**WILL NO-ONE RID US OF THIS TROUBLESOME JUDGE?[[1]](#footnote-1)**

***JEAN ELY***



**Justice Lionel K. Murphy and his wife Ingrid in the garden of their Canberra home**

**Photograph taken by Polexini Papapetrou
October 1985.**

On September 17, 2017, for those of us whose lives spanned the second half of the twentieth century, ghosts of ‘The Murphy Saga’ were raised with a vengeance.[[2]](#footnote-2) Class A records of the Commonwealth Parliamentary Commission of Inquiry established in May 1986 to investigate allegations concerning the conduct of Justice Lionel Keith Murphy of the High Court of Australia, were published on the Parliamentary website.[[3]](#footnote-3) The Commissioners , Sir George Lush, Sir Richard Blackburn and The Honourable Andrew Wells QC, like Justice Murphy himself have all ‘gone to their reward’. But in September 2017, Australian media went into overdrive. It was as if even the *ghost* of Lionel Murphy had to be exorcised from the High Court of Australia.

Little was said about the Class B documents released on 16 December 2016 or the report of the Commission consisting of the legal findings on the meaning of ‘proved misbehaviour’ of a judge which had been on the public record since 21 August 1986.[[4]](#footnote-4) “Misbehaviour” of the judge in question had never been proved and Murphy went back to the High Court, then died. His critics hoped he also had been removed into the dustbin of history, but still felt the need to justify their position. Reporting on the Class A documents in September 2017, the *Sydney Morning Herald* presented the unproved allegations listed in them as ‘misbehaviour’. They also misrepresented plain statements of fact. [[5]](#footnote-5) Trial by media continued on.

If the Class A documents are placed with the Class B documents and the 21 August 1986 Report of the Commissioners to Parliament the issues are much wider than media scuttlebutt. They go to the heart of our democratic processes, the separation of powers, the independence of the judiciary and the removal process for a troublesome High Court Justice under Section 72 of the Constitution.

And History remains troublesome, even if journalists have forgotten nothing and learnt nothing.

Decades later, and despite many books written on Lionel Murphy’s contribution to jurisprudence and social justice in Australia, the media campaign against Murphy has perhaps succeeded. Murphy himself has no natural justice – a right to be heard and answer all charges against him. Lionel Murphy’s son Cameron, now a barrister in Sydney, agrees. He described the release of the "never tested" allegations as "grossly unfair".[[6]](#footnote-6)

Unfinished business.

Murphy still has a voice. And he is still able in effect, to define the real issues above the media hype and hubbub. It is like this.

On 19 July 1985 an historian and three lawyers - Richard Ely and Ray Nilsen, Poli Papapetrou, and the present writer, put a full page advertisement in the Australian newspaper. Richard and Ray appreciated Murphy’s constitutional judgements; Poli, was an evidence expert; and I had been comforted by Murphy’s realistic dissenting judgements on taxation avoidance. We were all disgusted by the behaviour of the legal establishments and wanted to let him know that we had no part of it. The advertisement was censored but we got most of it through. It was a bad day in court for Murphy. He rang that night in tears. ‘It meant a lot for the children’ he said. He wanted to meet us.

In October 1985 we spent some hours with Justice Murphy in Canberra, deciding on the judgements for the book we had decided to produce. He was a ‘people’ person, gregarious, outgoing, wanting to inform, full of faith in human nature. His hand reached out and was placed on my arm as he expressed himself. I asked him what was going on. He thought carefully, then gave me a number of reasons for his predicament.

1. ‘The Fairfax media printed the story about the *Age* tapes,’ he said ‘ and it got out of hand’. Then
2. ‘It was the ‘Comalco’ case’ he said. This was a transfer pricing tax avoidance scheme and he had called it for what it was.[[7]](#footnote-7) Then
3. Read Bertram Gross’ ‘*Friendly Fascism: The New Face of Power in America*’ he said. He thought it made sense of what was happening in his own country. (I have read it. He was prescient on this.)
4. Finally, many hours later, Lionel Murphy was prepared to refer obliquely to the behaviour of the right wing faction of the Labor party. He spoke about the complications of the Croatian terrorist issues and was unapologetic about assertion of his then ministerial authority over ASIO.

We went into his garden to take photos. Poli, a beautiful Greek girl who later became a world famous photographer and has recently died, looked at Ingrid Murphy and said: ‘They could not forgive him for having such a beautiful wife.’

The elder son, Cameron, was in the garden. I chatted with him.

‘They do not want him to become Chief Justice’ he said.

Less than a year and many ongoing trials later, in 1986, Murphy had weeks to live. He had been acquitted and there was no proof against him of any ‘misbehaviour’. Only allegation after rumour after allegation remained. He announced that he would go back to sit on the Court.

As soon as Murphy took his place on the Bench that morning, Friday 1 August, Chief Justice Gibbs himself tried to get rid of the ‘troublesome’ judge.

He released a statement: *'It is essential the integrity and reputation of any justice of this court be seen to be beyond question. That being so, I regard it as most undesirable that Justice Murphy should sit while matters into which the Commission is inquiring remain unresolved, and before the Commission has made its report. Nevertheless, in the circumstances ... I do not regard it as appropriate to do more than express that view'.[[8]](#footnote-8)*

Murphy then released the statement concerning his health and his intention to remain sitting on the court .His statement also said that the allegations given him between 15 July and 30 July were*: 'in my view... either untrue or do not constitute misbehaviour. I have already been cleared of many of them by the unanimous decision of the first Senate Committee. In all the circumstances, I do not propose to attend any further proceedings of the Commission'.*

The Parliament disagreed with the Chief Justice and Lionel Murphy sat again on the High Court bench. The historian, Manning Clark, along with others, was there to greet him.

Later in the day, Murphy released the letter he had earlier that day sent to Gibbs. It said:

*Dear Bill,*

*I find it extraordinary that you propose to make a news release, especially one in the terms set out in your letter. Although you described it as uncontroversial, it would inevitably provoke an intense public controversy involving you, me and the court. If you do so, this would be the second time within weeks that such a controversy has been provoked. In May, the Government, through two ministers, informed me that you had said that if I resumed sitting, the court would or might go on strike. I now know that most members of the court had not even contemplated such a course. However, I have not heard any public denial by you, although the matter has been widely reported.* ***Your statement questions whether I have a constitutional right to sit on the court. The plain constitutional position is that the justices, when appointed to the court, have a right to sit until death, resignation or removal under s.72 (on the grounds only of proved misbehaviour or incapacity). It is not for the Chief justice or any Justice to decide whether it is undesirable for any other Justice to sit on the court. It is improper for one judge to publicly express an opinion on the desirability of another to continue as a Justice or to exercise his functions as a Justice. This is at the foundation of the independence of the judiciary. It has been part of Australia's judicial history that a number of appointments to the High Court have been attacked and the integrity and reputation of the appointees have been questioned in and out of Parliament, and occasionally by resolutions of Bar councils. If your contention is correct, it would follow because the Justice's integrity and reputation has been questioned, he should not continue as a judge of the court. Nothing could be more calculated to undermine the independence of the judiciary. It would encourage the promotion of campaigns against judges, and not only those newly appointed. For a Chief Justice to state that, if there is a question about a Justice's reputation or integrity, or if there is an inquiry into a judge's conduct, he should not continue as a justice, undermines the independence of every federal judge.*** *Significantly, you made no such suggestion when the two Senate inquiries were in progress, the second of which included parliamentary commissioners. During both of those inquiries I sat and decided cases. You refer to the undesirability of sitting before the Commission makes its report. As I informed all members of the court, my advice is that there is no reasonable prospect of the Commission reporting by the due date of 30 September. Even if an extension were granted, I am advised that the probability is that the Commission would not report before the end of this year. I wish to avoid any public controversy with you, as this will inevitably encourage others who will be only too anxious to feed on such a controversy. But if you issue the news release I will answer along the lines of this letter, or release the letter. As you suggested, my staff have informed yours of the cases in which I propose to sit.*

*Yours sincerely, Lionel[[9]](#footnote-9)*

On 11 and 18 August 1986 cabinet decided to wind up the parliamentary commission. It was to report and its records embargoed for thirty years..

So there we have it. Murphy has defined what he believed to be the real issues arising from the Class A – and the Class B documents from the Parliamentary Commission enquiry.

The issues defined by Murphy in his last days have been ignored in the latest media uproar.

The issues?

The Independence of the Judiciary[[10]](#footnote-10) with its corollary - the separation of powers under Section 71, 72, 76 and Section 49 of the Constitution and - most particularly, the removal of High Court Justices under Section 72 of the Constitution.

This failure of the media would have saddened Murphy. Lawyers and judges have discussed these issues[[11]](#footnote-11) but the media have failed to inform the citizenry. Their nineteenth century forebears and their readership were better informed.[[12]](#footnote-12) But then, there were at least five Supreme Court judges who lost their position in the colonial period.

The Murphy case ended a long, untroubled period of judicial independence for the Australian judiciary since Federation. Judges in the federal sphere and in some States like New South Wales, were protected by constitutional clauses. But it was not always so. During the colonial century a number of judges were removed And after the Murphy matter, Commission findings on the meaning of ‘misbehaviour’ in the Class B documents opened, if not the floodgates, a spate of removals from State courts. It also led to an unsettled federal judiciary with the Staples case. [[13]](#footnote-13)

**Colonial Australia**

It is now taken for granted in the United Kingdom, the United States of America, New Zealand and Australia that the independence of the judiciary from the executive is an essential element of the rule of law. It is secured by the holding of office during good behaviour and by the requirement that judges can only be removed by an address of the legislature. [[14]](#footnote-14)

But it was not always so.

The traditional starting point for a discussion of the independence of the judiciary is the political struggles, involving the Stuarts and their overthrow, culminating in the British *Bill of Rights* of 1690 and the *Act of Settlement* of 1701. It was by this means that the tenure of a judge's office ceased to be dependent upon the will of the King. Judges retained office during good behaviour and were liable to be removed only upon an address by both Houses of Parliament. Their salaries were to be "ascertained and established". The security obtained has been regarded as the cornerstone of judicial independence. [[15]](#footnote-15)

The Act of settlement was not received as part of the law when the Australian colonies were established. Under the New South Wales Act of 1823 judges held office only at pleasure, being removable by the Crown ‘as occasion may require’.

At the beginning, executive control over the judiciary was near absolute with the local legislature reduced to making complaints to London. There was keen appreciation in the local population of the value of judicial independence. This explains the fierce reaction by the local media in favour of judges thought to have been bullied by Governors.[[16]](#footnote-16) Even after the introduction of responsible government, however, the British insisted that the Imperial law prevailed over colonial legislation and *Burke’sAct* [[17]](#footnote-17)applied to the removal of a judge. This Act provided grounds for removal, equating the judges with civil servants who were removable at pleasure. This meant that power of removal was still in the hands of the local executive, acting as both judge and jury in these matters.

The first instance of removal of a judge in colonial Australia was that of Justice Willis of the Supreme Court of NSW in June 1843. As the resident judge for the district of Port Philip, Willis was removed from office by Governor Gipps because of his ‘foibles, idiosyncrasies and cantankerousness on the Bench and elsewhere’. His removal was the ‘only means of restoring peace and tranquillity to the district.’ Willis was successful in his appeal to the Privy Council which found that, while there were sufficient reasons for his removal, Willis should have been given a proper hearing. [[18]](#footnote-18) The Privy Council held that the Act of the Imperial Parliament the *Colonial Leave of Absence Act*1782, namely, *Burke’s Act,* applied to the removal of colonial judges. [[19]](#footnote-19)Under that Act judges were liable to removal or ‘amoval’ by the Governor in Council on the ground of either wilful absence, neglect of duty or misbehaviour. But they had an appeal to the Privy Council.

When the Australian eastern colonies wrote their own constitutions in the 1850s, they wrote the 1701 Act of Settlement procedures into their Constitution Acts, but the Imperial *Burke’s Act* still held sway. [[20]](#footnote-20)

The Tasmanian story of Algenon Montagu is of particular interest, since it is mentioned as a precedent in the Class B legal documents of the Commission. The most interesting aspect of this case however, is the historical rather than legal context. The legal case mentions only the fact that Montagu had severe

financial embarrassment and this was a ground for dismissal. . But there was a lot more to it.

In 1847, as a judge in the Van Dieman’s Land Supreme Court, Algernon Montagu was pursued by a creditor in his own court, and wrongly claimed immunity from suit. He was eventually removed on this basis. His appeal to the Privy Council failed. [[21]](#footnote-21)

There was a political context to Montagu’s removal from office. This is outlined in a 1966 article by P.A. Howell, ‘The Van Dieman’s Land Judge Storm’, He tells us that when the creditor first complained to the Lieutenant-Governor Sir W.T. Denison, the Governor did not take the matter seriously until Montagu and Chief Justice Pedder questioned Denison’s new tax under the Dog Act. The Governor, an army engineer, considered that civil government could function with the discipline of a well ordered regiment. Montagu was removed. Pedder who was suspended, eventually survived. The Hobart media took the part of the judges.[[22]](#footnote-22)

In the 1860s a crisis in South Australia came to a head over Mr Justice Benjamin Boothby. He refused to give effect to colonial legislation which he considered contrary to the common law of England. Ultimately, he too was removed from office. The debate over his assertions led, in part, to the *Colonial Laws Validity Act* 1865 (Imp) making clear the primacy of local legislation. [[23]](#footnote-23)

In 2008 Justice Keifel entertained her audience of lawyers in Townsville with the story of Pope Cooper, a Northern Judge based in Bowen, who in 1883 had his circuit expenses questioned by the Queensland executive led by the Premier, Samuel Griffiths. Cooper’s detractors in Parliament complained that he threw too many picnic parties and was overgenerous with champagne and ice. When he received no assurance that funds would be voted to provide for circuit expenses, he sent a telegram threatening to release all the prisoners awaiting trial - on the basis that they were entitled to a trial or to be discharged. He reconsidered his decision before the steamer left for Brisbane. Griffiths considered a Commission of Enquiry, but thought better of it when the media considered it an attack upon the independence of the judiciary. [[24]](#footnote-24)

So, when Sir Samuel Griffiths, and others went to the Constitutional Convention in Adelaide in 1897 and Melbourne in 1898 they had a clear understanding of the difference between the independence of judges in colonial Australia and that under the Act of Settlement 1701 in Great Britain.

Their intention when they inserted Section 72 in the Australian Constitution became a matter for interpretation by the Commissioners in July 1986 in the Murphy case. This is what the Class B documents are about.

The extraordinary thing about the nineteenth century cases is the part played by the media. There was resentment against governors who infringed upon judicial independence in a political context of frequent demands for responsible government. There were many legally learned letters to the Press and comparably learned editorials. [[25]](#footnote-25)

**How Could a High Court Justice be Removed in 1975?**

In his career as barrister, Senator, and Attorney - General, Lionel Murphy had been extraordinarily successful in both changing the legal and legislative landscape in industrial relations, family law, trade relations and environmental law. In the process he made loyal friends and implacable enemies.

From associated controversy, one can infer that, surrounding his appointment to the High Court in February 1975 [[26]](#footnote-26)until his death, Murphy’s position on the High Court was never accepted by powerful factions within the Melbourne and Sydney political, legal, and religious establishments.

In 1975 a section of the Victorian Bar Council unsuccessfully sought to move a motion

‘that positions on the bench be offered only to persons who are pre-eminent within the legal profession and whose fitness for office is not a matter of public controversy.’

They despatched a barrister to Canberra to find some information which could be used to embarrass Murphy into resignation. [[27]](#footnote-27)

As early as 1976 Paul Kelly, referring to his appointment to the High Court wrote in his book ‘*The Unmaking of Gough*,’

The Murphy affair left a deep impact on the Liberals. There are many of them today still working against Murphy and prepared to lay money that he will not survive on the High Court bench.[[28]](#footnote-28)

Garfield Barwick refused to speak to Murphy as a colleague, and after the Whitlam dismissal of November 1975, resisted him on both a personal and ideological level,[[29]](#footnote-29). The erstwhile Coalition Attorney General, Ivor Greenwood [[30]](#footnote-30) and his successor in the Fraser ministry, Robert Ellicott, [[31]](#footnote-31) detested Murphy. Feelings were mutual.

**The Sankey Case**

The first attempt to get rid of Murphy for ‘misbehaviour’ under Section 72 of the Australian Constitution was the 1975 Danny Sankey private prosecution. Sankey, as a private citizen, alleged a criminal conspiracy against Whitlam, Murphy, Connor, Cairns, and Kerr, in relation to their seeking of overseas loans. This was thrown out of court in late 1978. If successful Sankey’s prosecution would have affected the Murphy High Court appointment. Murphy himself described the case as ‘malicious’. [[32]](#footnote-32)

Morgan Ryan was the solicitor for Jim Cairns in this case. Donald Thomas a Commonwealth police officer led the police investigation into the Labor Party’s attempts to use Iraqi sources for fund-raising in 1975. This investigation was authorised by the Attorney-General in the Fraser Government, Robert Ellicott, in support of the Sankey prosecution. Donald Thomas appears again in the Murphy saga as the key witness in an allegation of bribery against Justice Murphy in the 1986 Class A documents.

Transcripts of illegal police telephone tapping of Morgan Ryan (The **Age** Tapes) commenced soon after the completion of the Sankey matter. In these transcripts Murphy was suggesting a case for malicious prosecution against Sankey and Ellicott to Morgan Ryan. (See later Allegation 8 Class A documents)

**Garfield Barwick, and the Mundroola matter**

The relationship between Murphy and Barwick deteriorated further after 1980 when the [[33]](#footnote-33)shadow Attorney General, Gareth Evans, tabled material in the Senate alleging irregularities and a conflict of interest on Barwick’s part. Barwick’s family company, Mundroola Pty Ltd, which owned Barwick’s home in Sydney, had failed to lodge annual returns with the Corporate Affairs Commission for six years. Brambles appealed to the High Court against a decision by the Commissioner of Taxation to disallow its claim for a payroll tax rebate. Barwick did not declare his association with Mundroola. Nor did he offer to step down from the case. The court found in favour of Brambles, and Justice Lionel Murphy was in dissent.[[34]](#footnote-34)

Gareth Evans, remembering the Sankey prosecution against Murphy, Whitlam, Cairns and Connor, indicated that he would seek evidence which could be used to charge Barwick under s 34 of the Crimes Act.[[35]](#footnote-35) Evans did not have the support of the right wing ‘groupers’ within the Hawke Labour government and Barwick survived to retire in peace in 1981. But, as Jenny Hocking wrote:

The Mundroola Affair ‘ cemented the bitter party hatreds on the court and bolstered the view that claim, allegation and rumour made initially in the parliament might ultimately lead to charges being laid to effect the removal of an unwanted justice from the bench.[[36]](#footnote-36)

Murphy survived attempts to remove him until 1983. He made a distinct mark with many dissenting judgements and by 1983 may have felt secure. Although the Fraser Government Attorney General, Robert Ellicott had lobbied hard to replace his cousin, Garfield Barwick on the bench, he failed. Justices Deane and Brennan joined Murphy on the bench, and the court’s literalist approach to tax cases changed. Murphy was no longer a lone voice against the tax avoidance industry. The Family Court was operating and it had been some time since bombs had been thrown at its judges or Yugoslav nationalists. Linda Chamberlain was still in jail, and the aboriginal native title matters were unresolved, but Murphy’s opinions were having an effect. He was even being openly canvassed by legal friends as a possible successor to Chief Justice Gibbs when he retired in 1987. Murphy’s long standing relationship with Attorney-General Gareth Evans, fuelled this speculation.

 This promotion could not be.

How could Murphy’s critics get rid of him? They were confronted by Section 72 (ii) of the Australian Constitution namely:

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:**

Justice Murphy could thus only be removed on the ground of ‘proved misbehaviour or incapacity’ . This was a procedure undertaken by both Houses of Parliament and the Governor in Council.

What constitutes ‘proved misbehaviour’? Who decides on its meaning? The Parliament? The High Court? The 1986 Parliamentary Commissioners making Rulings on the matter in the Class B documents?

If it has a narrow, legal, technical meaning, a proved criminal charge during Justice Murphy’s time in office would be required.

If it has a broad, ‘contemporary values’ meaning, then any behaviour of the Judge both before and during office which constituted conduct contrary to ‘accepted standards of judicial behaviour’ would be enough.

Narrow the definition and you would have to get a criminal conviction during the time of office. Broaden it, and behaviour which merely offends ‘contemporary values’ is enough.

This is what the December 2016 Class B documents - legal Memoranda and Rulings on the meaning of Misbehaviour together with the Class A ‘allegations’ files released September 2017 are about.

As an historian I waded through all the Class A and Class B documents released on September 17, 2018, trying to make sense of seventy-four files, more than 1700 kilobytes of data in PDF format in the Class A documents alone. They are a jumble of typed memoranda, handwritten notes, correspondence, photocopies, extracts or transcripts from records of interview which are not always identified, together with excerpts from Hansard, the *National Times* and *Age* newspapers and even Penthouse magazine.[[37]](#footnote-37) A who-dunit film maker could identify a caste of hundreds if not thousands.

As a lawyer I could identify prosecutors trying to run a case: gather evidence, credible witnesses, against Justice Murphy and legal arguments for a High Court Hearing on the meaning of ‘misbehaviour’ into which they could fit the listed allegations.

The case they were preparing for was set down for Hearing on 7-8 August 1986 in the High Court sitting in Brisbane. Why this High Court Hearing? Justice Murphy was questioning both the credibility of their witnesses and the constitutional validity of the Parliamentary Commission itself. And the legal elephant in the room for all parties was the puzzle of the meaning of ‘proved misbehaviour. And only the High Court can decide on constitutional matters.

Between 1983 and 1986 there were at least five attempts to remove Justice Murphy from the High Court with allegations of ‘misbehaviour’. The 1986 Parliamentary Commission had access to all the documentation and legal Memoranda of the previous attempts together with allegations which anyone wished to make in response to an Advertisement.

**Commonwealth Senate Select Committee on the Conduct of a Judge, 22 March 1984**

If the Sankey case was the first, the second attempt to dislodge Murphy began with the cover story of the *National Times* in November 1983, and the famous or infamous, depending on your point of view, *Age* tapes.[[38]](#footnote-38) Since 1983, transcripts and summaries of tapes, the originals of which disappeared, have provided salacious fodder describing the demi-monde of inner Eastern Sydney. The surviving material attracts arguments as to the authenticity of the documents themselves. [[39]](#footnote-39)

The original tapes appeared to be illegal interceptions of conversations on the phone of Morgan Ryan. In the 1950s and 60s Ryan had briefed Murphy in cases against the Victorian Racing Club and members of Grouper Unions.[[40]](#footnote-40)Ryan was also the solicitor for Jim Cairns in the Sankey case. Most of the tapes themselves were never produced. The one which was, was said to be a third generation tape. There were pages of transcripts – with guesses where the tape was inaudible - or summaries. A very few of these referred to conversations between Ryan and Justice Murphy. It was claimed that they were police intelligence reports. These ‘tapes,’ or rather, their transcripts, formed the basis of attempts to remove Lionel Murphy from the High Court. But all enquiries found problems with the tapes as evidence. A police and prosecutorial investigation was unable to conclude that the materials on which the reports were based were authentic and regarded them as have ‘no probative value’. [[41]](#footnote-41)

The Hawke Government did not have a majority in the Senate and could not stop an enquiry into Murphy’s conduct, namely the Commonwealth Senate Select Committee on the Conduct of a Judge. [[42]](#footnote-42) The Committee which had an inquisitorial, non-judicial function, advertised in the press’ to invite any person who had any evidence….to come forward and give that evidence’.[[43]](#footnote-43) But they could not verify the Age tapes, and found no evidence of conduct constituting ‘misbehaviour’. They unanimously found that the tape that survived was ‘most likely at least a third generation tape’, and the transcripts and summaries were partial, disjointed, and incomplete. The finding was that:

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 can be drawn from it. [[44]](#footnote-44)

Justice Murphy provided a written response, but refused to appear before the Committee. He said he regarded it as a violation of the rules of natural justice.

**Submission on Meaning of Misbehaviour from Dr Gavan Griffith 24 February 1984**

A Memo of Advice on the meaning of ‘misbehaviour’ had been obtained by the Attorney General from the Solicitor General Dr Gavan Griffith dated 24 February 1984. This Memo is also contained in the Class B Parliamentary Commission documents. [[45]](#footnote-45) Griffiths argued that the framers of the Australian Constitution deliberately narrowed the conventional grounds for ‘termination of judicial tenure’. ‘Misbehaviour was limited to matters related to judicial office or 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. The Judge had to be given proper notice and defend himself.

On this advice, evidence of a criminal matter and a strong witness were required.

In the course of the enquiry the Chief Stipendary Magistrate of NSW, Clarence Briese gave evidence inferring that Murphy had attempted to interfere in a proceeding for the committal of a Solicitor, Morgan Ryan. Although the inquiry found that Briese’s evidence did not establish a prima facie case, [[46]](#footnote-46) a third attempt was made to remove Murphy from the Court.

**Second Senate Committee : Select Committee on Allegations Concerning a Judge: September – October 31 1984**

Another Senate Committee to enquire into matters raised by Mr Briese was established. A second allegation came from Judge Paul Flannery –the judge in the Ryan trial. He claimed that Murphy had attempted to influence the outcome of Ryan’s trial in an immigration matter. This committee conducted its procedure like a court and departed from Parliamentary norms. Two Commissioners, retired Supreme Court judges, were appointed to assist the Committee. They had the right to examine witnesses and recommend to the committee that particular witnesses be summoned. Chief Magistrate Clarence Briese proved a robust witness, under cross-examination, and media comments from the Premier, Neville Wran.

 Justice Murphy was invited but refused to attend the Committee Hearings. His view was that a general election was about to be held and the Senate as then constituted could not and should not take any further action in relation to him.

Both Commissioners found that the actions of Mr Justice Murphy ‘had a tendency to pervert the course of justice.’

In May and August 1984 three more legal Memoranda of Advices on Section 72 of the Constitution were made available to the Second Senate Committee. They also are found in the Class B documents of the 1986 Parliamentary Commission of Enquiry. Hey are:

**Non-Technical Broad Meaning of Misbehaviour: Written Submission of C.W. Pincus QC dated 14 May 1984.[[47]](#footnote-47)**

Pincus took a broad view of the meaning of ‘proved misbehaviour’ in a Judge. He contended that whether any conduct alleged against a judge unrelated to his judicial office constituted misbehavour, was a matter for Parliament. He cast doubt upon the theory that there was an intention among the delegates to the 1897 Adelaide Convention to limit the plain words of s.72 by ‘ancient technical rules’[[48]](#footnote-48). He considered that, since ‘it (was )for Parliament to decide whether any conduct alleged against a judge constituted misbehaviour sufficient to justify removal from office; there was no ‘technical’ relevant meaning of behaviour, and in particular, it was not necessary, in order for the jurisdiction under s. 72 to be enlivened, that an offence be proved.’ In other words, ‘misbehaviour’ did not have a ‘legal’ meaning, but any meaning that Parliament decided to give it. Nor did ‘proved misbehaviour’ in Section 72 of the Constitution need to be ‘proved’, presumably by the Parliament.

**Technical Legal Meaning: The Written Submission of M.H. Byers and A. Robertson to the Attorney General August 13, 1984 [[49]](#footnote-49)**

Mr Byers QC had been the Commonwealth Solicitor General from 1973-1983 And Alan Robertson had worked with him in the Solicitor Generals office during those years. Byers had recently returned to practice in Wentworth Chambers and Alan Robertson followed him.

The Byers/Robertson advice would have been of interest to Murphy as he challenged the validity of the Act establishing the Parliamentary Commission .

Byers and Robertson took a ‘narrow’ view of the meaning of ‘misbehaviour’. pointed out that neither the Senate nor the House of Representatives possessed, except as Section 49 provided, any judicial power. They could only pray for removal of a Justice of the High Court ‘ on the ground of proved misbehaviour or incapacity.’ The addition of the word ‘proved’ to the expression ‘ misdemeanour or incapacity’ suggested the exercise of an authority indistinguishable from the judicial power. ‘At its lowest, it implies a charge, evidence and something very like a trial’.

Since the Parliament did not have judicial power, and since there is no remedy against an address of both Houses, then the words “proved” misbehaviour ‘should be given the meaning which they naturally bear, that is, as requiring the finding by a court of acts which amount to misbehavour in proceedings to which the judge is a party.’

Whether activity amounts to ‘proved misbehaviour’ is a question of the interpretation of the Constitution. On those questions the High Court is thus the final judge. The Parliament is not.

Byers did not think that the High Court could set aside an address by both Houses of Parliament even if it was based on an erroneous view of the meaning of section 72(ii). However, he considered that the Court would restrain the Ministers comprising the Federal Executive Council from advising the Governor from removing the judge, and if occasion required it, restrain him from acting to remove the Judge. If the address was not founded upon ‘proved misbehaviour’ properly construed, this would quash any order removing the judge.

**Memorandum of Dr. Bennett QC August 1984**

Dr David Bennett was a Queens Counsel in 1984 but later became Solicitor General of Australia from 1998-2008. He took the ‘narrow’ view that ‘proved misbehaviour ‘ had acquired a technical meaning in the last decade of the nineteenth century and was reflected in Section 72 of the Constitution. The only type of behaviour which could give rise to ‘proved misbehaviour’ was conduct which had led to a criminal conviction. Parliament’s role under section 72 is therefore confined to considering whether the circumstances of the conviction constitute ‘misbehaviour. Not all convictions e.g. traffic violations are sufficiently grave.

**The Choice between the Narrow and the Broad Interpretation of ‘Misbehaviour’?**

From 1984 the Parliamentary Enquiry Commissioners had three memoranda advocating the ‘narrow’ interpretation of ‘misbehaviour’ in Section 72 of the Australian Constitution and one, that of CW Pincus QC advocating a non-technical, non - legal meaning, untrammelled by ‘ancient rules’.

The next attempt to remove Justice Murphy depended upon the ‘Narrow’ interpretation.

**Criminal Proceedings in the Supreme Court of New South Wales**

The chief magistrate of NSW Clarrie Briese and the district court judge Paul Flannery alleged that Murphy had improperly attempted to influence them in relation to charges faced by Ryan. A majority on the second committee found that Murphy’s conduct might have amounted to “proved misbehaviour”.

So, the fourth attempt to remove Murphy from the Court was the indictment of Murphy by the politically independent DPP, Ian Temby QC, in February 1985 charged Justice Murphy with ‘conspiracy to pervert the course of justice,’ even though he considered a conviction in the case as ‘not probable’. [[50]](#footnote-50)

In the first trial Murphy was convicted on the Briese charge but acquitted on the Flannery charge and sentenced to 18 months in gaol.

According to the junior prosecutor, Nicholas Cowdery, , Roddy Meagher QC, a prominent member of the Sydney Bar, in Sydney on the evening of 5 July 1985 shouted champagne for his table, at the Bench and Bar Dinner. [[51]](#footnote-51) Had he finally won a wager?

Some members of the Old and New establishments may have been celebrating but others grieved. The jurors in the Murphy trial broke silence on the shock jock radio programs of Sydney, claiming that they had been wrongly directed by the judge and did not really want to convict Murphy. The NSW Premier Neville Wran, Murphy’s close friend, publicly claimed that Murphy was not guilty. He paid $25,000 for contempt of court. The common people whose lives Murphy had touched, revolted.

In November 1985, the Court of Criminal Appeal set aside Murphy’s conviction and ordered a new trial. This was held in April 1986. Murphy avoided cross-examination by giving and unsworn statement from the dock.

On 28 April 1986 Murphy was finally acquitted. On May 1, 1986. Murphy proposed to return to the Bench which he had left nineteen months before.

But this could not be.

On May 1, 1986 , the day Murphy was due to return to his position on the High Court Volme One of the Stewart Enquiry into the so-called *Age* tapes was also tabled. Volume Two was secret, but some of its contents were reported within a fortnight by Andrew Keenan in the *Sydney Morning Herald*. [[52]](#footnote-52)Interestingly seven matters on which Stewart had invited Murphy to comment are also contained in seven of the fourteen allegations in the 1986 Class A Parliamentary Commission of Enquiry documents.[[53]](#footnote-53) Murphy declined to comment on the Stewart allegations on the ground that he was facing a criminal charge at that time. He had also avoided cross-examination in his second trial by giving an unsworn statement. The prosecutor in the Briese matter, Ian Callinan,[[54]](#footnote-54) and his junior, Nicholas Cowdery [[55]](#footnote-55) did not accept Murphy’s unsworn statement. Nor did they accept Murphy’s acquittal. They were aware of the Stewart enquiry material, since Cowdery had also been junior Counsel assisting the Stewart enquiry. They believed they had powerful cross-examination material from the Stewart Commission enquiry which they wanted to use in cross examination at the second trial. [[56]](#footnote-56) The 1986 Parliamentary Commission was a second bite at this cherry.

Chief Justice Gibbs also had access to the second volume of the Stewart enquiry and indicated concerns about the reputation of the High Court to the Hawke executive if Murphy returned on May 1 1986.[[57]](#footnote-57) On Wednesday 7 May however, he issued a statement saying that the court had no function in any removal of Justice Murphy.[[58]](#footnote-58)

The Hawke/Keating government wanted this unfortunate remnant of the Whitlam era to stop embarrassing them, resign and let his suffering end. Keating called him ‘a professional martyr’[[59]](#footnote-59) The Cabinet decided to have Attorney General Bowen tell parliament that it would legislate for a ‘parliamentary commission of inquiry into various matters relating to the alleged conduct of Mr Justice Murphy’ so that ‘proper consideration may be given to the question of possible misbehaviour’. A parliamentary Commission of Enquiry with retired Supreme Court justices, Sir George Lush, Sir Richard Blackburn and Andrew Wells showed alacrity for their task. The minute of the 24 June Cabinet meeting records that the commissioners had requested the services of the Australian Federal police to help them with enquiries. Cabinet considered that the commissioners themselves had sufficient power to initiate investigations.[[60]](#footnote-60)

Murphy refused to resign and, on a matter of principle, was prepared to fight to his last dollar. His ‘to his last dollar’ aspect of the struggle is never mentioned in this whole saga. If a High Court Judge was to fight unfair, or untrue allegations made against him - at the constitutional level, he had to retain a QC or two or three. You cannot go to the High Court without a QC. And QCs do not come cheap. Both Murphy and his family were made to suffer both emotionally and financially in the trials established to remove him from the High Court. Murphy fought back as he knew best – through the courts.

**Murphy Fights Back: High Court Hearing 26 and 27 June 1986**

Murphy’s first move was an application to the full High Court for an interlocutory injunction against the three Commissioners and their officers. Murphy’s legal representatives argued that the Act establishing the Commission was invalid, and, in the alternative, assuming that it was valid did not authorise a roving investigation but only specific allegations in precise terms. They also claimed that one of the Commissioners, Mr Wells, was disqualified from taking part in the inquiry on the basis of bias. Murphy’s lawyers were concerned that the Commissioners were suggesting that the services of investigators other than Counsel assisting them would be engaged, and that their procedure

*was secret, open-ended and amounted to a roving enquiry into the whole of his life by persons without any statutory or Constitutional authority, and it was quite foreign both to the Constitution and our system of justice*….*to send investigators out into the community is to seriously defame our client, and he certainly reserves all his rights in relation to anything done by them.*

They also argued that Mr Justice Wells, when he was a Justice of the South Australian Supreme Court, had been quoted in the *Adelaide Advertiser* of 24 February 1984, as commenting adversely on a statement by Justice Michael Kirby supporting Lionel Murphy. [[61]](#footnote-61)

The legal representative for the Attorney General, A. Robertson QC, argued there was no question of delegation of the powers of the Houses of Parliament and the Commission was an advisory body only. On the question of ‘misbehaviour,’ the Attorney General argued that it was premature to deal with a hypothetical question in advance of specific allegations. However there was a statement in the Attorney-General’s written submission that the meaning of ‘misbehaviour’ of a judge referred to conduct in or during office and this meaning was a legal, technical one, ‘unanimous and known and accepted by the framers of the Constitution and that this had never been departed from since Federation.’[[62]](#footnote-62)

On 27 June 1986 the High Court rejected the application for an interlocutory injunction, and on the balance of convenience allowed the Commission to continue its investigation. They also found that retired Justice Wells was impartial or unprejudiced.

**The Constitutional Problem**

Nevertheless, the full High Court accepted that the constitutional question of the validity of the Act or the investigations authorised by the Act were triable and required a further Hearing set down for 6 and 7 August 1986 in Canberra.

The constitutional problems inherent in the Murphy ‘removal’ situation were very real. Could the Parliament delegate its responsibility and power to a Commission? Was the Commission advisory only? And what was the meaning of ‘misbehaviour’ and ‘proved’.

The elephant in the room, about which Chief Justice Gibbs was reluctant to hear extensive submissions on 26 June 1986, was the legal interpretation of ‘misbehaviour’ under Section 72 of the Constitution. If the Parliament made a decision on ‘proved misbehaviour’ were they acting judicially and how did this affect the separation of powers? Could they delegate this responsibility to a Parliamentary Commission?

Did ‘misbehaviour’ include conduct in his life before the appointment of the Judge, and did it also include non-judicial duties both before and while he was in office?

Above all, which institution made the final decision: on the meaning of ‘proved misbehaviour’? The Parliament or the High Court? Under Section 72 of the Constitution, the Parliament through an address to the Governor in Council has power to remove a judge on the basis of ‘proved misbehaviour’. But does a judge then have the right to appeal to the High Court? What would happen if all seven judges were removed on the grounds of ‘proved misbehaviour’ and replaced ? Where could they appeal?

If, under Section 72 of the Constitution, there is no ‘technical’ legal meaning of misbehaviour, and Parliament decides on the meaning of ‘misbehaviour’ on broad ‘contemporary values’ rather than legal grounds then what this really means is that Parliament’s power of removal cannot be *legally* defined at all.

Yet the Parliamentary Commissioners were placed in the position of legal authorities expounding a legal opinion. And they did this.

If, as in the event, they asserted that ‘misbehaviour’ in Section 72 of the Constitution did not have a ‘technical’ narrow, legal meaning, but rather a broad meaning relevant to ‘contemporary values’[[63]](#footnote-63)then they were making a ruling that the section’s legal meaning has no legal meaning at all. If that is the case, did this mean that the meaning of ‘misbehaviour’ was not justiciable.

The Commissioners – and the High Court - had a self-negation problem if the received ‘technical’ legal meaning of ‘misbehaviour was abandoned in favour of a broad, ‘contemporary values’ definition. [[64]](#footnote-64)

The hearing of the Constitutional validity of the Commission and its procedure was set down for 7 and 8 August 1986. In passing, the High Court noted that there was no suggestion that the Commission, which was required to report to Parliament by 30 September 1986 would be considering the holding of a public hearing before the August date. But the Commission held a judicial four day Hearing on 22-24 and 31July on the meaning of ‘Misbehaviour” and in a Report to Parliament made Rulings on the matter.

**The Parliamentary Commission Fights Back :**

**Class B Documents: Commission Hearings on the Meaning of ‘Misbehaviour”**

The Attorney General may have considered the Parliamentary Commission had only an ‘advisory’ role in relation to the ParliamentBut it was the role of the High Court to decide a Constitutional judicial matter like the meaning of ‘misbehaviour’ of a Judge in Section 72 of the Constitution.

The Commissioners thought otherwise. Because Sir George Lush was uncertain whether the High Court would deal with problems arising from an interpretation of ‘misbehaviour’ in Section 72 of the Constitution,[[65]](#footnote-65) he decided that he and his fellow Commissioners would do so themselves.

On 22- 24 and on the 31 July 1986 the Commission decided to have a Hearing, in Sydney on the meaning of “misbehaviour. Mr Gyles QC and Einfeld, QC for Lionel Murphy and Mr Charles QC for the Commissioners, made submissions to the retired judges who appeared to be sitting as a court.[[66]](#footnote-66)Charles argued for the Pincus ‘ broad’ non-legal meaning; Gyles and Einfeld argued for the received, ‘narrow’ meaning of ‘misbehaviour’ put forward by Dr Gavan Griffith, Maurice Byers QC Alan Robertson, QC and Dr Bennet QC.

The Gyles written submission linked ‘removal’, ‘ misbehaviour’ and the ‘independence of the judiciary’. The final paragraphs 10 and 11 of his written submission sound like a judgement from Justice Lionel Murphy himself:

10. Office holders who have a tenure during good behaviour stand in sharp contrast to office holders at pleasure, and to servants. They are given that tenure in order to secure independence in the conduct of the office, for the benefit not only of the office holder, but of the public generally. If an office holder is liable to be removed for conduct not connected with office otherwise than by conviction in the courts of the land, because of ‘conduct unbecoming the office’ then independence is diminished. The opportunity for direct and indirect pressure from disaffected litigants, political crusaders, politicians, the executive and others is increased. There are no criteria by which to judge the conduct. The evil is particularly obvious when ( as is often the case) the one political party controls both Houses of Parliament. It is not a necessary incident of judicial office.

11. The effect of a submission to the contrary of the foregoing is to render nugatory the obvious intent of s. 72. If ‘proven misbehaviour’ simply means ‘any conduct which Parliament considers to be inconsistent with the holding of office’ or ‘any conduct which Parliament considers unbecoming a judge’, then it is the equivalent of the pre 1900 position under the Act of Settlement where Parliament could address the Crown for removal for any cause. At least in the case of conduct not connected with office, ‘proved’ must mean ‘proved by conviction.’

Gyles also argued that if ‘proven misbehaviour’ simply means ‘ any conduct which Parliament considers to be inconsistent with the holding of office’ or ‘any conduct which Parliament considered unbecoming a judge’, then this would be the equivalent of the pre 1900 position where the Parliament could address the Crown for removal for any cause.

During the Hearing Mr Gyles also contended that none of the 14 Allegations delivered to the Judge eleven days before the Hearing, were, capable of amounting to ‘proved misbehaviour’ within the meaning of s 72 of the Constitution and should be rejected without moving to receive evidence in their support. [[67]](#footnote-67)

The transcript of the hearings and the findings of the three Commissioners themselves are voluminous. They range from discussion of the Constitutional Convention debates and acknowledged commentaries to the British and colonial cases – and perhaps most interestingly, the colonial, Montagu case. Appended to the transcript are Memoranda on the Meaning of ‘misbehaviour’ dating from 1984 together with 1986 Memoranda from the Commission lawyers themselves.

In their Rulings, all three Commissioners accepted the ‘broad’ non-legal meaning of ‘misbehaviour’ suggested by Mr Pincus QC, arguing against the narrow, meaning of submissions made by both Mr Gyles QC and the Memoranda of previous Solicitors General. The Act of Settlement of 1701, the intentions of the framers of the Constitution, and the commentaries on both the UK and Australian situation were considered but cast aside as irrelevant. The only precedent of interest was the 1848 ‘misbehaviour’ of Mr Algenon Montagu from the Supreme Court of Tasmania , the justice removed for ‘financial embarrassment’.

They were ready to put their legal case to the High Court on 6 and 7 August 1986. When Justice Murphy abandoned his High Court case, the opinions of the three Commissioners were presented to each House of the Parliament on 19 August 1986.[[68]](#footnote-68)

But in late July 1986, the Parliamentary Commissioners also wanted a proven ‘allegation ‘of misbehaviour for the High Court Hearing on 6 and 7 August. This leads the researcher back into the Class A documents and the Hearing on Allegation One set down for Hearing before the Commissioners on 5 August 1986.

**The Class A Documents : The search for ‘proven allegations’ and credible witnesses.**

Evidence on the first allegation was to be considered on August 5 1986, two days before the High Court hearing on the validity of the Act establishing the Commission,

In late June and early July 1986, the lawyers and investigators assisting the Commission worked zealously on 42 allegations made against Justice Lionel Murphy. Twenty one were discarded as ‘not giving rise to a prima facie case of misbehaviour under Section 72 of the Constitution.’ On July 15, 12 of the remaining allegations were delivered to the judge. Two or three were delivered at a later date.[[69]](#footnote-69) Seven of the allegations were taken from a letter to Justice Murphy from the Stewart Commission on 25 March 1986 to which he had refused a response. Justice Murphy and his legal team already had access to most of these allegations[[70]](#footnote-70) from previous enquiries, and they were ready. The ‘*Age* tapes’, or rather their transcripts and summaries had been assessed as unreliable evidence by two Senate Committees and the Stewart Commission. They were regarded by Commission lawyers as ‘useful for cross-examination’, presumably of Justice Lionel Murphy himself.

It was all very well to assert that ‘misbehaviour’ had a ‘broad contemporary values’ meaning. To be on the safe side, the investigators preferred a criminal charge and a credible witness. Their best option was Mr Don Thomas and his allegation of bribery. This was Allegation One in File C14.[[71]](#footnote-71)

Counsel assisting the Commissioners needed a witness of the same calibre and status as Clarence Briese. The Queens Counsel assisting the Commission considered a police informant, McCartney Anderson, Morgan Ryan, Abe Saffron, Senator Jim McClelland, and police officers Lewington and Egge as possible witnesses. It was unlikely that Abe Saffron, Morgan Ryan, or Jim McClelland would willingly incriminate themselves, or Justice Murphy. Lewington and Egge had been assessed by the Stewart enquiry as unreliable.

The best candidate was Don Thomas, the ex-police officer. He alleged that Murphy had attempted to bribe him with a promotion in the Federal police force at a luncheon in a Korean Restaurant in Kings Cross.

 There were difficulties even with this witness. Thomas had led the police investigation into the Labor Party’s attempts to use Iraqi sources for fund-raising in 1975. This investigation was authorised by the Attorney-General in the Fraser Government, Robert Ellicott. Jenny Hocking noted in 1987 that the material which became known as ‘The Age tapes’ dates from one month later,[[72]](#footnote-72)and it appears[[73]](#footnote-73) that Thomas was sensitive about attempts to link him with the ‘illegal’ *Age* tapes.

He had also headed the investigation into a much criticised ‘Greek conspiracy’ case which began with the arrests of 180 people in dawn raids in 1978. In an appeal to the High Court in 1983 by the sole person convicted, Murphy had strongly criticised the prosecution of the case as another example of an unnecessary conspiracy charge, citing the court’s comments in Hoar’s case: “*Too often those prosecuting appear to adopt the view that an accused person must be guilty of something, but, rather than identifying what that something is, choose a conspiracy charge as a dragnet*.’ [[74]](#footnote-74)

Don Thomas might be classified as a witness who might wilt under robust cross examination

The Commission was due to begin examining the Allegation No 1, namely the bribery charge on Tuesday, 5 August.[[75]](#footnote-75)

The Actual Allegation No 1 ‘in specific terms’ sent to ‘solicitors for LKM ‘ on 15 July 1986 was

Particulars of Allegation

The Honourable Lionel Keith Murphy, in or about the month of December 1979, at Sydney, and whilst a Justice of the High Court of Australia, engaged in a conversation with Donald William Thomas, then a Detective Chief Inspector of the Commonwealth Police in charge of the Criminal Investigation Branch for the New South Wales Region. The Judge spoke to Thomas regarding a social security conspiracy prosecution in the conduct of which Thomas had played a principal role. He extended an invitation to Thomas to meet Senator Donald Grimes, who in Parliament had strongly criticised the conduct of that case.

The Judge then spoke to Thomas about the impending formation of the Australian Federal Police. In the course of this conversation, the Judge said, “we need somebody inside to tell us what is going on”, thereby conveying to Thomas that the Judge sought from him the provision of covert information relating to or acquired by the Australian Federal Police to unauthorised persons within the Australian Labor Party. The Judge said that in return for Thomas fulfilling the role which he had suggested, the Judge would arrange for Thomas to be promoted to the rank of Assistant Commissioner in the Australian Federal Police. Thomas told the Judge that he would not be happy forming an affiliation with any political party. The Judge asked Thomas to think about the matter.

The said conversation occurred at a Korean restaurant during the course of a lunch attended also by Morgan Ryan and The Judge arranged for Thomas to attend the lunch for the purpose of holding the conversation set out above.

It will be contended that this conduct by the Judge amounted to misbehaviour within the meaning of Section 72 of the Constitution in the following respects –

1. Attempting to bribe a Commonwealth officer;
2. Further, or in the alternative
3. B) urging or encouraging a Commonwealth police officer to publish or communicate to unauthorised persons official information which it would be his duty not to disclose;
4. Further, or in the alternative
5. offering for improper purposes to intervene to secure for a Commonwealth officer an appointment to a higher rank.

As such it constituted conduct contrary to accepted standards of judicial behaviour.

 While Murphy took the position that ‘’there was no Case to answer’ to any of the allegations, a later letter he wrote to the Chief Justice indicated that in practice, they would take many months to answer.[[76]](#footnote-76) On 30 July 1986 Solicitors for Murphy sent a letter containing an extensive list of documents and persons ‘required’ to enable the Judge to answer Allegation No 1. The documents related to Don Thomas’ work in the New South Wales, Commonwealth and Federal police force and evidence given to the Stewart Royal Commission, together with any application by Thomas to be admitted to the NSW Bar. They also indicated that they would call 32 members of the police force, solicitors and bureaucrats together with five prominent politicians namely: Malcolm Fraser, Senators Durack, Withers, Guilfoyle and Grimes and Lionel Bowen. The Commissioners were also on notice that one of Justice Murphy’s QCs, Mr Einfeld, would cross examine key witnesses for at least a month.

This list from Murphy’s lawyers – and the Commission lawyers were responding and obtaining them, indicate that Murphy’s lawyers were going to question Don Thomas on his involvement with listening devices while he was a member of the NSW police force investigating the social security ‘conspiracy’ in the late 1970s - the time of the “Age’ tapes on the phone of Morgan Ryan.

The only other witness beside Don Thomas that the Commission were going to call on Allegation 1 was Morgan Ryan.

The Commission lawyers were having trouble tracking down Don Thomas for a full interview in mid July 1986. The file notes indicate that they were talking to others and considering evidence of his suitability. Time was running out and the Commission’s legal team were nervous. On 1 August however, they gave him notice that he would have to give evidence on 5 August 1986.

Here are some of the handwritten file note:

The first one is tantalising but almost illegible note. It is in small, upright writing and differs from any other file note.

Meeting:31/7

 Temby, Don Thomas Wadich ( Temby Federal DPP ; Wadich (NSW DPP)

1. DT worried that 6.4.85 in S.M.H. suggested he involved in Age tapes

Background/History – late 78. Associate to LKM rang re lunch

….arranged Korean rest. Kings X

Also present Davies(?)M.R.(Morgan Ryan) -‘always lunch with M R when in town’

D T (Don Thomas) never met M R (Morgan Ryan) before.’Always lunch with MR when in town’

 Conversation about the staffing program

Also LKM want information in …Later MR paid for meal.

2. Director said not worried re S.M.H. article

3. No black list

Another more readable file note of 22/7/1986 makes some sense of this.

Phoned Tony Wadich, DPP office Melbourne (03 6054333)

Discussed his file note of 31/7 ( presumably 1985)

According to Wadich, Thomas had prior to the meeting phoned Tony Griffin of DPP Sydney office complaining about ‘not getting brief’. Finally he rang the Director and asked to see him. At the meeting, Thomas expressed his concern that he may be a on a ‘black list’ because of something which might have been found in the ‘Age Tapes!. The conversation consisted mainly of Temby talking about the ‘Age Tapes’ and attempting to allay Thomas’ fear of a ‘black list! Temby told Thomas that he was simply one barrister among many.

Virtually as a ‘footnote’ Thomas then blurted out his story about the Korean lunch as an ‘illustration of his integrity’ (Wadich’s words)

It was clear to Wadich that Thomas was touting.

Later in the Allegation 1 file there are Memos of advice from Ian Callinan and Nicholas Cowdery to the Stewart Commission on the Thomas allegation of bribery, in which there is evidence that Thomas had had lunch previously with Morgan Ryan and had taped a conversation with him on a different matter. There is also *A Brief Analysis of Certain Documents Received from the Office of Director of Public Prosecutions on 19 June 1986*, from Mr Phelan to Mr Charles, Mr Weinberg, Mr Robertson, Mr Durack, Mr Sharp, and Mr Thomas, the legal Counsel, solicitor and Secretary assisting the Commissioners. Mr Phelan was concerned, as others had been before him, that Don Thomas had left it until 1986 to reveal the circumstances of his lunch with Justice Murphy. And a statement from the other policeman at the Korean lunch with Murphy and Ryan, John Donnelly Davies, then the Assistant Commissioner Crime of the Commonwealth Police in Canberra, provided no support whatever for the Don Thomas bribery charge. Davies account was that he had asked for the meeting. He felt sorry for Thomas and wished to further his career.

Meanwhile, the Commissioners and their legal team managed to find Thomas, summon him to make a Statement on 30 July 1986 and, after he signed it on 1 August advised him that he would be required (unless told otherwise) to give evidence.

On 5 August 1986 the day set down for the Hearing, Thomas rang at 9.30 am to say he had a painful back problem and was unable to attend!

Luckily for Thomas, he was no longer relevant.

Along with the Don Thomas matter, there had also been a concerted effort mounted by the Commission officers to link Justice Murphy with Abe Saffron. One of the most interesting documents in the Class A files is a record of an interview on 16 July 1986 between Mr Phelan from the Commission and the Chief of Staff to the New South Wales Police Commissioner. Others present were a sergeant from the Licensing squad and a detective Sergeant from the Vice squad.

Excerpts from this interview are enlightening. The police were asked if any link between Saffron and Justice Murphy had been uncovered at any time by the NSW police and Chief of Staff said that apart from what James McCartney Anderson had told a Sergeant, no link between Saffron and His Honour had come to light. McCartney Anderson , it seemed, was a police informant who was ‘singing like a canary’ to one of the police officers in the vice squad. Phelan, the Commission researcher, writes:

I thought I would stir up the waters a bit by asking whether it had ever been explained of why when the NSW Police were busily tapping a fairly large number of known or suspected criminals in Sydney no one bothered to tape Abe Saffron’s phone. There was an outbreak of mumbling by the police in the room at that juncture and I get the distinct impression that something very suspicious occurred at senior levels within the NSW Police Force to prevent such a tap being placed on Saffron’s phone.

McCartney Anderson was a previous associate of Saffron, Ryan and Sankey. He had given evidence to the Select Committee on Prostitution in NSW. This was quoted by Mr Aldred the Member for Bruce, in the federal Parliament on 2 June 1986 .[[77]](#footnote-77)

The purpose of the Association with Abe Saffron allegations was to link Justice Murphy with this ‘ person of notoriously low repute’ and place him in Lodge 44 (Saffron’s headquarters) and the Venus Room brothel when he was in Sydney. Scuttlebut! But useful scuttlebutt.

The Commissioner’s legal team, like prosecutors Ian Callinan and Nicholas Cowdery before them, considered it unlikely the Saffron allegations could amount to misbehaviour in themselves but they could form the basis for cross-examination of the judge, and ‘*give colour to other allegations which might depend upon there being demonstrated an association between the Judge and Saffron in order to constitute misbehaviour*.’

In the event, Anderson, Saffron, and others were not required to give evidence.

**Justice Lionel Murphy Terminally Ill**

There was no Hearing of the Commission on 5 August and there was no High Court Hearing on the substantive Constitutional issues on 6-7 August 1986.

On July 29 1986, Murphy informed the High Court that he had been diagnosed with terminal cancer and given months to live.

A statement made by Murphy on Friday 1 August said: *'On Tuesday 29 July, I resumed the full exercise of my constitutional and statutory functions as a Justice of the High Court of Australia. I so informed the Court at its statutory meeting on the Tuesday... My medical advice is that I have an advanced state of cancer - in its secondary stages - that there is no cure and no treatment. The advice is that, in the absence of a remission, I shall not live very long... I have chosen to spend what portion I can of the limited time available in doing as much judicial duty as I usefully can'.[[78]](#footnote-78)*

Cabinet documents of 9 October 1986 show that cabinet decided to pay legal costs incurred by Justice Murphy of $420,473. On 11 and 18 August Cabinet decided to wind up the parliamentary commission without it having to report and to stop its records becoming public. But on 19 August 1986 the Commissioners did present a report of their ruling on the meaning of ‘Misbehaviour’. [[79]](#footnote-79)

Polexini Papapetrou and I went to Canberra on 20 October 1986 with a copy of the book ‘*The Rule of Law*’ hot off the Press. We met Richard Ely who was working at the ANU and went to see Justice Murphy at his home in Forrest, Canberra. He lay on his bed, fully clothed, with his boots on. He was wasted but his eyes were bright. He was happy with his book and pointed to a book on the bedside table where he had been given international recognition.

We asked him what he thought about his situation. He said he had been the victim of ‘great evil’.

On 21 October 1986, the day on which his last judgments were delivered, he joined his very own nebula in the sky.

**Unfinished Business**

The question will always remain. Would the Commissioners have finally rid the Hawke Labor Government of this persistent troublesome judge? The Class A and Class B documents, together with their Report indicate that they were doing their best, with questionable evidence and somewhat fragile witnesses.

But the most significant questions arising from the Class A and Class B documents relate to the Constitutional issues of the Independence of the Judiciary and the interpretation of Section 72 of the Constitution. These remain unresolved.

**Conclusion**

**Judicial Independence in Australia Reaches a Moment of Truth**

This is the title of an article by the then High Court Justice M.D. Kirby in 1990 published in University of NSW Law Journal. [[80]](#footnote-80)After the trials of Justice Murphy there had been a number of justices from the State jurisdictions removed from office: The Chief Magistrate of NSW, Murray Farquhar was convicted of an offence connected with his judicial office and served a sentence of imprisonment. In 1989 Justice Vasta had been removed from the Queensland Supreme Court. According to Kirby the Queensland Commission of Enquiry led by Sir George Lush and Sir Harry Gibbs which removed Justice Vasta were even more susceptible to criticism than the ad hoc Parliamentary Commission of Enquiry established in relation to Justice Murphy. The Commission merged the investigative and adjudicative functions and excluded effective appeal by the judge. Nor did it provide any guarantee for the payment of costs reasonably incurred by the judge himself. What price natural justice in such circumstances?

The Queensland Commission concluded that the matters found against the judge ‘warranted his removal’. Such a finding was required by the Act establishing them[[81]](#footnote-81)but Kirby pointed out that it was not for Parliament to delegate the power of deciding what conduct ‘warranted removal’.

Since the Act of settlement (1701) in respect of superior court judges, that conclusion (conduct warranting removal) has been reserved to Parliament itself. It should not be forfeited or delegated (however convenient and politically attractive that course may be) to a commission of judges.[[82]](#footnote-82)

For Kirby, the role of any Commission, if it had one, was to merely find on the facts.

# But the problems of an effective and fair complaints mechanism for the removal of a judge guilty of ‘misbehaviour’ remained.

This is the major function of a Commission under the Commonwealth *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act* 2012: *An Act to provide for parliamentary commissions to investigate allegations of judicial misbehaviour or incapacity, and for related purposes.[[83]](#footnote-83)*

# Under this Act, Commonwealth Commissioners are provided with extensive investigative and punitive powers in relation to witnesses and gathering of evidence. Its members are bound by the rules of natural justice but not by the rules of evidence.[[84]](#footnote-84)

And

***misbehaviour*** has (other than in section 73) the same meaning as in section 72 of the Constitution.

Note:          ***Misbehaviour*** has its ordinary meaning in section 73.[[85]](#footnote-85)

Section 73 of the Act states:

73  Termination, or cessation, of appointment

             (1)  A member’s appointment may be terminated on any of the following grounds:

1. the member’s misbehaviour or physical or mental incapacity (within the ordinary meaning of those words);

What exactly is ‘misbehaviour’  ~~‘~~within the ‘ordinary meaning’ of that word ? and What do the words ‘proved misbehaviour’ mean in Section 72 of the Constitution?

What role would or could the High Court play if the meaning of ‘misbehaviour’ is a non- legal one within a section of the Constitution ?

What is the meaning of ‘proved misbehaviour’ in a Justice of the High Court of Australia ?

Unfinished business!

1. ***Will no one rid me of this turbulent priest?*** (sometimes expressed as ***troublesome*** or ***meddlesome priest***) is an utterance attributed to [Henry II of England](https://en.wikipedia.org/wiki/Henry_II_of_England), which led to the death of [Thomas Becket](https://en.wikipedia.org/wiki/Thomas_Becket), the [Archbishop of Canterbury](https://en.wikipedia.org/wiki/Archbishop_of_Canterbury), in 1170. While it was not expressed as an order, it caused four knights to travel from [Normandy](https://en.wikipedia.org/wiki/Normandy) to [Canterbury](https://en.wikipedia.org/wiki/Canterbury), where they killed Becket.The phrase is now used to express the idea that a ruler's wish can be interpreted as a command by his or her subordinates [↑](#footnote-ref-1)
2. ABC *Four Corners*, <http://www.abc.net.au/4corners/lionel-murphy/9156666>, 16 November 2017. (accessed 9 July 2018) [↑](#footnote-ref-2)
3. The Cabinet records had been released in December 1913 and the Class B records had been released on 19 December 2016. On a Four Corners program, Clarence Briesse the erstwhile Chief Magistrate of New South Wales was prepared to re-assert his criminal allegations against Murphy and on the same program David Marr was prepared to justify the release of the *Age* Tapes when he was editor of the Fairfax’s *The National Times* in 1984. It had been the publication of material from transcripts of these illegal tapes of alleged phone conversations between Lionel Murphy and solicitor Morgan Ryan that had started the legal pursuit of Justice Lionel Murphy in the first place. Murphy supporters like Professor Blackshield and Jenny Hocking came to his defence. [↑](#footnote-ref-3)
4. Parliamentary Papers 443/1986 [↑](#footnote-ref-4)
5. For example, *The Sydney Morning Herald* of 14 September 2017 claimed that From 1976 to late 1983, the ‘NSW Police had been running an illicit phone-tapping operation that targeted drug boss Robert Trimbole and underworld figures George Freeman and Saffron.’ The Class A documents reveal that only Morgan Ryan’s phone was tapped. There was no evidence of the tapping of any other phone, and the NSW police could not answer why Saffron’s phone had not been tapped. The question also remains whether the federal police were involved. The *Sydney Morning Herald* also copied a photograph of a Swiss bank document. Had they researched further, they would have discovered there was evidence that this document was almost certainly forged. [↑](#footnote-ref-5)
6. https://www.smh.com.au/politics/federal/parliament-releases-lionel-murphy-papers-31-years-on-but-the-controversy-continues-20170914-gyhbz6.html [↑](#footnote-ref-6)
7. ##  *Federal Commissioner of Taxation v Commonwealth Aluminium Corporation Ltd* [1980] HCA 28; (1980) 143 *CLR* 646 (12 August 1980)

 [↑](#footnote-ref-7)
8. J. Priest, *Sir Harry Gibbs, :Without Fear or Favour*, (1995), Scribblers Publishing, Brisbane, 111*. The Canberra Times* 2 August 1986, 1 at [https://trove.nla.gov.au/newspaper/article/119465369](https://trove.nla.gov.au/newspaper/article/119465369%20accessed%2031%20July%202018)  accessed 31 July 2018. . [↑](#footnote-ref-8)
9. In Ibid.:113. My emphasis. [↑](#footnote-ref-9)
10. Murphy J. was not the only High Court Justice concerned with the Independence of the Judiciary. Ninian Stephen had written on it in ‘Judicial Independence – a Fragile Bastion’ (1983) 13 *MULR* 334 [↑](#footnote-ref-10)
11. M. Kirby, ‘Judicial Independence in Australia reaches a Moment of Truth’, University of New South Wales Law Journal, 1990, Vol 30, (2) 187-211; The Hon. Justice Kiefel, ‘Judicial Independence’, North Queensland Law Association Conference, 30 May 2008; S. Shetreet, ‘The Limits of Judicial Accountability: A Hard Look at the Judicial Officers Act 1986’, (1987) *UNSW Law Journal*, 10, 4;R.Ananian-Welsh and G. Williams, ‘Judicial Independence from the Executive’, Judicial Conference of Australia, Monash University Law Review (Vol 40, No 3),593; M. Kirby, Discipline of Judicial Officers in Australia’ *The Judicial Group on Strengthening Judicial Integrity Second Meeting, Bangalore, India* 24-26 February 2001: ‘ [↑](#footnote-ref-11)
12. David Clark ‘Independence of the Judges’, Macquarie Law Journal,(2013) vol. 12, 31. [↑](#footnote-ref-12)
13. M. Kirby, Ibid, outlines the Vasta case in Queensland, the McCrae case in NSW and the Staples case in the National Industrial Relations tribunal. Also see M.D> Kirby, ‘The Removal of Justice Staples and the Silent Forces of Industrial Relations’(1989) 31 *Journal of Industrial Relations* 334. [↑](#footnote-ref-13)
14. Constitutional Reform Act 2005 (UK) ss 3;33; United States Constitution art III §1; Constitution Act 1867(Imp) 30 & 31 Vict,c3,s99; Constitution Act 1986 (NZ) s 23; Australian Constitution S 72. [↑](#footnote-ref-14)
15. Justice Susan Keifel, now Chief Justice Keifel of the Australian High Court, had this to say in 2008:We recognise the Act of Settlement as pivotal in the development of the modern judiciary. It reflected some of the thinking of the time - such as Locke's Treatise on Government which referred to three independent arms of government. Montesquieu shortly later wrote of the need for the separation of the judiciary from the legislature and the executive, in order to secure the liberty of the subject. But there was also a political imperative to the Act. What had been asserted was the supremacy of Parliament. What Parliament needed was a judiciary independent of the King, a judiciary which could be relied upon in the event of future disputes between Parliament and the Crown. The enduring legacy of this political act is the mainstay of the Rule of Law. [↑](#footnote-ref-15)
16. The example in Van Dieman’s Land of the Montagu/Pedder cases of 1848 was an interesting precedent , that surfaced in the August 19 1986 rulings of the Parliamentary Commissioners in the Justice Murphy matter. See D. Clark, ‘ The Struggle for Judicial Independence: The Amotion and Suspension of Supreme Court Judges in 19th Century Australia,’(2013) Macquarie Law Journal, 12,20-22. [↑](#footnote-ref-16)
17. *Colonial Leave of Absence Act 1782,* 22 Geo 3, c 75, s 2 (‘*Burke’s Act*’). [↑](#footnote-ref-17)
18. Gleeson, CJ, ‘175th Anniversary of the Supreme Court of NSW, 17 May 1999’*; Willis v Gipps [1846] Eng R 803; [1849] 6 Moo PC 489’ 13 ER 773.*  [↑](#footnote-ref-18)
19. Act 22 Geo 111, c 75, confirmed and amended by Act 54 Gep iii, c 61. E Campbell, ‘Judicial review of proceedings for removal of judges from office’ *UNSW Law Journal* (1999) 22(2), 325. [↑](#footnote-ref-19)
20. Constitution Act NSW 1855 ss 38-9; Additional Judges Act 1865 (NSW) s.3; Constitution Act (Vic) s 38; Constitution Act 1856 (SA) ss 30-1, David Clark, ‘The Struggle for Judicial Independence: The Amotion and Suspension of Supreme Court Judges in 19th Century Australia,’ *Macquarie Law Journal* 2013, Vol. 12, p21-59, 29. [↑](#footnote-ref-20)
21. *Algenon Montagu v Lieutenant Governor, and Executive Council, of Van Diemen’s Land*, (1949) 6 Moo PCD 489, 499; 13 ER 773,777. [↑](#footnote-ref-21)
22. P.A. Howell, ‘The Van Dieman’s Land Judge Storm’, (1966) University of *Tasmania Law Review,* 253-269 [↑](#footnote-ref-22)
23. M. Kirby, M. Kirby, Discipline of Judicial Officers in Australia’ *The Judicial Group on Strengthening Judicial Integrity Second Meeting, Bangalore, India* 24-26 February 2001, 2. [↑](#footnote-ref-23)
24. J.B. Thomas "The Time of Cooper" (1990) p 61. <https://espace.library.uq.edu.au/data/UQ_203590/s00855804_1990_14_2_61> accessed 25 July 2018 [↑](#footnote-ref-24)
25. David Clark ‘Independence of the Judges’, Ibid, 31. *Sydney Morning Herald* (Sydney) 13 May 1845; Independence of the Judges’, *The Argus* (Melbourne), 18 May 1865,5; *Colonial Times and Tasmanian Advertiser* (Hobart), 10 March 1826, 2,3. ‘Independence of the Judges’*, The Courier* (Hobart), 19 January 1848, 2-4. [↑](#footnote-ref-25)
26. A.R. Blackshield, ‘Judges and the Court System’, in Gareth Evans (ed*), Labor and the Constitution 1972-1975’* *Essays and Commentaries on the Constitutional Controversies of the Whitlam Years in Australian Government* (Heinemann, 1977) 105, 118; ‘A clear case of justice not being seen to be done’, *The Sydney Morning Herald* (Sydney), 11 February, 1975,6. Peter Samuel, ‘The final Murphy time-bomb’, *Bulletin* (National) 15 February 1975, 16. For discussions on constitutional questions see Brendan Lim*, Australia’s Constitution after Whitlam*, Cambridge Studies in Constitutional Law, Cambridge University Press, 2017, pp108-9. J. Hocking, ibid. 266-267 [↑](#footnote-ref-26)
27. J. Hocking *Lionel Murphy, A Political Biography*, Cambridge University Press 2000 [↑](#footnote-ref-27)
28. P. Kelly, *The Unmaking of Gough*, (1976) Allen and Unwin, 97 [↑](#footnote-ref-28)
29. J. Hocking, Ibid, 232, 240-242, [↑](#footnote-ref-29)
30. ‘Murphy job “bid to gain influence”, *The Australian* (National) 11 February, 1975, 3. [↑](#footnote-ref-30)
31. *Rober*t Ellicott was admitted to the New South Wales Bar in 1950 and was Solicitor-General of Australia from 1969 to 1973. He was elected as the Liberal member for the Division of Wentworth in the 1974 election. He was Attorney-General in the Fraser Ministry from 1975 to 1977. He was also a cousin of Garfield Barwick. [↑](#footnote-ref-31)
32. Murphy J. to Ellicott, R. Hansard House of Representatives 6 September 1977:725. Letter reproduced in J. Hocking, Ibid, 257. [↑](#footnote-ref-32)
33. Paul Kelly, The Unmaking of Gough, (1976) Allen and Unwin, 1976, 97 [↑](#footnote-ref-33)
34. *The Age*, 26 April 1980: 10; *Australian Financial Review*, 28 April 1980:1-2, 21; *Sydney Morning Herald* 29 April 1980:1; 30 April 1980: 1, 3; *Canberra Times* 2 May 1980:3;, 2 May 1980:3. [↑](#footnote-ref-34)
35. Senate, Hansard 29 April 1980 also Evan Whitton, *Can of Worms* II, at <http://netk.net.au/Whitton/Worms13.asp> Accessed 28 July 2018. [↑](#footnote-ref-35)
36. J. Hocking, Ibid 266. [↑](#footnote-ref-36)
37. A. Blackshield, ‘Lionel Murphy and the Presumption of Guilt’, *Inside Story*, 21 September 2017, at <http://insidestory.org.au/lionel-murphy-and-the-presumption-of-guilt-by-association/> accessed 31 July2018. [↑](#footnote-ref-37)
38. Marion Wilkinson, ‘Big Shots Bugged’, The National Times (Sydney), 25 November – 1 December 1983, 3-5; Lindsay Murdoch and David Wilson, ‘Secret Tapes of judge: Sydney Solicitor’s phone was tapped;, *The Age,* (Melbourne) , 2 February 1984, 1,5; Lindsay Murdoch and David Wilson, ‘Phone Taps reveal crime web,’ *The Age* (Melbourne) , 3 February 1984. [↑](#footnote-ref-38)
39. Gary Sturgess, ‘Murphy and the Media’, in J. Scutt, editor, Radical Judge, (1987) McMillan Press, 211-229; David Brown,’Themes in an Inquisition: Justice Murphy and the Liberal Press, UNSW Law Journal, Vol.10, 60-92. [↑](#footnote-ref-39)
40. J Hocking, “Dream King’ Ibid. 45-55 [↑](#footnote-ref-40)
41. Commonwealth Senate Select Committee on the Conduct of a Judge: Report to the Senate, Parl. Paper No 168 (1984) 16-17. Also see excerpts from the Committee in G D. Sturgess, ‘Murphy and the Media’, in *Lionel* *Murphy*, A Radical Judge, Ed. J. Scutt, (1987) Macmillan, 220-222 [↑](#footnote-ref-41)
42. Commonwealth *Parliamentary Debates*, Senate, 28 March, 1984, 767-83; [↑](#footnote-ref-42)
43. Senate Select Committee on the Conduct of a Judge *Report* , 1984 par. 85, par.21. [↑](#footnote-ref-43)
44. G. Sturgess, ‘Murphy and the Media,’ in Radical Judge, ed. J. Scott, (1987), 321 [↑](#footnote-ref-44)
45. Appendix 6(ii) court transcripts for Commission Hearing 26-31 July 1986, B Class documents File No. C59. Dr Gavan Griffith QC was Solicitor General from 1984 to 1998. [↑](#footnote-ref-45)
46. ‘Commonwealth Senate Select Committee on the Conduct of Judge: Report to the Senate’ *Parliamentary Paper* No 168 (1984) 19-20, 28, 99 [↑](#footnote-ref-46)
47. Appendix 4 to court transcripts, B Class Documents File No C59. [↑](#footnote-ref-47)
48. Appendix 4 court transcripts, B Class Documents File No C59 opinion dated 14 May 1984. [↑](#footnote-ref-48)
49. Appendix to court transcripts, B Class Documents File No C59.dated August 13, 1984. [↑](#footnote-ref-49)
50. Mike Steketee, ‘Temby didn’t expect to see Murphy conviction,’ *The Sydney Morning Herald* (Sydney), 4 August 1986, quoting Senator Gareth Evans. [↑](#footnote-ref-50)
51. N. Cowdery, ‘Reflections on the Murphy Trials, *University of Queensland Law Review*, (2008) Vol. 27(1),13. Meagher was called to the NSW Bar in 1960. He lectured at the Faculty of Law at [Sydney University](https://en.wikipedia.org/wiki/Sydney_University) within the same year. After taking Silk, Justice Meagher served as President of the New South Wales Bar Association from 1979 to 1981.Meagher was a Justice of the [NSW Supreme Court](https://en.wikipedia.org/wiki/New_South_Wales_Supreme_Court) and the [Court of Appeal of New South Wales](https://en.wikipedia.org/wiki/Court_of_Appeal_of_New_South_Wales) from 1989 to 15 March 2004. [↑](#footnote-ref-51)
52. Evan Whitton, Lionel Murhy: Trials and Tribulation, Networked Knowledge,- Whitton Reports at <http://netk.net.au/Whitton/Worms19.asp> accessed 25 June 2018. [↑](#footnote-ref-52)
53. See later discussion of the Class A documents. [↑](#footnote-ref-53)
54. Later Justice Ian Callinan of the High Court [↑](#footnote-ref-54)
55. Later Director of Public Prosecutions, NSW [↑](#footnote-ref-55)
56. N. Cowdery, ‘Reflections on the Murphy Trials, *University of Queensland Law Review*, (2008) Vol. 27(1), 20. [↑](#footnote-ref-56)
57. Kitney, G, ‘Murphy: The agony could go on for months’, *National Times* 9-15 May 1986; [↑](#footnote-ref-57)
58. #  P. Chadwick, ‘Lionel Murphy drama confirmed but much detail remains under wraps’, The Guardian, 1 January 2014,at

[www.theguardian.com/world/2014/jan/01/lionel-murphy-drama-ended-with-a-whimper-rather-than-a-bang](http://www.theguardian.com/world/2014/jan/01/lionel-murphy-drama-ended-with-a-whimper-rather-than-a-bang) accessed 28 July 2018. [↑](#footnote-ref-58)
59. Paul Keating, Interview with Jenny Hocking, 16 October 1992, quoted in J. Hocking, Lionel Murphy, a Political Biography(1997, Cambridge University Press, 293. [↑](#footnote-ref-59)
60. P. Chadwick, Ibid. [↑](#footnote-ref-60)
61. Class B documents, File C9, High Court transcript Murphy v Lush, Blackburn, Well and AG for Commonwealth of Australia, Brisbane 26 June 1986. P. 16 . This allegation is No 18 in the Class A documents and [↑](#footnote-ref-61)
62. Class B documents File C 9 Outline of Submissions for the Fourth Defendant (The Attorney-General for the Commonwealth. [↑](#footnote-ref-62)
63. Ruling of Justice Wells, B Class Documents File No C59. 9. [↑](#footnote-ref-63)
64. [↑](#footnote-ref-64)
65. Sir George Lush to Senator D McClelland, 1 July 1986 B Class Documents File No C59. [↑](#footnote-ref-65)
66. Commission Hearings re Section 72 of the Constitution, B Class Documents File No C59. [↑](#footnote-ref-66)
67. Parliamentary Committee of Inquiry, Transcript of Proceedings, 22 July 1986 referred to in Ruling of [↑](#footnote-ref-67)
68. Parliamentary Papers 443/1986. [↑](#footnote-ref-68)
69. Most of these allegations have been discounted by Professor Tony Blackshield in his chapter in The Radical Judge and, more recently in an article in *Inside Story* A.R.. Blackshield, ‘The Murphy Affair, in Jocelynne A Scutt (ed), *Lionel Murphy: A Radical Judge* (McCulloch Publishing, 1987)120ff; A.R. Blackshield , ‘Lionel Murphy and the presumption of guilt’, *Inside Story , 21 September 2018,* at <http://insidestory.org.au/lionel-murphy-and-the-presumption-of-guilt-by-association/> Accessed 11 July 2018. [↑](#footnote-ref-69)
70. Allegations : Class A documents Files [↑](#footnote-ref-70)
71. Ian Callinan and Nicholas Cowdery, the prosecutors in Murphy’s 1984/1985 criminal trials were going to use the Thomas allegations in cross-examination of Murphy at his second trial. They were prevented from doing so when he gave an unsworn statement. [↑](#footnote-ref-71)
72. Ibid .288, [↑](#footnote-ref-72)
73. See later file note , Class A documents, Allegation No 1, File C14. [↑](#footnote-ref-73)
74. Ibid 307. [↑](#footnote-ref-74)
75. The following materials are taken from Parliamentary Commission of Enquiry Documents, Class A File C 14 [↑](#footnote-ref-75)
76. Allegation No. 1 Class A documents, File C14. [↑](#footnote-ref-76)
77. Hansard p. 4396-7 [↑](#footnote-ref-77)
78. *Canberra Times*, August 2, 1986, 1. [↑](#footnote-ref-78)
79. Class B Documents, Letter from George Lush to Leader of Senate, D. McClelland, 19 August 1986. [↑](#footnote-ref-79)
80. ‘Judicial Independence in Australia Reaches a Moment of Truth’, *UNSW* *Law Journal*, (1990) 13(2) 187-211 [↑](#footnote-ref-80)
81. Parliamentary (Judges) Commission of Inquiry Act 1988 Queensland Section 5(1)(b). [↑](#footnote-ref-81)
82. Ibid 201. [↑](#footnote-ref-82)
83. Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012 , No. 188, 2012. *An Act to provide for parliamentary commissions to investigate allegations of judicial misbehaviour or incapacity, and for related purposes* [↑](#footnote-ref-83)
84. Ibid Section 3. [↑](#footnote-ref-84)
85. Ibid Section 7, Definitions. [↑](#footnote-ref-85)