THE UNIVERSITY OF MELBOURNE

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17 December 2012

Dear Mr Fernando:

Advice as requested by the Asian Human Rights Commission

We thank you for the opportunity to provide this advice in relation to the procedures and protections which regulate how Australian judges may be removed from office, and international standards relating to judicial removal.

We provide this advice in our capacity as academics who specialise in Australian and comparative constitutional law.

Australia forms a good comparator jurisdiction for Sri Lanka. Both nations share the same English common law and parliamentary heritage. The rule of law forms the fundamental basis entrenched in the Australian *Constitution*. The stability of the Australian polity, its economic growth and prosperity, and the wellbeing of its people depend upon respect for the rule of law. Central to the realisation of that ideal is that the independence of the judiciary be beyond question. Australian courts, and not Parliament, have the final say on the interpretation of the law. The High Court has general authority to determine the meaning of Australia's *Constitution*, and its interpretations bind Australian legislatures and executives at all levels of government.[1] The Court's power of judicial review prevents any law or executive action from transgressing the principles and limits to government laid down in the *Constitution*. The Justices of the High Court of Australia are highly respected as the guardians and guarantors of Australia's democracy: like all judges, they cannot fulfil these vital tasks without complete independence; in practice as well as principle.

These are the hallmarks of all successful and lasting constitutional democracies. Such a state cannot be achieved without entrenched safeguards to ensure judicial independence, chief among which is proper standards preventing the arbitrary or baseless removal of judicial officers.

Yours sincerely

Laureate Professor Cheryl Saunders AO

Professor Adrienne Stone

Director, Centre for Comparative Constitutional Studies

[1] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

I. AUSTRALIAN PROCEDURES FOR REMOVAL OF JUDGES

Judicial removals have been very rare in Australia. Of the four major examples of investigations and considered removals frequently referred to in the literature, only one — relating to a state supreme court judge[2] — was carried through to completion.[3] This rarity is attributable to the strong security of judicial tenure in Australia, as well as general good behaviour of individual judges ensured by close scrutiny from inside and outside the courts.[4]

Due to the small number of attempted or completed removals, many specific questions relating to the removal of judges remain undetermined by Australian courts. Nonetheless, the general procedures for removal and protections from removal are clear.

This section is split into two parts, relating to federal and state judges. Australia's federal system of government means that the instruments and wording of protections may differ, however the principles and standards remain the same at both levels of government.

A) Removal of Justices of the High Court and Judges of the Federal Court

Section 72(ii) of the Australian *Constitution* provides the only means by which a federal judge may be removed from office before the expiry of tenure at the age of 70:

> The Justices of the High Court and of courts created by the parliament ... shall not be removed except by the Governor General in Council, on an address from both houses of the parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity.[5]

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[2] Justice Antonio Vasta, a judge of the Queensland Supreme Court, was removed by the Queensland Parliament in 1989 following an inquiry by a Parliamentary Commission of three former judges established under the *Parliamentary (Judges) Commission of Inquiry Act 1988* (Qld). The Commission did not find that Justice Vasta had failed to discharge his duties as a judge, but rather concluded that he was not fit to hold judicial office, due to, among other things, the fact that he had knowingly made false statements in a defamation proceeding, maintained false allegations against other judges and the Attorney-General of Queensland, and was involved in sham tax dealings: see H P Lee and Enid Campbell, *The Australian Judiciary* (Cambridge University Press, 2001) 106.

[3] Justices Lionel Murphy and Ian Callinan (both of the High Court of Australia), Justice Antonio Vasta (Queensland Supreme Court) and Justice Vince Bruce (NSW Supreme Court).

[4] Internal mechanisms include informal peer-management and oversight, as well as appellate review of judicial decisions. External scrutiny comes from bar associations, the academy, the media, politicians and the public at large: see Thomas, *Judicial Ethics in Australia*, 247.

[5] Section 72(iii) of the *Constitution* also provides for the security of remuneration, which may not be diminished whilst a judge is in office. Section 72 was amended in 1977 to provide that the term of judges appointed after that year would expire upon the judge attaining the age of 70 years. Appointment for a term of years is not constitutionally valid: *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434. Section 72 is modelled upon the English *Act of Settlement* (1701). The *Federal Court of Australia Act 1977* (Cth) s 6(1)(b) provides a protection from removal for Federal Court judges which is worded almost identically to s 72(ii).

The *Constitution* does not contain any express power to suspend the tenure of a federal judge, nor is it likely that a suspension power could be inferred from the appointment or removal provisions.[6] In addition to the removal protection, s 72(iii) provides that remuneration of a federal judge may not be diminished whilst the judge is in office.

The general requirements of s 72(ii) are clear. Both the House of Representatives and Senate in the Commonwealth Parliament must — following a full floor debate — be satisfied that a judge's misbehaviour or incapacity has been proved, and on that basis pass a vote by simple majority to remove the judge. After that vote is passed, the removal will be executed by the Crown's representative, the Governor-General.

The specific requirements of s 72(ii), however, remain undetermined. The single instance in which proceedings under s 72(ii) were commenced, those proceedings were not carried through to completion. No Australian court has ever ruled on the legality of a judicial removal under s 72(ii) or the precise definition of its terms or procedures. Consequently, the precise requirements of federal judicial removal, and hence the precise ambit of the protections afforded to federal judges, remains somewhat unclear.[7]

1) What constitutes 'misbehaviour' or 'incapacity'?

Despite a lack of any authoritative judicial statement of the definition of misbehaviour or incapacity, several interpretations of the meaning and implications of those terms exist. Compared with extensive discussions on the meaning of 'misbehaviour', the meaning of 'incapacity' is uncontroversial, and relates to physical or mental barriers preventing a judge from discharging his or her official duties. 'Incapacity' has never, to our knowledge, been invoked as a reason to remove an Australian judge.[8]

The 'narrow' view of misbehaviour is confined to mischief during the discharge of official duties (for example, excessive delays in handing down judgments)[9] as well as criminal misbehaviour.[10] Several commentators have noted that the narrow

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[6] See Lee and Campbell, above n 2, 112–4, observing that a chief judge may refuse to assign further cases to a judge under investigation to determine grounds for removal, though the chief judge cannot compel the investigated judge to recuse or suspend himself or herself (as Chief Justice Gibbs unsuccessfully requested Justice Murphy do): at 113.

[7] Enid Campbell, 'Judicial Review of Proceedings for Removal of Judges from Office' (1999) 22 *University of New South Wales Law Journal* 325, 326–7. *Murphy v Lush* (1986) 65 ALR 651 involved an interlocutory injunction application regarding the Parliamentary Commission into Justice Murphy's removal. The application was dismissed.

[8] This is perhaps best explained by the 70 year age limit to federal judicial tenure, and because most judges facing such problems would be likely to opt to retire on medical grounds.

[9] For a comprehensive examination of the many ways in which judges may engage in official misconduct in and around the courts, see James Thomas, *Judicial Ethics in Australia* (LexisNexis Butterworths, 2009) ch 4.

[10] See P H Lane, 'Constitutional Aspects of Judicial Independence' in Helen Cunningham (ed), *Fragile Bastion: Judicial Independence in the Nineties and Beyond* (Judicial Commission of New South Wales, 1997) 62.

understanding has, in large part, been dispelled in favour of a broader view reflected in the report of the Parliamentary Commission of Inquiry which extends misbehaviour to conduct that is morally wrong or damaging to the Court itself, the particular judge's authority or general public confidence in the judge's ability to continue to do his or her duty.[11] One influential commentator has argued for what might be termed the 'broadest' interpretation of misbehaviour. According to Tony Blackshield, no 'technical' legal definition of misbehaviour could possibly exist, because defining what constitutes misbehaviour is a task which s 72(ii) reserves to Parliament alone, in any and all cases.[12] Any limitations to what Parliament considers to be misbehaviour would have to stem from self-imposed political limitations, not legal judgments.[13]

B) The 'Murphy Affair'

The unsuccessful attempt to remove High Court Justice Lionel Murphy remains the sole invocation of proceedings under s 72(ii).[14] The 'Murphy Affair' provides a useful illustration of both Australian removal processes and the protections afforded to judges.[15] The allegations against Murphy were of the gravest nature. In 1979, an Australian newspaper published transcripts of illegally-taped phone calls that suggested that Justice Murphy had been involved in an attempt to pervert the cause of justice by seeking to influence the outcome of a lower-court criminal case.

Following initial inquiries by the Australian Federal Police and the incoming Director of Public Prosecutions,[16] the Commonwealth Parliament passed legislation establishing the Senate Select Committee on the Conduct of a Judge in March 1984. This Committee comprised six Senators,[17] and was tasked with determining the authenticity of the transcripts, and whether Murphy's conduct *might* amount misbehaviour for the purposes of removal through s 72(ii).[18] After this first Committee failed to reach a conclusive finding, and following fresh allegations, a second Senate inquiry was established on 6 September 1984.[19] A majority of the

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[11] See, eg, Thomas, above n 9, 19.

[12] A R Blackshield, 'The "Murphy Affair"' in *Lionel Murphy: A Radical Judge* (McCulloch Publishing, 1987) 230, 255.

[13] Ibid.

[14] The only other call for an inquiry into the conduct of a High Court judge related to Justice Ian Callinan, over conduct as a barrister prior to his Honour's appointment to the bench. The Commonwealth Attorney-General declined to seek to establish an inquiry, and the matter never progressed.

[15] The necessarily truncated account offered here draws on the following authoritative accounts: Blackshield, above n 12; Lee and Campbell, above n 2, chs 5, 8; Thomas, above n 9, 219–31; L J King, 'Removal of Judges' (2003) 6 *Flinders Journal of Law Reform* 169.

[16] This opinion, from Ian Temby QC, construed 'misbehaviour' very narrowly and concluded that the evidence could not support such a finding: see Lee and Campbell, above n 2, 103.

[17] Senators Tate, Bolkus and Crowley (Labor); Senators Durack and Lewis (Liberal; Durack was also shadow Attorney-General); and Senator Chipp (Democrat). None of these Senators were former judges.

[18] The Committee did not rule on whether such grounds *did* exist, as this could only be determined by Parliament itself, hence the emphasis upon 'might': see Blackshield, above n 12, 235.

[19] Comprising four senators (Senators Bolkus, Lewis, Tate and Haines) assisted by two former judges (Commissioner Wickham and Commissioner Connor).

members of this second inquiry found that Murphy had attempted to influence the course of justice and that this amounted to 'misbehaviour'. In 1985, Murphy was convicted by the NSW Supreme Court for attempting to pervert the course of justice, though this conviction was later quashed and Murphy was acquitted on a retrial in 1986. Following Murphy's acquittal, in May 1986 the federal Parliament passed legislation establishing a final investigative body — the Parliamentary Commission of Inquiry comprised of three retired judges[20] — to examine outstanding allegations against Murphy. Following the announcement that Murphy had terminal cancer, this Commission discontinued its work, producing a report on the meaning of 'misbehaviour' in s 72(ii). Murphy passed away, and the vote was never held.

The Murphy Affair illustrates several important points relating to the power and limitations on inquiries into potential grounds for removal from office.

First, despite the very serious nature of the allegations, the attempt to remove Justice Murphy from office was preceded by three parliamentary inquiries, as well as criminal investigations and a criminal trial. It was only after Murphy was convicted of a crime in an ordinary, independent state supreme court that efforts under s 72(ii) were made to remove him from office.

Second, the constitutionality of legislation establishing an extra-parliamentary preliminary inquiry,[21] and the processes and determinations of that body, can be subject to judicial review.[22] General principles of administrative law — for example, that inquiries must operate within the bounds of their establishing statutes and must ensure common law standards of procedural fairness, absence of bias, and so forth — apply to inquiries into grounds for removal.[23] Blackshield has argued that inquiries may not 'pre-empt' the parliamentary debate which must precede a vote to remove a judge. Any inquiry which comes to conclusive factual declarations of misbehaviour, and extends beyond merely 'advising' Parliament on whether, in the inquiry's opinion, a judge's conduct amounted to proved misbehaviour, is likely to be unconstitutional due to it arrogating the s 72(ii) responsibilities of Parliament.[24]

Third, an Australian federal judge cannot be compelled to appear before or give testimony to an inquiry into his or her removal. Although Murphy voluntarily tendered written submissions denying any wrongdoing and responding to the allegations against him, he refused to appear before any inquiry in person to deliver oral testimony or submit to questioning. He refused on the basis of three arguments: first, the hearing did not grant Murphy the opportunity to cross-examine witnesses

[20] Commissioners Wells, Blackburn and Lush.
[21] That is to say, the Parliamentary Commission of Inquiry, but not the two Senate Committees.
[22] In *Murphy v Lush* (1986) 65 ALR 651, the Court did not consider it necessary to rule on the constitutionality challenge raised by Justice Murphy, however the Court indicated it was competent to examine the constitutional validity of the Act. Campbell doubts that the Parliamentary Commission of Inquiry appropriated any judicial or legislative powers of the Commonwealth and was constitutionally valid: Campbell, above n 7, 332.
[23] Lee and Campbell, above n 2, 114.
[24] The Parliamentary Commission of Inquiry into Murphy's conduct was established under legislation worded in this way.

(including his accuser),[25] and thus violated the rules of natural justice; secondly, Senate questioning of a High Court judge — whether compelled or not — would infringe upon the separation of powers and judicial independence; thirdly, though Parliament might launch preliminary inquiries, it could not empower a body with court-like functions such as interrogation.

Finally, despite the cautious, lengthy and multiple investigations that preceded any attempt to vote to remove Murphy, the Affair as a whole was then — and is still now — criticised by many in the community as unfair and poorly handled.[26] This reflects the more general problem that parliaments are not suitable bodies to investigate judicial officers or to make these kinds of judgments.

To avoid unfavourable comparisons with the Murphy Affair, any future parliament which set up an inquiry into judicial conduct pending potential removal under s 72(ii) would likely face pressure to afford the accused judge full procedural rights before the inquiry, and to comprehensively avoid any possibility that the inquiry could pre-empt parliament's debate and decision.

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[25] Cross-examination was prohibited under a Senate Standing Order. Suggestions by one member of the First Committee to suspend the order were rejected by the other members.

[26] Blackshield, above n 12, 256.

C) Removal of Judges of State Superior Courts

The effective standard of protection from removal relating to state superior court judges is identical to that of federal judges. Superior court judges in the Australian states and territories can only be removed by the Crown following an address by the state parliament. Like the federal provisions, most states and territories in Australia require that 'proved misbehaviour or incapacity' ground a vote to remove a superior court judge.[27] However, removal provisions in South Australia, Western Australia and Tasmania do not explicitly state any required grounds for removal.[28] Theoretically, the parliaments in these States could remove any judge by a majority vote without citing (let alone proving) a cause for dismissal.[29] In practice throughout the states and territories, however, it would be extremely unlikely that a state superior court judge would be removed without proof of serious misbehaviour, and, likely, a criminal conviction of a serious offence.

The major difference between federal and state protections is the lower degree of constitutional entrenchment in the state and territories. Section 72(ii) of the Commonwealth *Constitution* can only be amended by a constitutional referendum pursuant to s 128, and is therefore firmly entrenched. With the exception of NSW and Victoria, state and territory removal provisions can be amended or repealed by a mere majority vote of parliament, even in states whose removal provisions reflect the federal requirements.[30] Other minor differences exist: several jurisdictions have established permanent judicial conduct panels which can readily form specific investigative commissions;[31] and in some jurisdictions specific investigative requirements must be fulfilled before parliament can vote on removal, and in this regard constitute a more onerous set of protections for judges in those states.[32]

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[27] The ACT, NT, NSW, Queensland, Victoria: *Judicial Commissions Act 1994* (ACT) ss 4–5; *Constitution Act 1902* (NSW) s 53; *Judicial Officers Act 1986* (NSW) s 41; *Supreme Court Act 1979* (NT) s 40; *Constitution of Queensland Act 2001* (Qld) s 60; *Constitution Act 1975* (Vic) s 77(1).

[28] See *Constitution Act 1934* (SA) s 74; *Supreme Court (Judges' Independence Act) 1857* (Tas) s 1; *Constitution Act 1889* (WA) s 54; *Supreme Court Act 1935* (WA) s 9(1).

[29] In practice, of course, this would be extremely unusual: it would be contrary to convention, and politically-speaking, incredibly dangerous: see King, above n 15, 174.

[30] In NSW, the tenure provisions were constitutionally entrenched in 1995 and can only be amended or repealed through a referendum procedure. In Victoria, an absolute majority (a majority in both chambers of Parliament) is required to amend or repeal the tenure provisions.

[31] Victoria and the ACT have each established a panel of three former judges to be appointed to an investigating commission into a particular judge's fitness for office. In the ACT, a judge cannot be removed without an investigation and report by a Judicial Commission appointed to inquire into the matter: see *Judicial Officers Act 1994* (ACT); Campbell, above n 7, 330. NSW is the only Australian jurisdiction with a permanent Judicial Commission to deal with complaints against judges and, if the complaint is serious enough to warrant parliamentary consideration of removal, to report to the governor and relevant minister: see *Judicial Officers Act 1986* (NSW). Thomas notes that in 21 years of operation, the NSW Judicial Commission has assembled a conduct division on 14 occasions, leading to 8 resignations or retirements, 4 complaints dismissed, 1 report to the judicial commission, and 1 consideration by parliament which concluded in a decision not to dismiss the judge: see Thomas, above n 9, 263.

[32] ACT, NSW and Victoria. These provisions are not constitutionally entrenched.

II. INTERNATIONAL STANDARDS ON JUDICIAL INDEPENDENCE

In its most general formulation under international human rights law, the international standards on protection from removal from judicial office stem from the human right to a fair trial — namely, that no person's rights will be infringed without a trial before an impartial and independent tribunal operating according to fair procedure.[33] A second general standard em0erges from international standards and endorsement of the rule of law — namely, that an independent judiciary is a crucial check to excessive government power, and that a central part of judicial independence is a strong protection from removal from office.[34]

Specific articulations stemming from these broad principles have been made by the UN General Assembly, and a range of international organisations. These articulations reflect standards of judicial independence and protections from removal that are accepted and endorsed by governments and lawyers in nations around the world.

A) United Nations Standards

Several declarations of international standards of judicial independence have been drafted by the UN Special Rapporteur on Judicial Independence and subsequently endorsed in UN General Assembly resolutions. These declarations do not have any binding legal effect, but do constitute authoritative statements of widely-recognised and accepted principles.

The major UN declaration on judicial independence is the UN *Basic Principles on the Independence of the Judiciary*, adopted by the General Assembly in *Resolution 40/32*[35] and *Resolution 40/146*[36] in 1985. Several articles of the *Basic Principles* express international standards on discipline, suspension and removal:

> 17 A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.

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[33] See *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 10; Shimon Shetreet, 'The Normative Cycle of Shaping Judicial Independence in Domestic and International Law' (2009) 10 *Chicago Journal of International Law* 275.

[34] See, eg, Michael Kirby, 'The Rule of Law, Human Rights and Judicial Independence in the ASEAN Region' (Paper presented at American Bar Association — Asia Division, ASEAN Human Rights Conference, Chang Mai, 6–10 January 2010).

[35] *Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, GA Res 40/32, UN GAOR, 40th sess, 96th plen mtg, UN Doc A/RES/40/32 (29 November 1985).

[36] *Human Rights and the Administration of Justice*, GA Res 40/146, UN GAOR, 40th sess, 116th plen mtg, UN Doc A/RES/40/146 (13 December 1985).

18 Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

19 All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20 Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.[37]

B) International Organisation Standards

A large and varied array of international organisations have published reports and declarations of principles on judicial independence and removal protections.[38] One formative declaration is the International Bar Association's *IBA Minimum Standards of Judicial Independence*, adopted in 1982, which declares:

29 a) The grounds for removal of judges shall be fixed by law and shall be clearly defined.

b) All disciplinary actions shall be based upon standards of judicial conduct promulgated by law or in established rules of court.

30 A judge shall not be subject to removal unless by reason of a criminal act or through gross or repeated neglect or physical or mental incapacity he/she has shown himself/herself manifestly unfit to hold the position of judge.

31 In systems where the power to discipline and remove judges is vested in an institution other than the Legislature the tribunal for discipline and removal of judges shall be permanent and be composed predominantly of members of the Judiciary.

The International Commission of Jurists has published one of the most comprehensive and recent restatement of international principles on judicial independence and removal protections. The most recent edition of the *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors: Practitioners Guide No 1*, published in 2007 and spanning 244 pages, is a digest of international standards of the rights and duties of judges, lawyers and prosecutors as expressed in a wide range of declarations and international agreements, which are reproduced in the second part of that guide.[39]

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[37] *Basic Principles on the Independence of the Judiciary*, UN Doc A/Conf.121/22/Rev.1 (6 September 1985).

[38] The most prominent among these include: *Draft Principles on the Independence of the Judiciary ('Siracusa Principles')* (1981); *IBA Minimum Standards of Judicial Independence* (1982); *European Charter on the Statute for Judges* (1998); *The Universal Charter of the Judge* (1999); *The Bangalore Principles on Judicial Conduct* (2002).

[39] International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors: Practitioners Guide No 1* (International Commission of Jurists, 2nd ed, 2007).

The statements on judicial removal standards in that report are based largely on the UN *Basic Principles on the Independence of the Judiciary.* The report digests these into the following statements:

> As a general rule, judges can only be removed for serious misconduct, disciplinary or criminal offence or incapacity that renders them unable to discharge their functions. This should only occur after the conduct of a fair procedure. Judges cannot be removed or punished for *bona fide* errors or for disagreeing with a particular interpretation of the law
>
> States have a duty to establish clear grounds for removal and appropriate procedures to this end. The determination as to whether the particular behaviour or the ability of a judge constitutes a cause for removal must be taken by an independent and impartial body pursuant to a fair hearing.[40]
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> ...
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> Judges must conduct themselves according to ethical standards and will be held accountable if they fail to do so. International law clearly establishes that judges can only be removed for serious misconduct or incapacity. Disciplinary proceedings must be conducted by an independent and impartial body and in full respect for procedural guarantees.[41]

The report also notes a number of references in Human Rights Committee periodic reports to insufficient protections in a number of countries, leading to recommendations such as:[42]

- Ensuring that disciplinary proceedings are supervised by the judiciary, and not parliament.[43]
- Prohibiting executive dismissal without safeguards.[44]
- Requiring that judges not be removed unless before they have been tried by an independent tribunal and found guilty of inappropriate conduct.
- Requiring that judges only be removed in accordance with an objective, independent procedure that is prescribed by law.

Overall, international standards on judicial removals require strong protections. Judges cannot be removed without misconduct being proven by a fair and unbiased tribunal composed of former judicial officers who are free to conduct the inquiry and make a determination in complete independence from the other branches of government.

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[40] Ibid 55–6.
[41] Ibid 61.
[42] See ibid 59–60.
[43] Regarding Sri Lanka: ibid 59.
[44] Regarding Belarus: ibid. The UNHRC has elsewhere stated that summary removals are incompatible with the *ICCPR*: at 60.

III. CONCLUSION

Judicial removals are treated by the vast majority of governments with the utmost seriousness. As extraordinary decisions that must only be made in extraordinary circumstances, judicial removals must be treated with that level of seriousness.

Australian and international standards on the removal of judges from office clearly reflect a requirement that prior to any consideration by a parliament to remove a judge, a thorough, cautious, fair and independent investigation into alleged misconduct or incapacity by former judicial officers must take place.

Any procedure which does not fulfil that standard is inimical to the rule of law and the independence of the judiciary, and no government that refuses to afford its judicial officers these standards of protection can claim to legitimately represent its constituent people, or act with the legitimate authority which only the people may bestow upon their governors.