

ODPP Statement in relation to NSW Judicial Commission findings



6 November 2024

Due to the high level of public interest relating to comments made by Judge Newlinds SC in *R v Martinez* [2023] NSWDC 552 (*Martinez*) and Judge Whitford SC in *R v Smith (a pseudonym)* [2024] NSWDC 41 (*Smith*), and the referral of those comments to the NSW Judicial Commission by the Director of Public Prosecutions, the ODPP has determined to publish both reports handed down by the Conduct Division of the Judicial Commission.

Each report can be read in full in the attached documents. Summaries are also provided below.

The ODPP notes that Judge Whitford apologised to the Judicial Commission for his comments in *Smith*, which the Conduct Division found to fall short of the appropriate standards of a judicial officer because they were very likely to have undermined and/or risked undermining public confidence in the administration of criminal justice in NSW.

In relation to Judge Newlinds, the ODPP notes that the judge informed the Judicial Commission that his comments in *R v Martinez* were 'deeply regrettable'. Both judges have removed their judgments from Caselaw NSW.

Summary of the Report of the Conduct Division in relation to the DPP's complainant against Judge Whitford SC

On 8 April 2024, the Director of Public Prosecutions referred the conduct of Judge Whitford SC of the District Court to the NSW Judicial Commission. The Director's complaint concerned Judge Whitford's judgment in the case of *R v Smith (a pseudonym)* [2024] NSWDC 41, in which Judge Whitford granted a costs certificate to an accused person after their acquittal in relation to sexual assault charges.

The Director's complaint was referred to the Conduct Division of the Judicial Commission, comprised of the President of the Court of Appeal the Hon Julie Ward, retired judge of appeal the Hon Carolyn Simpson AO KC and a community member of high standing appointed by Parliament, Professor Nalini Joshi AO.

On 5 November 2024 the Conduct Division handed down its report into Judge Whitford's conduct. The Conduct Division upheld the Director's complaint, finding that:

- Judge Whitford deliberately used the judgment in *Smith* as a tool for public criticism of the Director and the ODPP.
- Judge Whitford publicly attempted to influence prosecutorial decision making.
- Judge Whitford failed to afford the ODPP procedural fairness by giving notice of, and an opportunity for the ODPP to be heard on, his Honour's comments on prosecutorial decision-making in the *Smith* judgment.
- Judge Whitford's criticisms of the prosecutorial decision-making within the ODPP (and implicitly of the Director) fell short of the appropriate standards of a judicial officer because they were very likely to have undermined and/or risked undermining public confidence in the administration of criminal justice in NSW.

The Conduct Division also found that Judge Whitford made errors of law and judgment in his decision. In particular, the Conduct Division found (at [80], [81] and [85]) and Judge Whitford conceded, that:

1. It was an error of law for Judge Whitford to take into account irrelevant factors in his judgment, in particular by endorsing comments made by Judge Newlinds SC in *Martinez* that were critical of the ODPP's practices (and which misunderstood the terms of the *DPP Act*).
2. It was an error of law not to afford the Director procedural fairness before taking these irrelevant factors into account.
3. It was an error of judgment to use such strident language when expressing those erroneous views. Judge Whitford accepted that the use of this language risked diminishing public confidence in the ODPP's decision making processes.

However, the Conduct Division considered that these errors were not so serious as to amount to a failure to meet basic standards of competence.

The Conduct Division noted that Judge Whitford had accepted that he made "errors both of law and judgment" (at [5]). The Conduct Division also noted that Judge Whitford, in his response to the complaint:

"made clear that he did not intend to attempt to defend error in his judgment and that he unreservedly accepted that elements of his judgment in *Smith* failed to meet acceptable judicial standards (which he regretted and for which he apologised)." (at [56]).

Concerning the suggestion by Judge Whitford that the ODPP operates in accordance with "opaque, even secret, policies" that are inconsistent with the Prosecution Guidelines, the Conduct Division described these comments as "extraordinary", and found that they had "no evidentiary foundation and created the appearance of a lack of judicial impartiality" (at [117]). The Conduct Division said that it could not "seriously be disputed" that these comments risked undermining public confidence in the administration of justice, and that "it is difficult to see anything more likely to undermine public confidence in the administration of justice in this State" (at [93] and [125]).

The Conduct Division found that Judge Whitford's observations that the Prosecution Guidelines had been abandoned in view of unwritten policies, without giving the Crown notice or an opportunity to respond to these allegations, was a denial of procedural fairness and was "profoundly unfair" (at [136] and [138]). Judge Whitford conceded this finding. The judge expressly acknowledged that:

1. He failed to afford the Crown procedural fairness.
2. There was no evidence about any pattern of apparently unsustainable cases coming before the courts.
3. It was inappropriate to have included reference to his general conclusions on this topic, or to the perceived existence of a practice or policy generally in relation to the institution of proceedings.

The Conduct Division went on to find that Judge Whitford's "extraordinary (and it may be said irresponsible) suggestion (without evidentiary foundation) that prosecutorial decisions may be made with reference to "opaque, even secret" policies", could have and, given the publicity following the judgment, are likely to have reduced public confidence in the administration of criminal justice (at [144]). This was compounded by Judge Whitford's express endorsement of similar comments made by Judge Newlinds in *Martinez*, and the further media comment this

attracted (at [145]). The Conduct Division found that the making of these comments in the manner that Judge Whitford did was “not consistent with appropriate judicial conduct.” (at [162]).

The Conduct Division refused Judge Whitford’s application to restrict publication of its report. The Conduct Division considered that it would not be appropriate to restrict the report, given that Judge Whitford’s impugned comments were made in a public judgment, were deliberately made to endorse similar comments by Judge Newlinds, and were the subject of media reporting, all of which gives rise to the risk of public confidence in the administration of justice being undermined (at [196]). The Conduct Division also observed that if its decision were restricted, Judge Whitford’s acknowledged error, his expression of regret and his apology for his conduct would not be known to the Director, as there had been no apology made directly to the Director by Judge Whitford himself (at [195]).

The Conduct Division determined that the matter should be referred to the Chief Judge of the District Court for such counselling and support as the Chief Judge considers appropriate in the circumstances.

Prior to the delivery of the report, Judge Whitford voluntarily removed his judgment in *Smith* from public access on NSW Caselaw.

Report of the Conduct Division, NSW Judicial Commission: Complaint by the Director of Public Prosecutions Against Judge Newlinds SC

Pursuant to s 15(1) of the *Judicial Officers Act 1986*, the Director of Public Prosecutions referred a matter affecting the ability and behaviour of Judge Newlinds SC to the Judicial Commission. The complaint concerned the awarding of a costs certificate and the associated judgment in the matter of *R v Martinez* [2023] NSWDC 552.

The grounds of the Director’s complaint were:

- Ground 1 – failure to meet basic standards of competence
- Ground 2 – failures in judicial impartiality, detachment and demeanour
- Ground 3 – unreasonable criticism and vilification of a sexual assault complainant
- Ground 4 – baseless criticism of the Director of Public Prosecutions and the Office of the Director of Public Prosecutions (“the ODPP”)

The matter was referred to the Conduct Division of the Judicial Commission for further examination of the complaint. The Conduct Division was constituted by Chief Justice Andrew Bell, retired judge of appeal the Hon Carolyn Simpson AO KC and a community member of high standing appointed by Parliament, Professor Nalini Joshi AO.

Each of the grounds of the complaint were upheld by the Conduct Division.

Ground 1: Failure to meet basic standards of competence

The Conduct Division found that Judge Newlinds’ conduct “demonstrates a lack of awareness or misunderstanding of the law as it applies to the conduct of criminal trials and related applications”. This finding was based on the combination of the following factors:

- His Honour had failed to familiarise himself with the statutory regime governing the Director of Public Prosecutions and the special responsibilities of the Director under the *Director of Public Prosecutions Act* (at [44]).
- His Honour misapprehended the test to be applied in s 3 of the *Costs in Criminal Cases Act* by conflating the proper test based on a hypothetical prosecutor (who enjoys the

benefit of hindsight) with his Honour's own conclusions about the reasonableness of the prosecution (at [60], [61]).

- His Honour's comments suggesting that, for a sexual assault prosecution to be reasonable, it was necessary for a complainant to have "a correct understanding of the legal definition of sexual assault or sexual intercourse without consent" were "legally inaccurate and ill-considered" (at [68]).
- His Honour was, by his own admission, unfamiliar with and misapplied the operation of a provision of *Evidence (Audio Visual) Act* concerning the calling of evidence by Government employed expert witnesses (at [73]).

Based on these factors, the Conduct Division found that there was a "want of competence" which justified the Conduct Division making recommendations as to Judge Newlinds' suitability to continuing sitting in criminal matters generally (at [79]).

Ground 2: Failures in judicial impartiality, detachment and demeanour

In upholding Ground 2, the Conduct Division observed that "intemperance and baseless criticism" from a judge can and does erode public confidence in the administration of justice and the judiciary (at [81]).

Judge Newlinds, in making comments about the admissibility of tendency evidence, attributed to the Director and the ODPP a deliberate embrace of "unfair" legislation, and a failure to adhere to their ethical obligations. This was a serious example of a "failure of judicial impartiality and demeanour" (at [99]).

The comments also reflected an adverse view on a provision of the *Evidence Act* that his Honour was required to apply impartially and gave rise to an apprehension of bias (at [99]). The exchanges between Judge Newlinds and the ODPP Solicitor Advocate revealed "a deeply concerning absence of detachment" on the part of the Judge.

Further, the Conduct Division found that Judge Newlinds' conduct towards the Solicitor Advocate amounted to belittling, harassment and bullying of the prosecutor (at [126]).

Judge Newlinds admitted that his comments were "unprofessional, rude, [and] unduly aggressive". The Conduct Division held in unequivocal terms that Judge Newlinds' conduct was apt to bring the judiciary into disrepute (at [137]).

In upholding Ground 2, the Conduct Division concluded (at [143]) that there was:

- A demonstrated failure of judicial impartiality bordering on manifested and generalised prejudice against the Crown
- A want of proper judicial detachment
- A gross failure of judicial demeanour.

Ground 3: Unreasonable criticism and vilification of a sexual assault complainant

In upholding Ground 3, the Conduct Division expressed the view that comments made by Judge Newlinds about the complainant's allegations against other men amounted to unjustified criticism of the complainant and could be characterised as vilification of the complainant (at [165]).

Further, certain comments by the Judge concerning the complainant were unnecessary, disrespectful and likely to cause unnecessary hurt to the complainant (at [167]).

Ground 4: Baseless criticism of the Director of Public Prosecutions and the Office of the Director of Public Prosecutions (ODPP)

In upholding Ground 4, the Conduct Division considered that Judge Newlinds' comments to the effect that "the prosecution took the lazy and perhaps politically expedient course" of charging the accused without a proper interrogation of the evidence should not have been made (at [177]-[181]). The Conduct Division identified three reasons for this:

- The question of how the decision to prosecute this matter was made was not before Judge Newlinds to determine.
- Judge Newlinds had no evidence of how the decision was made
- The Director and the ODPP were not given an opportunity to address this very serious criticism, which amounted to a fundamental denial of procedural fairness.

Further, comments made by Judge Newlinds about an "unwritten policy" concerning sexual assault prosecutions by the ODPP, and the ODPP's purported failure to properly consider sexual assault allegations, were "profoundly unfair and done in violation of a cardinal element of judicial conduct", namely not making adverse findings about a party or person without giving them an opportunity to respond (at [184]).

The Conduct Division considered that Judge Newlinds' comments, particularly given the extensive publicity given to them, were likely to have had the effect of reducing public confidence in the administration of criminal justice, in particular with respect to the conduct of sexual assault prosecutions by the Director and the ODPP (at [187]). They amounted to "fundamentally unjudicial conduct" (at [188]).

Consequences of the Conduct Division's Findings

The Conduct Division concluded that the findings were "extremely serious", and determined that the matter should be referred to the Chief Judge for further action.