would confine the power of removal in the way suggested by the Solicitor-General - even if it were legitimate to infer that all the other delegates had the same view as did Isaacs.

I have noted, also, as additional evidence that Isaacs did not regard the use of the word "misbehaviour" in the then Clause 72 as having

any precise technical significance, the fact that he, like others, used the word "misconduct" in debate as synonymous with misbehaviour - see for example p.312 of the record of the Melbourne Convention, 31st January 1898.

I disagree, then, with the view of the Solicitor-General that s.72 in referring to misbehaviour used the word "in the technical sense understood by the delegates" - p.12. I think this is based upon a misreading of the debates and upon the misapprehension that at the end of the 19th century the notion of judicial misbehaviour justifying removal from office had some received technical meaning. The contrary is so; the Privy Council had long before made clear that such misbehaviour could consist in a variety of reprehensible action or inaction, including mere immorality, or commercial misconduct not amounting to the commission of an offence at all. I note that Mr. Wise, at p.945 and p.946 of the Adelaide debates, referred to colonial removal cases in terms which showed he was alive to the point that no criminal conduct is necessary to justify removal.

GENERAL

In my opinion, too much has been made of Todd's statement as to what misbehaviour "includes". Further, there has been drawn too readily the conclusion that the use of the word "misbehaviour" was intended to incorporate the law as to removal of judges in England prior to the Act of Settlement 1700. An interesting example of this is to be found in the opening passage of Quick & Garran's "Annotated Constitution of the Australian Commonwealth" para. 297, in which the learned authors quote part of the passage from Coke

on p. 6 above. Notice that the authors quote, as if it laid down Australian law, Coke's view that "quamdiu se bene gesserit must be intended in matters concerning his office", implying that misbehaviour in non-judicial life cannot be relevant - a view which they immediately contradict by quoting Todd.

In my opinion, a safer course is to come to the Constitution unaided by any authority, in the first place, and see if there is an ambiguity. Is the word "misbehaviour" obscure? One is assisted, in construing it, by the fact that it is the justices of the High Court and of other courts who are being spoken of. It is, when one keeps the subject matter in mind, unlikely that it was intended to make judges who are guilty of outrageous public behaviour, outside the duties of their office, irremovable. I suggest an example suggested by an American impeachment case: Suppose a High Court judge took office as Patron of a political party, used the prestige of his office in making public addresses urging people to vote for that party, and openly engaged in election campaigns as a speaker, promoting the party's policies and attacking those of the other side. Although such conduct would be by no means an offence and would, indeed, be free from blame if done by anyone other than a judge, surely it would justify removal. I do not say that Parliament would be obliged to remove such a judge - merely that that would constitute misbehaviour giving rise to a discretion to remove him. It would be misbehaviour in a High Court judge, though not in an ordinary man, because it must lead to utter destruction of public confidence in the judge's ability properly to decide matters before him having a political flavour.

Argument against my view is based on the fact that the attachment, to an office held for life, of a condition of good behaviour has been held not to put an end to the holding of the office, as to conduct outside official duties, in the absence of proof of a conviction. The reasons for my believing that that doctrine should not be held to govern the use of the word "misbehaviour" in s.72 may be summarised as follows:

1. As to the judiciary, both in England and the Colonies it had become clear before 1900 that the power to remove for judicial misconduct was not so confined.
2. The law with respect to non-judicial removals, as to conduct outside office, required a conviction; the language of s.72 at least makes it clear that that is not necessary.
3. As a matter of practicality, it would have been foolish to leave Parliament powerless to remove a judge guilty of misbehaviour outside his duties, as long as an offence could not be proved; that remark applies particularly to the High Court, which was to occupy a position at the pinnacle of the Australian Court system, and to exercise a delicate function in supervising compliance with the requirements of the Constitution on the part of legislatures.

I note that the opinion of Sir Garfield Barwick, quoted by the Solicitor-General, is inapplicable to the construction of s.72 for two reasons:

firstly, because it relates to the construction of a condition as to good behaviour, which is not to be found in s.72; secondly, it has not to do with removal of judges under s.72 or at all, but to the security of tenure of bank officers. Lastly, I record the comments of the delegates at p.952 of the Adelaide convention, as casting doubt on the theory that there was an intention to limit the plain words of s.72 by ancient technical rules:

> "Mr. Isaacs: Who would be the judges of misbehaviour in case of removal of a judge?
>
> Hon.Members: The Parliament.
>
> Mr. Barton: The two Houses of Parliament.
>
> Mr. Isaacs: Would they be the judge of the misbehaviour?
>
> Mr. Barton: Unquestionably.
>
> Mr. Isaacs: If that is so it is all I contend for."

SUMMARY OF OPINION

As a matter of law, I differ from the view which has previously been expressed as to the meaning of s.72. I think it is for Parliament to decide whether any conduct alleged against a judge constitutes misbehaviour sufficient to justify removal from office. There is no "technical" relevant meaning of misbehaviour and in particular it is not necessary, in order for the jurisdiction under s.72 to be enlivened, that an offence be proved.

[redacted]

C.W. PINCUS

14th May 1984

1. Mr Briese first met Mr Justice Murphy at a dinner at the home of Morgan Ryan on 10 May 1979. This was a small dinner party attended by Mr Murray Farquhar, who was then Chief Stipendary Magistrate of New South Wales, and Mr Mervyn Wood, then Commissioner of Police of New South Wales.

2. The nature and purpose of the dinner have been the subject of considerable evidence before the Committee. The only significance of this dinner in relation to the issue now remaining before the Committee is the fact that Mr Briese and Mr Justice Murphy engaged in lengthy conversations about various subjects concerned with the courts and the law including the administration of justice in New South Wales until 2 or 3 a.m. Mr Briese made the most of what he saw as an opportunity to seek the views of a High Court Judge for whom he had the highest respect.

3. Mr Briese and Mr Justice Murphy met again on several occasions at a Sydney restaurant, at the High Court and at Mr Justice Murphy's Canberra home over the period 1980-81, during which the principal topic of conversation was the question of independence for the New South Wales Bench of Magistrates, which Mr Briese was anxious to obtain and for which Mr Justice Murphy expressed his support. Mr Briese sought Mr Justice Murphy's intervention with the Premier and the Attorney-General of New South Wales. Mr Justice Murphy said he would take the opportunity of doing so.

4. Although one or two statements were made by the judge in the course of these various conversations to which Mr Briese now ascribes some significance to matters before the Committee, we do not believe that they are relevant to the question which the Committee must now decide.

5. Early in January 1982, Mr Briese received a telphone call at his home from the judge who, according to

Mr Briese, said he had a matter which he would like to discuss, but not on the telephone. The judge denies this and explains the telephone call as being in response to several messages he had received from Mr Briese reminding him of a standing invitation to return his hospitality.

6. Mr Briese denies this but agrees that in reponse to the call from the judge he invited the latter and his wife to dinner with him and his wife at their home in Sydney. Prior to dinner being served, while Mrs Briese was engaged in its preparation, the judge, his wife and Mr Briese had a discussion in the lounge room. According to Mr Briese the judge raised the question of the social security conspiracy case, and criticised it in strong terms.

7. There is again some conflict between Mr Briese and the judge as to how this subject arose, but it is common ground that the judge criticised the case in strong terms, although there is no suggestion that any request was made by the judge to Mr Briese that he should communicate the judge's views to the magistrate who was hearing that case.

8. The judge states that Mr Briese said that he had not discussed this case with the magistrate handling it, and that he had made it an invariable rule never to discuss any case with a magistrate unless that magistrate came to him for advice. The judge claims he responded that this was the proper course. Mr Briese denies this conversation.

9. Mr Briese says that the judge then said to him "and I will tell you about another wrong case of conspiracy too and that is against Morgan Ryan". The judge denies this, saying that Mr Briese first mentioned the Morgan Ryan case.

10. The judge admits that he criticised the Crown for its habit of "tossing in (a) conspiracy (charge) if a case is not very strong". Mr Briese states that he had the impression from the judge that he had read the evidence and

that it was very weak. The judge denies indicating anything more than a reading of newspaper accounts.

11. There is no suggestion that Mr Justice Murphy requested Mr Briese to speak with the magistrate hearing the Morgan Ryan case. Nevertheless Mr Briese indicated he would make some inquiries about the matter to see what the situation was. He says that he did so because he felt that he was under pressure to take some action in relation to the case because of the possibility of some wrong happening in his court.

12. Prior to the judge's departure from his home that evening, Mr Briese alleges that the judge told him that he might be able to do something about obtaining an official government car for his use. This embarrassed Mr Briese to the extent that he told the judge that he already had one, which was not the case. The judge denies that any such conversation occurred.

13. Shortly after this visit by the judge to Mr Briese's home, Mr Briese asked the magistrate hearing the case about the strength of the evidence against Morgan Ryan, and was told that there was enough for a prima facie case, although it was not that strong. Mr Briese did not tell the magistrate that any inquiries had been made of him about the matter, and emphasised to the magistrate that the case was one entirely for his own judgement.

14. A few days later, Mr Briese received another telephone call from the judge who, he says, asked him about the inquiries he had promised to make about the Ryan case. The judge denies this and said he rang Mr Briese to thank him for the dinner, though Mr Briese does not recall that. He questioned the likelihood of this because a huge bouquet of flowers had been delivered at his home the morning following the judge's visit.

15. Mr Briese asked the judge whether he would be attending a reception at the State office block that evening, and told the judge that he would see him there. At the reception Mr Briese told the judge that it was his impression that the presiding magistrate seemed to have a different view of the Ryan case than the judge and it was Mr Briese's guess that Ryan would probably be committed for trial. Mr Briese says that the judge responded "the little fellow will be shattered". Although the judge denies that he used the expression "the little fellow" he admits commenting that "Ryan would be shattered".

16. Mr Briese then went on to suggest two possible ways that Ryan had of getting around the problem. First, he could try to persuade the magistrate not to commit him under "the second leg of section 41", which is a reference to a section of the New South Wales Justices Act under which a charge may be dismissed if the magistrate is of the view that even though there is a prima facie case it is not of sufficient strength to commit for trial. The second matter mentioned by Mr Briese was an application for a "No Bill", which Mr Briese and the Judge then proceeded to discuss.

17. Several days later the judge again rang Mr Briese and told him that he had discussed the question of the independence of the magistracy with the New South Wales Attorney General, and that the government was going ahead with legislation to give effect to it. The judge states that he told Mr Briese that his conversation with the Attorney-General had taken place at the reception. Mr Briese does not recall this.

18. Mr Briese says the judge then said to him "and now what about my little mate?". In evidence Mr Briese was unsure of the exact opening words of the inquiry ("and" or "now" or "and now"), but was adamant that the question was asked with such emphasis as to suggest a link between the inquiry and the preceding conversation.

19. The judge's recollection is that he did not use the expression "my little mate", but that, not having heard the exact reference at the reception, he did make an inquiry about the section of the Justices Act there referred to by Mr Briese.

20. Mr Briese and the judge agree that Mr Briese then simply repeated the general advice he had offered at the reception.

SUBMISSIONS ON THE INAPPROPRIATENESS OF INTERROGATION OF A JUDGE INTO WHOSE CONDUCT AN INQUIRY IS BEING CONDUCTED

0. Introduction

The issue facing this Committee is one of the most basic and most elementary principles of our Constitution. It is the independence of the Judiciary.

There are no precedents upon Section 72 of the Constitution. Indeed, no Australian judge, State, Federal or Territorial, has been removed from office since Federation nor has such removal been attempted. In the United Kingdom only one judge has ever been removed upon an address by both houses (Sir Jonah Barrington of the Irish High Court of Admiralty in 1830, who was removed for misappropriating moneys paid into Court by litigants).

The scarcity of precedents means that the few precedents which do exist necessarily receive, notwithstanding their antiquity, disproportionate attention. The course which will be taken by this Committee may be, for the foreseeable future, the only precedent on Section 72 of the Constitution. Its task is, therefore, one the importance of which transcends the factual issues it is presently investigating.

1. The nature of the power

Quick and Garran in the Annotated Constitution of the Australian Commonwealth, at page 731 cite Todd: Parliamentary Government in England (ii) 857 in the following terms:

> "Misbehaviour means misbehaviour in the grantee's official capacity. 'Quamdiu se bene gesserit must be intended in matters concerning his office, and is no more than the law would have implied, if the office had been granted for life.' (Coke, 4 Inst. 117). 'Misbehaviour includes, firstly, the improper exercise of judicial functions; secondly, wilful neglect of duty, or non-attendance; and thirdly, a conviction for any infamous offence, by which, although it be not connected with the duties of his office, the offender is rendered unfit to exercise any office or public franchise."

The same definition was adopted by Mr Isaacs, as he then was, in the Adelaide Convention Debates at page 948.

Prior to the enactment of the Constitution, Judges could be removed in two ways. First, since the Act of Settlement of 1700, they could be removed by an address of both houses of Parliament. Secondly, prior to that date, English judges could be removed by the Crown for misbehaviour without an address. This was based on the proposition that the power to appoint carried with it an implied power to revoke the appointment. Similarly, Australian colonial judges held office during the pleasure of the Governor.

With this background, the Commonwealth Bill of 1891 provided that judges would hold office during good behaviour and that it should "not be lawful for the Governor-General to remove any judge except upon an address from both houses of the Parliament praying for such removal". The clear purpose of this provision was to require an address in all cases.

Clause 17 of the draft Constitution as at 20th April, 1897 provided:-

The Judges of the High Court and of the other courts created by the Parliament:-

(i) shall hold their office during good behaviour;

(ii) shall be appointed by the Governor-General by and with the advice of the Federal Executive Council;

(iii) may be removed by the Governor-General with such advice but upon an address from both houses of the Parliament in the same session praying for such removal.

No grounds were necessary.

It was subsequently proposed to strike out the whole of sub-section (iii), the proposal being based upon the proposition that -

The permanency of the judiciary was the very citadel of public justice. It shows the necessity of having the Court secure above popular clamour and political influence.

It follows that:

1) The Founding Fathers were anxious to combine the two alternative procedures and to impose the requirements of both. There must be misbehaviour or incapacity and there must be an address by both houses on that ground.

2) Misbehaviour means -

a) the improper exercise of judicial functions,

b) wilful neglect of duty or non-attendance, or

c) conviction for an infamous offence by virtue of which the offender is rendered unfit to exercise any public office.

Later, in the Melbourne Session, the word "proved" was added (along with some consequential and grammatical amendments) in order further to secure the position of the Judiciary.

The essential proposition flowing from this analysis of the section is that private misconduct falling short of a criminal offence can never amount to "misbehaviour" within the meaning of Section 72 and that, in any event, it cannot amount to "proved misbehaviour" in the absence of criminal conviction. The Parliament's role is to determine whether the circumstances surrounding the conviction and the nature of the offence are such that the conviction constitutes "proved misbehaviour" so as to justify removal. Not all convictions will constitute behaviour such that a judge should be removed. For example, a conviction for negligent driving or for disobeying a traffic sign would not provide a basis for the removal of a judge.

The contrary approach would produce some surprising results. Suppose the Senate were to be informed that a Federal Judge had murdered someone. It cannot seriously be suggested that the Senate or House, or a select committee would be entitled to determine for itself the question whether the murder had been committed with a view to deciding whether the judge was guilty of "proved misbehaviour". Even if the allegation related to a less serious offence such as drunken driving, it would be quite inconsistent with the Separation of Powers that a legislative committee should embark upon such an inquiry which is of a different character from the legislative inquiries which are incidental to its functions. It is clear that, if Parliament did take upon itself such a role, it would have to exercise that role judicially, that is, the charge would need to be formulated and all the principles of natural justice applied. This would involve a strict formulation of the charge, the right to cross-examine any witness or person who gave adverse evidence, the right to have all the evidence presented against him or her before any answer was made, the right to be treated not as a witness but as a party and the standard of proof which would need to be applied would, of course, be proof

beyond a reasonable doubt. In the absence of natural justice no critical comment or adverse finding can be made.

An analysis of the development of s.72 at the Constitutional Debates held in Adelaide in 1897 demonstrates very clearly the proposition contended for. It is convenient to set out this submission by reference to Occasional Paper No.2 of 1984 by James A. Thomson entitled "Some Notes on the History of Section 72(ii) of the Australian Constitution".

At page 6.8 the provisions of Clause 70(iii) as at 12 April 1897 are set out as follows:

> "The Justices of the High Court and of other courts created by the Parliament:
>
> III. May be removed by the Governor-General with such advice, but only upon an Address from both Houses of the Parliament in the same Session praying for such removal."

Mr Kingston proposed verbally an amendment set out at page 8.6 under which Clause 70(iii) would read:

> "shall only be removed for misconduct, unfitness or incapacity by the Governor-General in Council, but only upon an Address from both Houses of the Parliament".

Mr Higgins at page 953 of the Debates (page 11.5 of the Occasional paper) said:

> "May I point out to Mr Kingston that his amendment will not leave it to the judgement of the Houses of Parliament as to whether there has been misconduct or not. It will put a burden on them first to prove in a court of law whether there has been misconduct or incapacity, and secondly to pass an address."

Notwithstanding this Mr Thomson (at page 168 of the Occasional Paper)

stated that Mr Kingston's opinion represented the view of most other delegates and his version was agreed to so that Clause 70(iii) read:

> "Shall not be removed for misbehaviour or incapacity, and by the Governor-General in Council, but only upon an Address from both Houses of the Parliament in the same Session praying for such removal."

It follows that those responsible for the passage of the amendment accepted the meaning described to it by Mr Higgins and regarded that meaning as desirable. This meaning is that misbehaviour must be established in a Court of law before it becomes a ground for removal of a Federal Judge.

The opinion of the Solicitor-General which has already been incorporated in Hansard agrees that the three grounds set out by Quick and Garran are the only grounds for removal. In particular, he concedes the necessity, in relation to the third category of ground for removal, that there be established the commission of a serious criminal offence. It appears that the Solicitor-General differs from the view now submitted only in that, contrary to the views of Todd, Quick and Garran and those participating in the Constitutional Debates, he considers that there need not be an actual conviction. It is respectfully submitted that in this respect the learned Solicitor-General has not given sufficient weight to undisputed authority.

Where the charge against a judge which is relied on for an address under Section 72 is the commission of a criminal offence, it is impossible to read the provision of the Australian Constitution requiring "proved misbehaviour" as contemplating anything less than misbehaviour proved in a court. The idea that the Constitution contemplates a trial for murder (or any other criminal offence) by a Senate committee is inconceivable. Nothing could be more inimical to the independence of the Judiciary or the separation of powers. It only requires to be stated to be categorically rejected.

The result can be expressed in the form of a dilemma. If what is being investigated is the possible commission of a criminal offence, that is not a matter for a committee of the legislature. If what is being investigated is something less than a criminal offence, it is outside the scope of Section 72.

It is apparent that the present is not a case where there has been any suggestion of any of the three alternatives referred to by Quick and Garran as constituting "misbehaviour". There has been no suggestion of misconduct in the Judge's judicial capacity. There has been no suggestion of neglect of judicial duties. There has been no suggestion of an actual conviction and, even if a conviction is unnecessary, the material supplied to the Judge by the Committee would not sustain a charge for any offence.

Once it is accepted that there is no power to dismiss except for judicial misconduct, neglect of duty or conviction for a serious criminal offence (or even, on the Solicitor-General's approach, a serious criminal offence without actual conviction), it is clear that a roving inquiry into the conduct of a Judgewith a view to finding something which could be criticized cannot be authorized by the power under s.72(ii). Any suggestion of summoning him for interrogation in relation to such matters must, therefore, be misconceived.

2. The Scope of the Power

The Constitution gives Parliament only one power - the power to present an address for removal. Section 72 does not authorise action against a judge which is less this. The Constitution permits no intermediate or "compromise" course and such a course would be quite inappropriate.

In an article in (1953) 26 A.L.J. 462, Zelman Cowen and David P. Derham conclude that there is no statutory power to admonish. They say that no

Government should directly admonish a judge unless it was proposed, at that time, to remove him. They again emphasise the principle of judicial independence which they submit would be eroded by the possibility of admonition without removal.

Shetreet on "Judges on Trial" states at page 163:-

> "The general rule is that the conduct of judges cannot be discussed in Parliament unless upon a substantive motion which admits of a distinct vote of the House... As to motions for an inquiry into the conduct of a judge, the principle has been established that unless the prima facie case against the judge is strong and unless the charges, if proved, would justify an address for his removal, Parliament will not interfere. Given these principles, it seems that Parliament does not exercise any disciplinary function over judges short of removal by an address, and that it cannot pursue a course with the final aim not of an address for removal but of censure, criticism or condemnation of judicial conduct."

Gladstone, when Prime Minister, arguing against a vote of censure against a judge, stated:

> "At present you are strictly restrained from interfering except in one most solemn and formal manner. You are not to tamper with the question whether the judges are on this or that particular assailable. You are not to inflict upon them a minor punishment. You have never thought it wise to give opinions in criticism or in reprobation of their conduct when they have casually gone astray. (If) the act (of a judge) was not an act with respect to which you would be right to ask Parliament to address the Crown for his removal, it was not an act of which hostile notice should be taken at all. Are you prepared to (break down) that fence (which) prevents you from inter-meddling with the character of the judges by means of votes, which ... dare not aim at their removal, but which, at the same time, have a certain credit and authority? (209, Parl, Deb. 3rd Ser. 757 (1872)).

As was pointed out by Sir John Walton, then Attorney-General:

> "Such a course would leave the Learned Judge in the occupation of his eminent position, but discredited and disgraced in his administration of justice by censure of the House of Commons".

In other words, to maintain the independence and standing of the Judiciary, it is necessary to refrain from damaging the standing of a person who is to remain a judge.

If this Committee does not find grounds for an address it must, it is submitted, refrain from making any adverse comment on the behaviour of the Judge and should, in view of what has appeared in the Press, state that no adverse findings were made. It is obvious that justice in this country would be negatively affected in its performance, or in what is seen to be its performance, if one of the judges whose decisions make and direct such law were to be either censured or the subject of adverse comment. This would reflect not only on the judge himself but also on the whole court and the respect in which it is held in the eyes of the community. This goes both to the reason why Section 72 is framed the way it is and to the standard of "proved misbehaviour" applied by that Section.

3. Separation of Powers

One of the essential pillars upon which the Constitution rests is the doctrine of the Separation of Powers (see The Queen v. Kirby; Ex parte Boilermakers' Society of Australia (1955-1956) 94 C.L.R. 254, especially at 275). Once an inquiry extends beyond what is neeessary for removal pursuant to Section 72, a serious breach of the doctrine of the Separation of Powers occurs. No Federal Judge can be independent and fearless if he faces the possibility of roving inquiries on the conduct of a Judge by Committees of the Legislature.

What follows from this is that interrogation for the purpose of justifying adverse comment is totally outside the legitimate function of the Committee.

4. Natural Justice

Throughout the early cases, even where there was no requirement for "proved" misbehaviour, it was made clear that the judge was entitled to hear the charges made against him. This does not mean only the general nature of the charge but the details and facts behind each charge or statement reflecting upon him that has been made. At the very least the judge must have a right to appear in person or by counsel to adduce evidence and to be heard (Gleeson: (1979) 53 A.L.J. 338). This is reinforced by the comments of Quick & Garran on the Melbourne Session of the Convention Debates where they conclude that the judge should be heard in his defence and that the charge against him should be alleged in the Address. The authors cite Todd who uses the expression "the fullest and fairest inquiry". Lord Loreburn L.C. pointed out in Board of Education v. Rice, (1911) A.C. 178 at 182, that the person sought to be removed must always be given "a fair opportunity.. for correcting or contradicting any relevant statement prejudicial to their view".

In de Smith's Judicial Review of Administrative Action, 4th edition, page 214, it is submitted that refusal to permit cross-examination of witnesses at an administrative hearing will usually be a denial of natural justice. The authors state that seldom can such a refusal be justified if a witness has testified orally and a party requests leave to confront that witness and examine him. The authors equate this with a duty to act fairly.

In summary, all tribunals whose decisions may have adverse effects on citizens have a duty to observe the rules of natural justice.

De Smith states that the audi alterem partem rule sets the minimum standard of fairness. This is a rule that governs every tribunal or body of

persons invested with authority to adjudicate upon matters involving civil consequences to the individual (Wood v. Wood, (1874) L.R. 9 Ex.190 at 196). The content of the rule includes prior notice to put the party in a position effectively to prepare his own case and to answer the case he has to meet. It is clear that the party whose interest are affected ought not to be taken by surprise. Further, the rule gives an opportunity to be heard. At the conduct of the hearing there is a duty of adequate disclosure. If relevant evidentiary material is not disclosed to a party who is potentially prejudiced by it, there is prima facie a breach of natural justice.

At the very least it is submitted that the following are basic prerequisites for the observance of natural justice:

(a) the right of access to all evidence prejudicial to the Judge (as is recognised in Clause 17 of the Committee's Guidelines);

(b) the right to cross-examine any witness or person who gives evidence which could reflect upon him adversely;

(c) the right to have any case prejudicial to the Judge closed before he answers any questions himself;

(d) the right to make full submissions by counsel and, if the Judge wishes, to give evidence on his own behalf;

In a case where the Judge voluntarily furnishes a statement at the request of a Committee, the Judge's statement should not be shown to any other witness before the Judge's counsel has an opportunity to cross-examine that witness.

In the absence of these it would be a denial of justice to require the Judge to submit himself for interrogation by the Committee.

Conclusion

In short, it is quite inappropriate, an intrusion upon the independence of the Judiciary, a misconception of Section 72 of the Constitution and a denial of natural justice to attempt to interrogate a Judge whose conduct is being inquired into for the purposes of Section 72 as if he were an ordinary witness in a routine legislative inquiry.

[redacted]

Dated 4 July 1984

DAVID BENNETT Q.C.

[redacted]

ANNABELLE BENNETT

APPENDIX 6 (ii)

IN THE MATTER OF

SECTION 72 OF THE CONSTITUTION

OPINION

1. I am asked the meaning of "misbehaviour" in section 72 of the Constitution, and, in particular, whether misbehaviour for this purpose is limited to matters pertaining to the judicial office in question and conviction for a serious offence which renders the person concerned unfit to exercise the office.

2. So far as relevant, section 72 provides -

> 72. The Justices of the High Court and of the other courts created by the Parliament -
>
> (i) Shall be appointed by the Governor-General in Council:
>
> (ii) 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:

3. Clearly the ambit of the grounds for removal from office embraced by section 72 is limited by comparison with the position of judges under English law. Section 72 gives conscious effect to the principle that the judiciary in our Federal system should be secure in their independence from the legislature and the executive. This was a matter which considerably exercised attention in debates during the drafting processes leading to its final formulation. Quite deliberately, the conventional grounds for termination of judicial tenure were narrowed.

4. The English position is that judges hold office during good behaviour or until removed upon address to the Crown by both Houses of Parliament.

5. Coke described the grant as creating office for life determinable upon breach of condition: Co. Litt. 42a. Now tenure is until retiring age. A judge may be removed by the Crown for misbehaviour (or want of good behaviour) without any address from Parliament. The position as to such misbehaviour is conveniently summarised by Todd, Parliamentary Government in England, ii, at 857-8 -

> '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 conditional 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. Misbehaviour includes, firstly, the improper exercise of judicial functions; secondly, wilful neglect of duty, or non-attendance; and, thirdly, a conviction for any infamous offence, by which, although it be 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. The contrasting Parliamentary jurisdiction to address for removal is described by Todd (at 860) as an additional power unrelated to breach of condition which -

> ... the constitution has appropriately conferred upon the two Houses of Parliament - in the exercise

> of that superintendence over the proceedings of the courts of justice which is one of their most important functions - a right to appeal to the crown for the removal of a judge who has, in their opinion, proved himself unfit for the proper exercise of his judicial office. This power is not, in a strict sense, judicial; it may be invoked upon occasions when the misbehaviour complained of would not constitute a legal breach of the conditions on which the office is held. The liability to this kind of removal is, in fact, a qualification of, or exception from, the words creating a tenure during good behaviour, and not an incident or legal consequence thereof.
>
> In entering upon an investigation of this kind, Parliament is limited by no restraints, except such as may be self-imposed.

7. The position is much the same in Canada: section 99 of the British North America Act provides that judges "shall hold office during good behaviour, but shall be removable by the Governor-General on Address of the Senate and House of Commons". Likewise for the States of the Commonwealth. Indeed, many of the precedents cited by Todd as establishing Crown rights to remove for misbehaviour or upon address by Parliament concern judges with an Australian connection: Justice Willis was removed from the Bench in Upper Canada in 1829 and later from the Supreme Court of New South Wales in 1846; also debate concerning Justice Boothby of the Supreme Court of South Australia, 1861-1867; and Sir Redmond Barry (over the curious issue of taking vacation without leave) 1864-1865, discussed in some detail in Todd, Ch. VI.

8. Todd (at 860-1) emphasises obvious inhibitions upon the exercise of the discretionary powers of Parliament -

> Nevertheless, since statutory powers have been conferred upon Parliament which define and regulate

> the proceedings against offending judges, the importance to the interests of the commonwealth, of preserving the independence of the judges, should forbid either House from entertaining an application against a judge unless such grave misconduct were imputed to him as would warrant, or rather compel, the concurrence of both Houses in an address to the crown for his removal from the bench. 'Anything short of this might properly be left to public opinion, which holds a salutary check over judicial conduct, and over the conduct of public functionaries of all kinds, which it might not be convenient to make the subject of parlimentary enquiry.'

9. Under our Constitution Parliamentary address is the only method for judicial removal. The reason sufficiently is summarised by Quick and Garran, The Annotated Constitution of the Australian Commonwealth, 733-4, under the heading "Reasons for Security of Judicial Tenure":

> The peculiar stringency of the provisions for safeguarding the independence of the Federal Justices is a consequence of the federal nature of the Constitution, and the necessity for protecting those who interpret it from the danger of political interference. The Federal Executive has a certain amount of control over the Federal Courts by its power of appointing Justices; the Federal Executive and Parliament jointly have a further amount of control by their power of removing such Justices for specified causes; but otherwise the independence of the Judiciary from interference by the other departments of the Government is complete. And both the Executive and the Parliament, in the exercise of their constitutional powers, are bound to respect the spirit of the Constitution, and to avoid any wanton interference with the independence of the Judiciary. "Complaints to Parliament in respect to the conduct of the judiciary, or the decisions of courts of justice, should not be lightly entertained ... Parliament should abstain from all interference with the judiciary, except in cases of such gross perversion of the law, either by intention, corruption, or incapacity, as make it necessary for the House to exercise the power vested in it of advising the Crown for the removal of the Judge". (Todd, Parl. Gov. in Eng., i. 574.)

Hence the structure of the Constitution itself explains this direct limitation upon the power of judicial removal. The desire is to protect the judiciary as the interpreters of the Constitution.

10. Clearly section 72 excludes all modes of removal other than the one mentioned. This deliberate limitation, apparent from the terms of the section, is emphasised by permissible consideration of legislative history. To paraphrase what Stephen J. said in Seamen's Union of Australia v. Utah Development Co., (1978) 144 C.L.R. 120, 142-4, it is from the successive drafts of the Bills which ultimately became our Constitution that the true role of section 72 emerges; its history and origins cast light upon meaning, the precise effect of which may otherwise be subject to some obscurity.

11. The first draft of the Commonwealth Bill of 1891 departed from English and colonial precedent and tied revocation of office held during good behaviour to address from both Houses. At Adelaide, in the 1897 Bill, this intention was made clear. In committee, tenure was further secured by resolution to limit parliamentary power of intervention to cases of misbehaviour or incapacity. The clause read:

> 72. The Justices of the High Court and of the other courts created by the Parliament:
>
> ~~(i) Shall hold their offices during good behaviour;~~
>
> (ii) Shall be appointed by the Governor-General in Council:

(iii) Shall not be removed except for misbehaviour or incapacity, and then only by the Governor-General in Council, upon an Address from both Houses of the Parliament in the same Session praying for such removal.

In the Melbourne session on the 31st January 1898 Mr Barton successfully moved that tenure be further secured by providing that a parliamentary address must pray for removal "upon the grounds of proved misbehaviour or incapacity".

12. Although their Honours regarded it as unnecessary then to consider the extent to which the Debates may be regarded in the construction of the Constitution, in Re Pearson; Ex parte Sipka, (1983) 57 A.L.J.R. 225, 227, Gibbs C.J., Mason and Wilson JJ. accepted Griffith C.J.'s dictum in The Municipal Council of Sydney v. Commonwealth, (1904) 1 C.L.R. 208, 213-214, that it is permissible to have regard to Convention Debates, "for the purpose of seeing ... what was the evil to be remedied". Perusal of the Adelaide and Melbourne Convention Debates confirms the extent to which the delegates desired to deal with the need adequately to safeguard the independence of the judiciary as an essential feature of the separation of powers in the Federal system. Todd's summary of the English position (set out in paragraph 5 above), which was read by Mr. Isaacs at Adelaide on 20th April 1897 (Convention Debates 948-9), was the received meaning of misbehaviour. Each of the successive amendments to the draft clause was intended further to limit, for the purpose of the

Constitution, the power of removal to a single specific and narrow basis related solely to the established ground of removal for breach of condition for good behaviour. The general discretionary power of Parliament to address for removal on grounds other than misbehaviour, in the technical sense understood by the delegates, was eliminated; with the function of finding such misbehaviour vested in the Parliament rather than in the Executive.

13. What then is proved misbehaviour or incapacity? Incapacity is easily dealt with: it extends to incapacity for mental or physical infirmity, which always has been held to justify termination of office: see Todd, at 857. The addition of the word "incapacity" does not alter the nature of the tenure during good behaviour; it merely defines it more accurately: see Quick and Garran, at 732.

14. As noted in paragraph 5 above, Todd, at 857-8, purported exhaustively to define misbehaviour as breach of the condition for judicial office held "during good behaviour" as including -

(1) the improper exercise of judicial functions;

(2) wilful neglect of duty or non-attendance; and

(3) the conviction for any infamous offence, by which, although it be not connected with the duties of his office, the offender is rendered unfit to exercise any office or public franchise.

Todd's commentary, at 858, was that the decision of whether the first category of misbehaviour is constituted rests

with the Crown. However in the case of the third category, misconduct outside the duties of office, he stipulated misbehaviour must be established by previous conviction by a jury. Similarly Halsbury's Laws of England, 4th ed, viii, para. 1107, which accepts Coke's statement that "behaviour" means behaviour in matters concerning the office and also the exceptional case of conviction upon indictment for any infamous offence of such a nature as to render the person unfit to exercise the office. Much might be said as to the received meaning of infamous offence. It is discussed in R. v. Richardson (1758) 1 Burr. 517, in the context of removal from office. Bacon's Abridgement, 7th ed., iii, 211 regarded such offences as embracing convictions for treason, felony, piracy, praemunire, perjury, forgery, and the like, together with crimes with penalty "to stand in the pillory, or to be whipped or branded". All this is somewhat archaic for contemporary definition. Maxwell J. in In re Trautwein, (1940) 40 S.R. (N.S.W.) 371, warned against exhaustive definition, and adopted the sensible approach of having regard to the nature and essence of a proved offence without attempting a definition or enumeration of the crimes which fall within the expression. To his Honour (at 380) infamous crime was one properly described as "contrary to the faith credit and trust of mankind". Such ambulatory approach seems appropriate to give continuing content to any limitation expressed by reference to infamous offence, although it certainly does not close the otherwise open texture of meaning.

15. However defined, Todd's third category of breach of condition for office held during good behaviour requires conviction for offence. Hence it is curious that, without comment, Quick and Garran (at 731) accept Todd's three categories as defining misbehaviour for the purposes of section 72. However a definition requiring conviction for offence in misbehaviour not pertaining to office does not rest easily with Quick and Garran's clear recognition of the essential limitation of section 72 requiring address of Parliament upon the proved ground of misbehaviour as the sole basis for removal (at 731) -

> The substantial distinction between the ordinary tenure of British Judges and the tenure established by this Constitution is that the ordinary tenure is determinable on two conditions; either (1) misbehaviour or (2) an address from both Houses; whilst under this Constitution the tenure is only determinable on one condition - that of misbehaviour or incapacity - and the address from both Houses is prescribed as the only method by which forfeiture for breach of the condition may be ascertained.

Obviously "proved misbehaviour" is to be established to the Parliament and, whatever the offence, such proof is not predicated upon anterior conviction in a court of law.

16. The ultimate requirement of section 72 is for address upon "proved misbehaviour". Quick and Garran's views (at 732) are -

> No mode is prescribed for the proof of misbehaviour or incapacity, and the Parliament is therefore free to prescribe its own procedure. Seeing, however, that proof of definite legal breaches of the conditions of tenure is required, and that the enquiry is therefore in its nature more strictly judicial than in England, it is conceived that the procedure ought to partake as far as possible of the formal nature of a criminal trial; that the charges should be definitely formulated, the accused allowed full

> opportunities of defence, and the proof established by evidence taken at the Bar of each House.

Odgers, Australian Senate Practice, 4th ed., 598, suggests, without discussion, that the probable procedure would be by way of joint select committee, with the accused being allowed full opportunities to defend himself. However it is difficult to see how Parliament adequately could discharge its obligation to address upon "proved" misbehaviour if the trial function were to be delegated (cf. FAI Insurances Ltd. v. Winneke (1982) 41 A.L.R. 1, 17 per Mason J., discussing delegation of enquiry by Governor-in-Council). Todd, ii, 860-875, requires "the fullest and fairest enquiry into the matter of complaint, by the whole House, or a committee of the whole House, at the Bar; notwithstanding that the same may have already undergone a thorough investigation before other tribunals" such as a select committee.

17. Inasmuch as the Convention Debates reveal mischief intended to be dealt with, clearly it was contemplated that Parliament could fix its own procedures: see Convention Debates, 20th April 1897, 952, (Mr Isaacs and Mr Barton) and 959-960 (Mr Kingston). At the Melbourne Convention it was made clear that the judge would be entitled to notice and to be heard: (see Convention Debates, 31st January 1898, 315, (Mr Barton)). Hence Parliamentary discretion as to mode in which power should be exercised is in the context of obligation that charges be formulated, and full opportunities for defence be furnished, before finding of proved misbehaviour.

18. Quick and Garran reject any analogy between the Parliamentary discretion to address on grounds which do not constitute a legal breach of the condition on which office is held and the position which obtains under section 72. After reciting Todd's summary of the discretion in Parliament and in particular his conclusion that Parliament is "limited by no restraints except such as may be self-imposed" (set out in paragraph 6 above), the authors note (at 731) -

> These words are quite inapplicable to the provisions of this Constitution. Parliament is "limited by restraints" which require the proof of definite charges; the liability to removal is not "a qualification of, or exception from, the words creating a tenure," but only arises when the conditions of the tenure are broken; and though the procedure and mode of proof are left entirely to the Parliament, it would seem that, inasmuch as proof is expressly required, the duty of Parliament is practically indistinguishable from a strictly judicial duty.

19. The conferring of exceptional function to find proved misbehaviour is not equated to vesting discretion in Parliament to define misbehaviour constituting breach of condition of office. The general power of a Parliament to address for removal where there is not technical misbehaviour is negated by section 72. The power is limited to address only upon proof of misbehaviour, and neither House is at large to define and recognize misbehaviour as it pleases. Misbehaviour, as a breach of condition of office in matters not pertaining to the office, has a meaning related to offences against the general law of the requisite seriousness to be described as infamous. To this extent it has an ascertainable

meaning, even if content varies in particular circumstances. In consideration of the issue of proved misbehaviour Parliament is obliged to apply this meaning.

20. The inquiry is whether the offence is of such nature as to render the person unfit to exercise the office, although it is not committed in connection with the office. The notion that private behaviour may affect performance of official duty was expressed by Burbury C.J. in Henry v. Ryan, (1963) Tas. S.R. 90, 91:

> ... misconduct in his private life by a person discharging public or professional duties may be destructive of his authority and influence and thus unfit him to continue in his office or profession.

Sir Garfield Barwick, in opinion of 18th November 1957 on clauses of the Reserve Bank, Commonwealth Bank and Banking Bills of 1957, dealing with office held "subject to good behaviour", wrote -

> Good behaviour ... refers to the conduct of the incumbent of the office in matters touching and concerning the office and its due execution, though the commission of an offence against the general law of such a nature as to warrant the conclusion that the incumbent is unfit to exercise the office would be a breach of the condition of good behaviour even though the offence itself was unrelated to the duties and functions of the office ...
>
> There is, in my opinion, no significant difference between a condition of good behaviour and a condition against misbehaviour. Indeed, in the older books the word "misbehaviour" is often used as synonymous with a breach of good behaviour. Thus, the "misbehaviour" in the Bill will be held to refer to conduct touching and concerning the duties of the member in relation to the office, but will also include acts in breach of the general law of such a quality as to indicate that the member is unfit for office.

I concur with this opinion. It represents a contemporary statement of the quality of offence not pertaining to office which may constitute misbehaviour. As discussed in paragraph 14 above, the content of offence so expressed is much the same as what may now be understood as embraced by infamous offence.

21. It follows that the terms of section 72 dictate meaning for "proved misbehaviour". The fundamental principle of maintaining judicial independence is recognized by excluding all modes of removal other than for misbehaviour as a breach of condition of office. In matters not pertaining to office, the requirement is not conviction for offence in a court of law. Inasmuch as Parliament considers the matter, the question is whether there is proved offence against the general law "of such a nature as to warrant the conclusion that the incumbent is unfit to exercise the office". Parliament is not at large to define proved misbehaviour by reference to its own standards or views of suitability for office or moral or social character or conduct. The Parliamentary enquiry is whether commission of an offence of the requisite quality and seriousness is proved. Parliament would act beyond power if it sought to apply wider definition or criteria for misbehaviour than the recognized meaning of misbehaviour not pertaining to office.

22. Parliament has, of course, a residual discretion not to address for removal, even if proved misbehaviour is found.

23. Accordingly the question asked in paragraph 1 is answered -

Misbehaviour is limited in meaning in section 72 of the Constitution to matters pertaining to -

(1) judicial office, including non-attendance, neglect of or refusal to perform duties; and

(2) the commission of an offence against the general law of such a quality as to indicate that the incumbent is unfit to exercise the office.

Misbehaviour is defined as breach of condition to hold office during good behaviour. It is not limited to conviction in a court of law. A matter pertaining to office or a breach of the general law of the requisite seriousness in a matter not pertaining to office may be found by proof, in appropriate manner, to the Parliament in proceedings where the offender has been given proper notice and opportunity to defend himself.

[redacted]

SOLICITOR-GENERAL

CANBERRA

24th February 1984.