REPORT OF CONDUCT DIVISION

OF THE

JUDICIAL COMMISSION OF NEW SOUTH WALES

COMPLAINT BY

DIRECTOR OF PUBLIC PROSECUTIONS (NSW)

AGAINST NEWLINDS SC DCJ

19 August 2024

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Introduction

1 By resolution of 13 May 2024, the Judicial Commission of New South Wales (**the Commission**) constituted a Conduct Division to which it referred a complaint (**the Complaint**) that had been made by Ms Sally Dowling SC, the New South Wales Director of Public Prosecutions ("**the Director**" or "**the DPP**"), in relation to his Honour Judge Newlinds SC of the District Court of New South Wales (**the Judge**).

2 The Judge was appointed to the District Court of New South Wales on 29 May 2023. His practice at the Bar was predominantly in the area of commercial law.

3 The Complaint was made under s 15(1) of the *Judicial Officers Act 1986* (NSW) (**the Act**). By s 15(1) of the Act, any person may complain to the Commission about "a matter" that concerns the "ability" or "behaviour" of a judicial officer. "Ability", for the purposes of s 15, extends beyond proficiency in legal doctrine, and encompasses the capacity to perform the functions of a judicial officer, including the exercise of appropriate restraint, and the determination of issues presented for resolution with objectivity and detachment.

4 The "matter" the subject of the Complaint commenced with a trial on an indictment that alleged against Mr Daniel Martinez (a pseudonym) four counts of sexual offences against s 61(I) of the *Crimes Act 1900* (NSW) (**Crimes Act**) (of which Mr Martinez was acquitted) and concluded with the disposition of an

application made by Mr Martinez for a costs certificate under the *Costs in Criminal Cases Act 1967* (NSW) (**Costs in Criminal Cases Act**): *R v Martinez* [2023] NSWDC 552 (**the Judgment**). Both the trial and the costs application were conducted on behalf of the Director by a Solicitor Advocate.

5 The Judge presided over Mr Martinez' jury trial between 23 November and 4 December 2023. Argument was heard on the costs certificate application on 5 December 2023 and a judgment of some 25 pages and 101 paragraphs was delivered *ex tempore* on the same day, immediately following the conclusion of argument. The Judge's reasons for granting a certificate are set out in the Judgment. Key passages from the Judgment will be reproduced in the course of dealing with specific aspects of the Complaint.

The Complaint

6 The Complaint was presented under four headings as follows:

- Ground One - Failure to meet basic standards of competence;
- Ground Two - Failures in judicial impartiality, detachment and demeanour;
- Ground Three – Unreasonable criticism and vilification of a sexual assault complainant; and
- Ground Four – Baseless criticism of the Director of Public Prosecutions and the Office of the Director of Public Prosecutions (**ODPP**).

7 Each of the grounds was supported by particulars taken either from the transcript of the proceedings or the Judgment. They relate to both questions of ability and behaviour within the meaning of s 15(1) of the Act. There was some overlap between a number of the grounds.

8 The Complaint refers to the "*Guide to Judicial Conduct*", published by the Australasian Institute of Judicial Administration Incorporated (**AIJA**) and issued

for and under the auspices of the Council of Chief Justices (**the CCJ Guide**), a copy of which is furnished to all new judicial officers in New South Wales on their appointment to office, as part of their induction to judicial office. The CCJ Guide is an important publication whose purpose is to give practical guidance to members of the Australian judiciary at all levels. In some sections of this Report, particular parts of the current CCJ Guide are referred to and set out. Other parts of the CCJ Guide are extracted in Appendix B to this Report. The emphasis added to those extracts is ours, and highlights matters germane to the determination of the Complaint.

Procedural background

9 Following the initial making of the Complaint, the Commission invited the Judge to respond to it in writing. He did so in two submissions dated 11 March 2024 (**the first response**) and 19 March 2024 (**the second response**).

10 Section 20(1) of the Act states a number of circumstances in which the Commission is required summarily to dismiss a complaint. These include that the Commission is of the opinion that there is or was available a satisfactory means of redress (s 20(1)(e)), and that the complaint relates to the exercise of a judicial or other function that is or was subject to adequate appeal or review rights (s 20(1)(f)).

11 Following the Commission's review of the Complaint and the first and second responses, the matter was referred to this Conduct Division. The terms of that referral were as follows:

> "It appearing to the Commission that:
>
> (a) the matter, if substantiated, could justify parliamentary consideration of the removal of the judicial officer from office, or
>
> (b) although the matter, if substantiated, might not justify parliamentary consideration of the removal of the judicial officer from office, the matter warrants further examination on the ground that the matter may affect or may have affected the performance of judicial or official duties by the officer,

> pursuant to s 21(1) of the Judicial Officers Act 1986 (the Act), the Commission resolved to refer the complaint to a Conduct Division which will be constituted under Division 3 of the Act."

12 The legislative framework under which the investigation by the Conduct Division has been conducted is as follows.

13 Section 22 of the Act provides that the Commission shall appoint a panel of three persons to be members of the Conduct Division for the purpose of exercising the functions of the Division in relation to a complaint referred to the Division. Two of the members of the Division are to be judicial officers (one of whom may be a retired judicial officer). By s 14, the functions of the Conduct Division are to examine and deal with complaints referred to it under Part 6 and formal requests referred to it under Part 6A.

14 By s 31(1) of the Act, in dealing with a complaint about a judicial officer, the Conduct Division is not limited to the matters raised initially in the complaint, and the Division may treat the original complaint as extending to other matters arising in the course of its being dealt with.

15 The Conduct Division appointed by the Commission comprised the Chief Justice of New South Wales, the Hon. Andrew Bell, the Hon. Carolyn Simpson AO KC, a retired judge of appeal and Justice of the Supreme Court of New South Wales, and Payne-Scott Professor Nalini Joshi AO, Chair of Applied Mathematics at the University of Sydney, being a community representative of high standing in the community nominated by Parliament in accordance with Schedule 2A of the Act.

16 Section 23 of the Act provides that the Conduct Division shall conduct an examination of a complaint referred to it, and that, in conducting the examination, the Conduct Division may initiate such investigations into the subject-matter of the complaint as it thinks appropriate. Section 23(3) provides that the examination or investigations shall, as far as practicable, take place in private. By s 24 of the Act, the Conduct Division may hold hearings in

connection with the complaint, and those hearings may be held in public or in private, as the Conduct Division may determine.

17 The Conduct Division, by s 26(1), is required to dismiss a complaint to the extent that it is of the opinion that:

> "(a) the complaint should be dismissed on any of the grounds on which the Commission may summarily dismiss complaints, [see s 20] or
>
> (b) the complaint has not been substantiated."

18 If, however, the Conduct Division decides that a complaint is wholly or partly substantiated, by s 28(1):

> "(a) it may form an opinion that the matter could justify parliamentary consideration of the removal of the judicial officer complained about from office, or
>
> (b) it may form an opinion that the matter does not justify such consideration and should therefore be referred back to the relevant head of jurisdiction."

19 Section 28(2) provides that, if it forms the second of these opinions, the Conduct Division must send a report to the relevant head of jurisdiction setting out the Division's conclusions and, by s 28(3), such a report may include recommendations as to what steps might be taken to deal with the complaint. Copies of the report must be given to the Commission, and the Commission must give a copy to the judicial officer concerned. The Commission may also give a copy of the report (or a summary of the report) to the complainant (unless the Conduct Division has notified the Commission in writing that this should not occur): s 28(4)-(6).

20 By s 37A(3), the Commission must notify the Minister [relevantly the Attorney General] when a complaint about a judicial officer is referred to the Conduct Division and when and the manner in which such a complaint is disposed of (whether or not the Minister has requested information about the complaint). By s 37A(4), the Commission may, when providing the Minister with information about a complaint against a judicial officer under this section, also provide other information that the Commission considers relevant.

21 There is a more elaborate procedure under s 29 of the Act in the event that the Conduct Division decides that a complaint is wholly or partly substantiated and forms an opinion that the matter could justify parliamentary consideration of the removal of the judicial officer from office. That procedure entails the presentation of the report to the Governor setting out the Division's findings of fact and its opinion that the matter could justify parliamentary consideration of the removal of the judicial officer from office; and the laying of the report before both Houses of Parliament.

22 Under cover of a letter from Moray & Agnew, the Judge submitted a six page letter dated 4 July 2024 signed by him and addressed to the Chief Justice as Chairperson of the Conduct Division. That letter was considered by the Conduct Division together with his Honour's letters of 11 and 19 March 2024 addressed to the Commission (the first and second responses respectively), written submissions dated 10 July 2024 prepared on the Judge's behalf by Mr Phillip Boulten SC and furnished under cover of a letter dated 11 July 2024 from Moray & Agnew. The Conduct Division also had before it the Judgment, the transcripts of the trial and of the costs certificate application, and a media statement dated 15 December 2023 issued by the Director.

23 The 11 July 2024 letter from Moray & Agnew confirmed that there was no additional material that the Judge wished to place before the Commission. A hearing to present oral submissions was offered but not taken up by the Judge or his legal representatives.

A preliminary point

24 In both his first and second responses, the Judge pointed to the Director's failure to appeal against the orders made on the costs certificate application as "a powerful discretionary factor in favour of dismissing the complaint, particularly in circumstances where [the Director] has not explained why an appeal would not be an adequate remedy." (This was a reference to s 20(1)(e) and (f) and s 26(1)(a) of the Act.) The Director had anticipated this point in her Complaint, stating:

> "The Crown has not appealed from the orders made by Newlinds DCJ on 5 December 2023. There are many factors relevant to a decision about whether to appeal an order for a certificate for costs, which need not be canvassed here. While I consider that the Judgment contains appealable errors of law and the judge took into account patently inappropriate considerations in the exercise of his discretion, an appeal would not have been an appropriate or sufficient means of seeking redress for the subject-matter of this complaint (cf s 20(1) *Judicial Officers Act 1986*)."

25 The Commission having declined summarily to dismiss the Complaint and having referred it to the Conduct Division, the Division must proceed on the basis that, by referring the matter to the Conduct Division, the Commission did not consider that an alternative remedy, whether by appeal or review or otherwise, was available.

26 In assessing whether there were "*adequate* appeal or review rights" within the meaning of s 20(1)(f) of the Act, the nature of the complaint in any given case must be considered. The fact, for example, that the conduct complained of arises in the context of or relates to a judgment that may be infected by appellable error does not mean that a Conduct Division must dismiss a complaint. The putative upholding of a notional appeal may not be assessed to be "adequate" in the opinion of either the Commission or a Conduct Division in the circumstances of a particular case. That is especially likely to be so where the complaint in question involves, as does the present Complaint, questions of competence and judicial behaviour and temperament.

The role of a prosecutor

27 Before turning to consideration of the Complaint, it is desirable to set out in short form some well-known and long-established principles relating to the role of a Director of Public Prosecutions. As will be seen, aspects of the conduct complained of by the Director relate to what is said to be the Judge's misconception or misunderstanding or lack of proper understanding of the role of the Director, including the terms of the *Director of Public Prosecutions Act 1986* (NSW) (**DPP Act**).

28 In *Jago v District Court (NSW)* (1989) 168 CLR 23 at 39; [1989] HCA 46, Brennan J said:

> "*Barton* [*v The Queen* (1980) 147 CLR 75] reaffirms the clear division between the executive power to present an indictment and the judicial power to hear and determine proceedings founded on the indictment. That division is of great constitutional importance. It ensures that the function of bringing alleged offenders to justice is reposed entirely in the hands of the executive branch of government who must answer politically for the decisions which they make - not only decisions to prosecute in particular cases but decisions relating to the commitment of resources to the detection, investigation and prosecution of crime generally. These are decisions which courts are ill-equipped to make and, so far as they relate to the commitment of resources, powerless to enforce. The division of powers in the administration of the criminal law between the executive and judicial branches of government also ensures that the courts do not become concerned by matters extraneous to the fair determination of the issues arising on the indictment and are thus left free to hear and determine charges of criminal offences impartially".

29 In the same case, Gaudron J said that "... the question whether an indictment should be presented is and always has been seen as involving the exercise of an independent discretion inhering in prosecution authorities, which discretion is not reviewable by the courts": at 77.

30 In *Price v Ferris* (1994) 34 NSWLR 704 at 706-707, Kirby P said:

> "What is the object of having a Director of Public Prosecutions? Obviously, it is to ensure a high degree of independence in the vital task of making prosecution decisions and exercising prosecution directions. Its purpose is illustrated in the present case.... The purpose of so acting is to ensure that there is manifest independence in the conduct of the prosecution. It is to avoid the suspicion that important prosecutorial discretions will be exercised otherwise than on neutral grounds. It is to avoid the suspicion, and to answer the occasional allegation, that the prosecution may not be conducted with appropriate vigour.... Decisions to commence, not to commence or to terminate a prosecution are made independently of the courts. Yet they can have the greatest consequences for the application of the criminal law. It was to ensure that in certain cases manifest integrity and neutrality were brought to bear upon the prosecutorial decisions that the Act was passed by Parliament affording large and important powers to the DPP who, by the act, was given a very high measure of independence."

31 A corollary to the DPP's independence is that prosecutorial decisions are only made by the DPP, as Dawson and McHugh JJ observed in *Maxwell v The Queen* (1996) 184 CLR 501 at 513; [1996] HCA 46 (**Maxwell**):

> "The decision whether to charge a lesser offence, or to accept a plea of guilty to a lesser offence than that charged, is for the prosecution and does not require the approval of the court. Indeed, the court would seldom have the knowledge of the strengths and weaknesses of the case on each side which is necessary for the proper exercise of such a function. The role of the prosecution in this respect, as in many others, 'is such that it cannot be shared with the trial judge without placing in jeopardy the essential independence of that office in the adversary system'."

32 Gaudron and Gummow JJ noted in *Maxwell* at 534 that, if courts became concerned with the DPP's prosecutorial decisions, it would also compromise the *court's* independence:

> "It ought now be accepted, in our view, that certain decisions involved in the prosecution process are, of their nature, insusceptible of judicial review. They include decisions whether or not to prosecute...The integrity of the judicial process — particularly, its independence and impartiality and the public perception thereof — would be compromised if the courts were to decide or were to be in any way concerned with decisions as to who is to be prosecuted and for what."

33 French CJ made a similar point in *Likiardopoulos v The Queen* (2012) 247 CLR 265; [2012] HCA 37 at [2]:

> "The general unavailability of judicial review in respect of the exercise of prosecutorial discretions rests upon a number of important considerations. One of those considerations, adverted to in the joint judgment, is the importance of maintaining the reality and perception of the impartiality of the judicial process. A related consideration is the importance of maintaining the separation of the executive in relation to prosecutorial decisions and the judicial power to hear and determine criminal proceedings. A further consideration is the width of prosecutorial discretions generally and, related to that width, the variety of factors which may legitimately inform the exercise of those discretions. Those factors include policy and public interest considerations which are not susceptible to judicial review, as it is neither within the constitutional function nor the practical competence of the courts to assess their merits."

34 In the same case, Gummow, Hayne, Crennan, Kiefel and Bell JJ observed at [37] that "... the independence and impartiality of the judicial process would be compromised if courts were perceived to be in any way concerned with who is to be prosecuted and for what".

Consideration of the Complaint

Ground 1 – Failure to meet basic standards of competence

35 Ground 1 of the Complaint was expressed under the heading "Failure to meet basic standards of competence". Four examples were relied upon to support the Director's statement that the Judge demonstrated "a lack of awareness, or misunderstanding, of the law as it applies to the conduct of criminal trials and related applications".

Discontinuance

36 The first example related to statements made by the Judge in [25] of the Judgment:

> "I did invite the Solicitor Advocate to consider discontinuing the proceedings at that time. We had a discussion where it became clear to me that he felt he was bound by instructions to continue the proceeding unless and until he obtained instructions from the Office of [the] Director of Public Prosecutions to the contrary. I expressed to him at the time and I will now say it again that *I believe this is a substantial flaw in the system set up within the DPP of this State*. Such an arrangement is in direct conflict with the obligations of barrister[s] and Solicitor Advocates appearing in this Court. They are required to form their own individual, subjective views, as to whether proceedings should be commenced and continued, and have an obligation (regardless of instructions) not to commence or proceed with cases if they form the view that they have no prospects of success. *This apparent policy of the DPP*, it seems to me, puts all advocates appearing on the DPP's instructions, but more importantly those of them that are actually employed either by the DPP or some related entity into a position of intolerable conflict." (Emphasis added)

37 The Director pointed out in her Complaint that the principal functions and responsibilities of the DPP are set out in s 7 of the DPP Act. Section 7 gives to the Director as a principal function and responsibility the institution and conduct, on behalf of the Crown, of prosecutions (whether on indictment or summarily) for indictable offences in the Supreme Court and the District Court. The function of *discontinuing* proceedings can be exercised personally by the Director or by a Deputy Director, but the statute does not permit the delegation of that function to any other person. Section 33(2)(a)-(b) of the *DPP Act* provides:

> "The Director may not delegate the exercise of any of the following functions, except to a Deputy Director--

(a) determining that no bill of indictment be found, in respect of an indictable offence, in circumstances where the person concerned has been committed for trial,

(b) directing that no further proceedings be taken against a person who has been committed for trial or sentence".

38 Reference was also made by the Director to Prosecution Guidelines (**the Guidelines**) issued under s 13(1) of the *DPP Act*. Relevantly, the Guidelines address the situation where an advocate briefed to conduct a prosecution on behalf of the Director forms the view that there are no reasonable prospects of conviction on the admissible evidence. In those circumstances, the advocate is to consult with the alleged victim and seek a direction to discontinue the proceedings. The terms of [5.6] of the Guidelines are reproduced in Appendix A of this Report.

39 The Director drew attention to the following extracts of transcript from the hearing of the costs certificate application, which records the Judge saying:

> "I don't know anything about the director's guidelines ...
>
> The director might be bound by those guidelines but I'm not and I don't know what they are so I don't really care about the director's guidelines. I have a feeling the director's guidelines may be causing a real problems in the system which is something that I wanted to raise with you." (T19.50, 20.20)

40 In his first response, the Judge said:

> "The complaint alleges a lack of awareness or misunderstanding on my part of the law, in particular in relation to the principal functions and responsibilities of the DPP. This is said to have led to a grave error on my part.
>
> I reject this aspect of the complaint. This is one of the matters that could have been ventilated through an appeal of my decision.
>
> I do not think my reasons demonstrate a lack of understanding of the functions and responsibilities of the DPP, much less a grave error in thinking. As my reasons make clear (see at [25]), I was concerned with the tension between the way in which the DPP is structured, and an individual advocate's own personal responsibility to ensure that the case is conducted in accordance with the Bar Rules (incorporated in the Solicitor Rules for advocates). The contention that I did not understand the legal arrangements in a fundamental way is not borne out by a fair reading of the judgment (the exchange at T[ranscript] 349 also makes this clear).

> Accepting that Solicitor Advocates do not have the power to withdraw an Indictment, it remains my opinion that, consistent with their ethical duties as lawyers, they must be able to make their own decision to adduce no further evidence and or make submissions to the judge and or jury that they do not feel able to make a submission consistent with a finding of guilt.
>
> This aspect of the complaint is misconceived, misunderstands and/or misstates my reasons and the point I was trying to make. But in any event, even if I was in error, it does not amount to anything approaching judicial incompetence."

41 In the second response, the Judge stated "[s]uffice to say that I do not accept the asserted ignorance". Mr Boulten subsequently submitted on the Judge's behalf that:

> "His Honour's concerns about the prosecutor advancing a trial that the prosecutor personally views as being unsustainable was a legitimate concern. Whether or not his Honour understood the exact delegations that covered the situation is moot. The Judge's expression of concern does not constitute incompetence.
>
> The reference in [20] of the complaint about the Judge's comments that 'I don't know anything about the Director's Guidelines and 'the Director might be bound by those Guidelines, but I am not' when read in their proper context relate to the Judge's assessment about whether or not the Guidelines were before him for consideration on the application for a Costs Certificate. Those comments do not demonstrate a lack of awareness or a misunderstanding of the law. Nor should they be construed as disregard for the DPP Guidelines."

42 The Judge's references in [25] of the Judgment to the "*substantial flaw in the system set up within the DPP*", "*such an arrangement*" and "*[t]his apparent policy of the DPP*" make it plain that the Judge could not have been aware of a Solicitor Advocate's inability (by dint of statute) to discontinue a prosecution on his or her own initiative, and must not have been aware of the statutory regime governing discontinuance, as noted above, at the time he gave his Judgment. Contrary to the submission of Mr Boulten, there is nothing "moot" about the Judges' understanding of the relevant legislation. Some of the "discussion" which the Judge says in [25] of the Judgment that he had with the Solicitor Advocate is contained in the extended passage which is the subject of the judicial bullying allegation which forms part of Ground 2 which the Judge has come to accept is accurately so characterised. That is a matter which goes essentially to judicial behaviour, but also bears upon the ability of the judicial

officer to discharge the judicial function. The Judge's evident lack of familiarity with the *DPP Act* goes to questions of competence.

43 There is nothing in the passage of transcript at T349, to which the Judge referred, to support his assertion that he understood the applicable principles. The discussion there recorded is about whether the jury should be discharged after a witness gave some evidence that had been the subject of an exclusion ruling.

44 It was unfortunate that the Judge launched into his observations about conflict of interest in a published judgment without familiarising himself with the statutory regime governing the DPP and the special responsibilities and obligations of the Director under the constitutive Act. That lack of familiarity both with the *DPP Act* and the Guidelines was the source of some of the matters complained of. So too, a lack of familiarity with provisions of the *Evidence (Audio and Audio Visual Links) Act* 1998 (NSW) (**Evidence (Audio and AVL) Act**) resulted in the Judge proceeding on an erroneous basis in another aspect of the hearing of the trial which is dealt with at [69]-[76] below.

45 The Director also complains that the Judge's comments in relation to the decision to prosecute Mr Martinez were based upon an erroneous application of the *Costs in Criminal Cases Act*, although the Director accepts that the Judge correctly identified leading authorities in relation to that Act in the Judgment. This is dealt with at [52] ff below.

46 While the specific matter complained of under this part of Ground 1, namely the Judge's evident lack of familiarity with the limited way in which prosecutions may be discontinued in New South Wales, did expose a significant gap in the Judge's understanding of the law in this area, it does not follow that that (of itself) should result in a finding of incompetence on the Judge's part. No one judge in the State could claim (or be expected) to be familiar with the entirety of the statute book, or even the entirety of the statute book in a particular area of the law. This is perhaps especially so in the District Court where judges are generally expected to sit (in part at least) in criminal cases even where their

practices at the Bar have been in a different area of the law, as it was with the Judge who practised almost exclusively in commercial law with little or any experience in criminal law. He had only been a judge of the District Court for slightly over six months at the time of the decision in *Martinez*.

47 While judges may not be familiar with the entirety of the New South Wales or the Commonwealth statute books or, without research, with the interpretations that have been placed on specific statutes, they can be expected to undertake such careful research before making global statements, especially in terms that are severely critical of public officers or other officers of the Court, and or which call for reform.

48 It was undoubtedly imprudent for the Judge, especially one with so little experience in criminal law and criminal practice and procedure, to express himself in such terms as he did in [25] of the Judgment:

> "This apparent policy of the DPP, it seems to me, puts all advocates appearing on the DPP's instructions, but more importantly those of them that are actually employed either by the DPP or some related entity into a position of intolerable conflict"

without at the very least familiarising himself with the *DPP Act* and the Guidelines which are consistent with, and authorised by, that Act.

49 We also observe that the suggestion in the first response that, notwithstanding the provision that disentitles Solicitor Advocates from discontinuing proceedings, Solicitor Advocates could nevertheless determine to adduce no further evidence or submit to the jury or the judge that they could not make submissions consistent with guilt would be in clear contradiction of the statute.

50 Viewed in isolation, the Judge's ignorance of the statutory regime relating to the discontinuance of prosecutions was regrettable but, so viewed, i.e. in isolation, it does not manifest "a failure to meet basic standards of competence". We note, however, that questions of ability in relation to other aspects of criminal procedure are also the subject of legitimate complaint and an overall

assessment must be made as to the substantiation of the grounds of the Complaint.

51 The Judge's lack of familiarity with the fundamental role of the Director in the initiation and continuation of prosecutions also falls to be considered in the context of the Judge's swingeing criticisms of the practices of the Director and her Office in relation to the bringing of the instant and other criminal prosecutions in sexual assault cases which proceeded on a basis of either ignorance or speculation in relation to those topics. This last matter is addressed under Ground 4.

Reference to actual decision to prosecute

52 The second matter relied upon by the Director under Ground 1 of the Complaint was that, in the Judgment, the Judge was "either unwilling or unable to confine his consideration and determination of the application to the legal test and evidence relevant to the application, in accordance with the provisions of the *Costs in Criminal Cases Act 1967*." The Director complained, referring in particular to [3] and [70]-[71], that the Judgment erroneously recorded speculative findings or comments about the *actual decision* to prosecute, which were neither required nor permitted by the *Costs in Criminal Cases Act*, or by the authorities the Judge cited.

53 Before turning to a consideration of those paragraphs, it is necessary to set out certain sections of the *Costs in Criminal Cases Act* pursuant to which Mr Martinez made an application for a certificate following the acquittal. Section 2 of that Act relevantly provides that a judge in any proceedings relating to any offence may grant a certificate under s 2 "where, after the commencement of a trial in the proceedings, a defendant is acquitted or discharged in relation to the offence concerned." Any certificate so granted is required to specify "the matters referred to in section 3 and relating to those proceedings."

54 By s 3(1), the certificate is required to specify that, in the opinion of the judge:

"(a) if the prosecution had, before the proceedings were instituted, been in possession of evidence of *all the relevant facts*, it would not have been reasonable to institute the proceedings, and

(b) that any act or omission of the defendant that contributed, or might have contributed, to the institution or continuation of the proceedings was reasonable in the circumstances." (Emphasis added)

55 "All the relevant facts" are defined in s 3A of the Act as:

"(a) the relevant facts established in the proceedings, and

(b) any relevant facts that the defendant has, on the application for the certificate, established to the satisfaction of the Court or Judge or Magistrate, and

(c) any relevant facts that the prosecutor, or in the absence of the prosecutor, any person authorised to represent the Minister on the application, has established to the satisfaction of the Court or Judge or Magistrate that—

(i) relate to evidence that was in the possession of the prosecutor at the time that the decision to institute proceedings was made, and

(ii) were not adduced in the proceedings."

56 Returning to the Complaint and the paragraphs of the Judgment to which this aspect of the Complaint is directed, [3] and [70]-[71] of the Judgment were in the following terms (with our emphasis supplied):

"[3] The Applicant was arrested on 3 June 2021 and was refused bail. Ultimately by order of the Supreme Court of New South Wales they were granted bail on 17 February 2022 after they spent approximately 8 months in custody. In my judgment they did not commit any crime *and should never have been prosecuted. This prosecution is a miscarriage of justice. That has occurred largely as a consequence of the prosecutor – relevantly the Office of the Director of Public Prosecutions either not properly considering its power to prosecute, or if it did, by wholly misapplying the law. On any basis the decision to prosecute and continue to prosecute was legally wrong.*

...

[70] What that means is on the whole of the Crown's case, not just known at the time of the trial but as was known to the Crown at the time the proceedings commenced, had no prospects of success, and therefore it would follow that no reasonable prosecutor ought to have commenced the proceedings let alone continued with them.

> [71] There are other factors which need to be considered because I think they are relevant to the exercise of my discretion I having now being [sic] satisfied that it was unreasonable for the prosecutor (or a hypothetical prosecutor) to have commenced the proceedings."

57 The Director's criticism is predicated on the fact that the jurisdiction to grant a costs certificate under the *Costs in Criminal Cases Act* – the jurisdiction which the Judge was relevantly exercising – does not call for a consideration of the actual decision to bring a prosecution. Rather, as the Judge accurately stated (at [14] and [22] of the Judgment), it turns upon:

> "[14] … an inquiry of what *a hypothetical prosecutor* would have done at the time of the institution of the proceedings (in this case at the time of the 'arrest or charge', which was relevantly 3 June 2021). The relevant facts are defined in subs 3(1)(a) and include facts known now which may not have been known or knowable to the actual prosecutor at that relevant time. Indeed, the 'relevant facts' are defined in such a way so that facts that have been proved to my satisfaction on this application are relevant facts notwithstanding that those facts were not before the jury - see s 3A(1)(b).
>
> …
>
> [22] The essential feature of the legal question, which is rather unusual is that it is directed to the state of mind *of a hypothetical prosecutor* at the time the proceedings were instituted but the question has to be answered not by reference to the relevant facts known at that time, but is determined by reference to all the relevant facts (as broadly defined in s 3A) including known to me at the time of the application for costs, or this application for costs." (Emphasis added)

58 The essence of the Director's complaint is that, notwithstanding his proper identification, based on the authorities, of the nature of the exercise required to be undertaken on such an application, the Judge expressed himself in unequivocal and negative terms about the actual decision to prosecute whereas that was not the nature of the task before him. This emerges sufficiently from [3] of the Judgment set out above but may also be seen in other paragraphs of the Judgment. The Judge's conflation of the actual prosecutor and the hypothetical prosecutor may also be seen in [71] of the Judgment.

59 In his first response to this aspect of the Complaint, the Judge said that it raised a question of law more appropriate for appeal. We have dealt with a general submission to that effect at [24]-[26] above. He then referred to what he had

said in the Judgment about the residual discretion as to whether a costs certificate ought be granted or not, stating that "there is considerable support in the authorities for this view."

60 This response seems, with respect, to have missed the point of the criticism made in the Complaint which did not go to whether or not there was any residual discretion but to the Judge's conflation of the proper test based upon a hypothetical prosecutor (with the benefit of hindsight knowledge) and highly adverse factual conclusions in relation to the reasonableness of the actual prosecution. In his submissions, Mr Boulten accepted that the test under s 3 of the *Costs in Criminal Cases Act* for the issue of a certificate does not require specific reference to the actual decision that was made to institute the proceedings. He went on to submit, however, that, nevertheless, a judge considering an application under s 2 is not prohibited from considering what was known to the prosecution at the time that the proceedings were commenced or at the time of trial. That may be so but is not to the point. The inquiry is as to the hypothetical prosecutor, as the Judge accepted in his summary of the authorities (see [57] above) and confirmed in the course of argument (see [178] below).

61 While we consider that the Judge's conflation of the hypothetical and actual prosecution decisions was regrettable, the retrospective assessment of what a hypothetical prosecutor should have done with the benefit of hindsight is not always a straightforward exercise and may lend itself to erroneous conflation as occurred in the present case. The Conduct Division's task is not to conduct an appeal from the Judge's decision. Rather, it is to assess whether what we consider to be the Judge's failure to apply the correct test, taken together with the other matters complained of under Ground 1, manifests "a failure to meet basic standards of competence" so as to warrant either of the courses contemplated by s 28 of the Act.

62 We express our overall conclusion in that regard at [76] ff below.

Complainant's understanding of the law

63 The third matter relied upon related to the suggestion at the end of [95] of the Judgment that satisfaction as to there being a reasonable basis for making an allegation of sexual assault would include "*at least being satisfied that the complainant has a correct understanding of the legal definition of sexual assault or sexual intercourse without consent*". The Director complained that this comment involved a "misunderstanding of one of the most straightforward precepts of the criminal law, namely that proof of commission of a crime does not depend on the complainant's understanding of the law".

64 It is correct, as the Director submitted, that proof of commission of a crime does *not* depend on the complainant's understanding of the law, and great care must be taken by the prosecution to avoid charges of coaching a witness as to the elements of an offence necessary to be established beyond reasonable doubt.

65 It is very difficult to understand the rationale for the Judge's statement which is the subject of this aspect of the Complaint, and Mr Boulten's submissions did not address it in its generality but sought to confine it to the facts of the particular case, as the Judge had done in his first response in which he said of this aspect of the Complaint that it "failed to come to grips with the facts of the case", continuing that:

> "It is wholly inconsistent with the way the Crown ran the case at trial where all of the statements by the complainant to the effect that she believed she had been sexually assaulted had been tendered by the Crown as 'complaint evidence'. The short point was that the complainant could not and did not give any evidence at all consistent with having been sexually assaulted apart from her subjective belief that she had been. That belief was based on her misunderstanding of the legal test."

66 The statement complained of in [95] of the Judgment was not confined to the facts of the particular case that was before the Judge, as he asserted in his response, and indeed was not directed to them at all. Rather, it was an *ex cathedra* statement that the ODPP should at least be satisfied of a complainant's understanding of sexual assault so as to have a reasonable basis when making allegations of sexual assault.

67 As the Judge recognised in the course of argument in relation to the costs certificate, the prosecution in the case before him did not turn on the complainant's understanding of the law at all but, rather, turned upon statements by Mr Martinez in an electronically recorded interview (**the ERISP**) which the Crown characterised as constituting admissions. For example, as the Judge pointed out at [65] of the Judgment:

> "the Applicant said things like, 'could tell she was intoxicated', 'clearly intoxicated', and 'beyond the point of consent'. They also from time to time talked about what they described as their 'duty of care', and how they were concerned they might have breached it."

While the Judge took the view that these admissions were taken out of context and that there was no reasonable prospect of a jury finding an admission of guilt being made out, the case was not taken from the jury and, had the jury accepted the admissions as inculpatory to the requisite standard, a conviction could have followed irrespective of the complainant's understanding of the legal elements of sexual assault.

68 The Judge's observation highlighted at [63] above was legally inaccurate and ill-considered. We consider this aspect of the Judgment further in conjunction with other particulars of this ground of the Complaint at [76] ff below.

Audio visual evidence

69 The fourth example relied upon by the Director arose in the following circumstances. The Solicitor Advocate proposed to call, in the Crown case, a medical practitioner who had examined the complainant following her allegation of sexual intercourse without consent. The medical practitioner was employed by the NSW Health Service. By s 5BAA(1) of the *Evidence (Audio and AVL) Act*, subject to any applicable rules of court, a government agency witness *must*, unless the court otherwise directs, give evidence by audio link or audio visual link from any place within New South Wales. A "government agency witness" is expressly defined to include a member of staff of the NSW Health Service. No application is required to call a relevant witness by audio visual link (**AVL**).

70 Turning to the portion of the transcript relied upon to support this aspect of the Complaint (T253-254):

> "HIS HONOUR: I will make the order, but can you just understand this? This is for your office more than [you] anyway Mr. Solicitor. The DPP doesn't run my court, so do not make arrangements to call people by AVL before you ask me.
>
> CROWN: Yes, your Honour.
>
> HIS HONOUR: And don't assume I'll say yes
>
> CROWN: No your Honour, but-
>
> HIS HONOUR: Because I don't like it. I don't think it's a good idea and I don't like this modern trend at all. Experts just reckon they can give it by AVL because they're so important.
>
> CROWN: The Crown's application would have been under s 5BAA all in capitals. Evidence, Audio and Audio Visual Links Act, which says, and I'm paraphrasing that, basically, witnesses employed by the New South Wales government must give evidence by AVL upon request unless there's an order to the contrary so the officer's position, your Honour, in accordance with that section -
>
> HIS HONOUR: Is that really what it says, it is?
>
> CROWN: It does use the word 'must'.
>
> HIS HONOUR: Whose (sic) this person employed by?
>
> CROWN: The New South Wales Government, so the New South Wales Health-
>
> HIS HONOUR: Are they? New South Wales Health's not New South Wales Government. You don't want to talk me out of it. I'm going to make the order but just be aware, I don't like it and if you want to make it on that ground, you'd better prove that the person is actually employed by the New South Wales government. I'm not employed by the New South Wales government, I'm employed by the Department of Justice.
>
> CROWN: I'll bear all that in mind.
>
> HIS HONOUR: I don't what to have a fight about it. I'm allowing it. I'm just saying, ask first."

71 The Director contends that this extract shows a lack of awareness and unwillingness to consider the application of well-used statutory provisions regulating the attendance of government experts by AVL. The Director complains that all judicial officers presiding over criminal trials in New South Wales ought to have at least a basic knowledge of the statutory framework

within which prosecutions and related applications in this jurisdiction are conducted.

72 In the first response, the Judge said:

> "I accept that I was unaware of the provisions relating to the attendance of government experts by AVL. This was not something I had come across in my 33 year career at the Bar or in my then short experience as a District Court Judge. When my error was pointed out to me by the Solicitor Advocate, I proceeded on the correct basis. I do not believe that this amounts to Judicial incompetence and submit that this aspect of the complaint is trivial, perhaps frivolous."

73 We accept the Judge's candid acknowledgement of his lack of awareness of the provision. It is not quite accurate, however, that the Judge proceeded on the correct basis, as there was no requirement for the grant of leave by the Court *cf.* his statement "*You don't want to talk me out of it. I'm going to make the order*". No order was required and the Judge evidently did not go to the legislation when it was drawn to his attention. Had he done so, it would have been obvious that the expert witness from the NSW Health Service fell within the provision.

74 We also reject Mr Boulten's submission that the Judge's "handling of the belated and rather presumptuous application was appropriate". There was nothing that was belated, and the Solicitor Advocate's conduct was not presumptuous but in accordance with the *Evidence (Audio and AVL) Act*. An application was not required but was nonetheless made: T253.10.

75 While we cannot help but observe that the Judge's response to the Solicitor Advocate, threatening to put him to proof as to the expert's status, was both defensive and at the same time somewhat aggressive, and that his Honour's response that, as a judge, he was not employed by the NSW Government but by the Department of Justice, was legally wrong (judges holding their offices on Commission from the Governor), nevertheless, we do not consider that this aspect of his Honour's conduct, taken alone, amounted to incompetence that would warrant either of the courses contemplated by s 28(1) of the Act.

Conclusion as to charge of failure to meet basic standards of competence

76 The particular examples relied upon by the Director under Ground 1 disclose that the Judge was unfamiliar with some fundamental features of the statutory regime relating to prosecutions in this State as well as the role of the Director within that regime, was misguided in his global statements in relation to a complainant's understanding of the law and the relevance of that understanding to decisions to institute prosecutions, misapplied the law in relation to the *Costs in Criminal Cases Act* by trespassing upon the actual decision to prosecute and was ignorant of provisions in relation to aspects of criminal procedure.

77 These shortcomings taken collectively do raise issues, in our opinion, as to the suitability of this Judge sitting in the District Court's criminal jurisdiction on account of his evident lack of knowledge or familiarity with key aspects of the procedural framework in which criminal trials are conducted. The Director's complaint that the Judge "demonstrates a lack of awareness or misunderstanding of the law as it applies to the conduct of criminal trials and related applications" is substantiated.

78 Some of these shortcomings may be put down to the Judge's inexperience in criminal law and procedure and his short time spent as a judge at the time of the events in question although there was a major disconnect between the Judge's lack of experience and familiarity with the criminal jurisdiction and his preparedness to be confidently outspoken about it. This phenomenon may also be seen in later aspects of the Complaint.

79 There was a want of competence in the various respects particularised and, taken together with other aspects of the Judge's behaviour, as discussed in considerable detail below, we make recommendations as to this Judge's suitability to continue to sit in the District Court's criminal jurisdiction.

Ground 2 - Failures in judicial impartiality, detachment and demeanour

80 The Director states in the Complaint that "[i]ntemperance and baseless criticism erode public confidence in the administration of justice and in the judiciary",

referring to the CCJ Guide at [2.1], [4.1], [4.2], [4.3], [4.4], [4.5] and [4.12]. These sections of the Guide are set out at Appendix B to this Report but key features of those sections emphasise:

- the need for impartiality and even-handedness;
- the avoidance of prejudgment;
- respect for all participants in the trial process;
- patience and moderation.

81 We agree that intemperance and baseless criticism, both on the Bench and as expressed in judgments of the Court, can and do erode public confidence in the administration of justice and in the judiciary. Intemperance is utterly inconsistent with the calm and balanced approach required in the discharge of judicial responsibility. Baseless criticism is inconsistent with the judicial method. While a judge is not foreclosed from criticising witnesses, parties or practitioners in certain circumstances, and such criticism may indeed be warranted in particular circumstances, a judge should only do so where it is relevant and necessary to do so, where a proper basis exists in the evidence, where the person the subject of the criticism is given notice of the proposed criticism and a proper opportunity to respond, and where the judge gives reasons for that criticism based on material which is identified by the judge.

82 The Director asserts that the Judge manifested intemperance in his judicial conduct and made baseless criticisms of her in the Judgment and gave the following eight examples of the failures in judicial impartiality, detachment and demeanour of which she complained:

> "(a) a preparedness to state and publish extreme criticism of the conduct of criminal trials by [the Director] and the ODPP, in circumstances of ignorance about the applicable law as set out in the first ground above;
>
> (b) the criticisms of the complainant ... in the third ground below;
>
> (c) the extraordinary discussion during the trial on 24/11/23 T45.50 – 46.5 in which the judge posed a hypothetical question concerning the circumstances in which he would be taken to rape his substantially intoxicated wife;

(d) the judge's statement during the trial on 30/11/2023 (in relation to the defence tendency evidence) that '*I kind of find the irony a little bit sweet that tendency has been put back against the Crown, because the Crown's so enthusiastic about it, tendency evidence. Normally, they love tendency evidence, and they love the way it's unfair and they love the way it's really hard to answer*' (T439.3);

(e) the observation that '*I consider the trial was conducted in such a way that it was profoundly unfair to the Applicant*' (Judgment at [7]). The trial was, of course, presided over by Newlinds DCJ.

(f) the comments that show that his Honour has set himself against the current law of the State in, for example, s 294CB of the *Crimes Act 1900*. If a judge has views about law reform of this important provision, reasons for judgment in a costs decision is a decidedly inappropriate forum in which to ventilate those opinions.

(g) The belittling, harassment and bullying of the prosecutor. The most extreme example of this is the conduct of the judge on Day 5 (29/11/2023). After a Crown witness gave evidence that had previously been ruled inadmissible, the judge harangued the solicitor (from T337 – 352) in a passage that included the judge asking the solicitor, with reference to another officer of the ODPP '*how would I know if that person's got any more brains than you?*' (T342.40), calling the ODPP '*gutless*' (T345.30) and telling the solicitor '*ethically you're on bloody thin ice*' (T346.40).

(h) The strident denunciation of the Crown case in respect of consent in circumstances where, even on the face of the text messages and ERISP admissions referred to in the Judgment, there was reason to consider that there was a real question to be tried as to the issue of consent (Judgment [51], [62] – [68])."

83 In his first response, the Judge submitted that none of the matters particularised have "merit and or are trivial other than … (g) which I accept fell short of the standards I expect of myself".

84 The first particularised criticism overlaps with the first aspect of ground 1 and particularly Ground 4 of the Complaint which, for reasons set out extensively at [169]-[189] below, we find to be substantiated.

85 The second particularised criticism is dealt with under Ground 3 below, which we find to be partially substantiated: see [144]-[168] below.

Hypothetical question re judge's wife – [82(c)] above

86 The relevant exchange the subject of the Complaint occurred in the following context. In opening the Crown case to the jury, the Solicitor Advocate said:

> "...you should be aware that the law in this state says that a person does not consent to sexual activity if they are substantially intoxicated by alcohol. That really has application in this matter." (T5)

87 It is not in dispute that this was not a precisely accurate statement of the law. At the relevant time, s 61HE(8) of the *Crimes Act* provided that the grounds on which it might be established that a person does not consent to sexual activity included that consent was given while the person was substantially intoxicated.

88 The Judge was troubled by the Solicitor Advocate's submission, reflected on it overnight, and took it up with the Solicitor Advocate the next day. In the course of the discussion that followed, the Judge said:

> "HIS HONOUR: --in which case we'll run the case on that - I think it's substantially wrong to the point where it's almost a discharge point. Because it's wrong. Because I was thinking about this last night. So, if my wife's substantially intoxicated by alcohol, I rape her, do I? That's just not the law. It couldn't be the law. It defies common sense."

89 In his second response, the Judge said that:

> "I was seeking to explain, by use of an example or analogy why it seemed to me to be obvious that the legal basis on which the Solicitor Advocate had opened to the jury (extracted at T243) [sic-T43] was self-evidently fundamentally wrong. I do not think there is anything inappropriate let alone 'extraordinary', in the example used other than it exposed the difficulties with the Advocate's submission. It should not be overlooked that the Solicitor Advocate eventually accepted his error."

90 Views may differ as to the nicety or otherwise of the hypothetical example his Honour gave, which was for the purposes of testing the legal submission that had been made by the Crown in opening submissions. It must be said that the Judge's example was completely unnuanced and simplistic – whether a sexual assault occurs will depend on absence of consent and knowledge of lack of consent. Both the former and the latter *may* be affected by substantial intoxication of the complainant. Sexual assault, moreover, may occur within marriage, and the choice and simplistic nature of the example used by the

Judge was unfortunate. We do not, however, consider that it amounts to or manifests an example of a "failure in judicial impartiality, detachment and demeanour."

Tendency evidence – [82(d)] above

91 This aspect of the Complaint arises out of a pre-trial application made on behalf of Mr Martinez to adduce certain evidence in the trial. It appears that the evidence sought to be admitted was of what was asserted to be a pattern of behaviour on the part of the complainant to make unsustainable complaints of sexual offences against men other than Mr Martinez.

92 Section 294CB of the *Criminal Procedure Act 1986* (NSW) (**Criminal Procedure Act**) precludes the admission of evidence, in trials for certain sexual offences (including offences against s 61I of the *Crimes Act*), of the prior sexual history of the complainant (including a history of making false allegations: see, *R v Jackmain* (2020) 102 NSWLR 847; [2020] NSWCCA 150, which addressed s 293 of the *Criminal Procedure Act*, subsequently renumbered as s 294CB). The section allows for some limited exceptions. The application came before Shead DCJ who allowed the evidence in a limited respect, but otherwise dismissed the application.

93 During a discussion concerning the evidence that had been ruled admissible by Shead DCJ the Judge said":

> "But if that is your position, you should make a submission to me that it's irrelevant. Which I might be minded to accept because I'm struggling, but I understand tendency. I kind of find the irony a little bit sweet that tendency has been put back against the Crown, *because the Crown's so enthusiastic about it, tendency evidence. Normally, they love tendency evidence, and they love the way it's unfair and they love the way it's really hard to answer.* So, so long as it's relevant, I'm not that - I don't really care that it puts the Crown in a difficult position, because *they were designed to put accused in a difficult positions.*
>
> ORMAN-HALES: Which it does.
>
> HIS HONOUR: *Which it does all the time, and the Crown overuses them.* But I think you might be overusing this, in the same way as the Crown often does. ..." (T439) (Emphasis added)

94 This was a reference to s 97 of the *Evidence Act 1995* (NSW) (**Evidence Act**), which provides for the admission of tendency evidence in stated circumstances. Tendency evidence is *not* admissible unless it is determined by the Court to have significant probative value: s 97(1)(b). In a criminal case, tendency evidence about a defendant that is adduced by the prosecutor may not be used against the defendant unless its probative value is assessed by the Court to outweigh the danger of unfair prejudice to the defendant: s 101(2) of the *Evidence Act*. As stated in the Judgment (at [80]), the Judge perceived a "tension" between s 294CB and s 97.

95 Having dismissed this aspect of the complaint as trivial or lacking merit in his first response, in his second response, the Judge said:

> "The comment was in response to the Solicitor Advocate's observation that for him to consider and respond to the tendency evidence would involve him running a 'case within the case'. I was pointing out what I saw as the irony of the situation because that is something that lawyers for Accused dealing with tendency evidence are confronted with regularly. I do not understand how this comment could be the basis for an allegation that I 'lacked impartiality, detachment or demeanour' as is suggested."

96 Mr Boulten submitted on behalf of the Judge that his Honour's language was "*somewhat colloquial and at times irreverent and ironic but the discussion was in the context of the lawyers debating an unusual legal point.*" He submitted that the "judge's language, although informal, did not demonstrate a failure in impartiality or detachment. Nor could it be properly characterised as a failure of judicial demeanour. It does not constitute misbehaviour."

97 We strongly disagree with the characterisation of this aspect of the Complaint as "trivial", "irreverent" and as not demonstrating impartiality or lack of detachment or a failure of judicial demeanour. True it is that the context of the exchange between the Judge and the Solicitor Advocate was one involving the debate of a legal point. Whether or not there was irony in tendency evidence being sought to be led on behalf of the defence as the Judge said, there was nothing objectionable about that aspect of the exchange.

98 Where the difficulty arises – and it is in our opinion a serious difficulty – is from the words italicized in the extract above, and, in particular, "*because the Crown's so enthusiastic about it, tendency evidence. Normally, they [referring to the Crown] love tendency evidence, and they love the way it's unfair and they love the way it's really hard to answer.* ... "

99 The Judge's effective characterisation of the legislation and its use as "unfair" is problematic given the terms of ss 97 and 101 of the *Evidence Act*. It disregards the evaluative elements of those sections going to the admissibility of tendency evidence and the assessment of unfair prejudice which are both ultimately in the control of the trial judge: see [94] above. But what is particularly problematic about this passage is the Judge's linkage of what he characterised as "unfair" legislation (allowing for the admission of tendency evidence) with the Crown's use or, as his Honour put it, the Crown's "overuse" of it. In particular, the Judge's statement "*they love the way it's unfair*" attributes to the Director and the ODPP (and *generally* rather than in or confined to this particular case) a deliberate embrace of "unfair" legislation, contrary to the ethical obligations of the Director and her Office generally and r 83 of the Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW) which require a prosecutor fairly to assist the court to arrive at the truth.[1]

100 The Judge's remarks manifested a serious example of a "failure in judicial impartiality, detachment and demeanour". Starkly put, they communicated a view on his part that the Director and practitioners within the ODPP do not act fairly in the bringing of prosecutions insofar as they seek to rely on tendency evidence, a form of evidence that the *Evidence Act* makes plain may be admissible in prescribed circumstances and regulated by proper notice and judicial evaluation. His Honour's remarks also reflect his own adverse view about a provision of the *Evidence Act* that he is required to apply without fear or favour, affection or ill-will. At the very least, those remarks would give rise to

[1] A similarly jaundiced and in our view partial (negative) view of the Judge about the Crown may be seen in his Honour's exchange with the Solicitor Advocate addressed at [120] and [136] below and, in particular, his Honour's statement "For you to go and get instructions and do the right thing, but that's not going to happen ..."

an apprehension of bias on the test stated by the High Court in *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337.

101 The CCJ Guide at [2.1] provides:

> "The large volume of case law involving challenges to judicial impartiality testifies to its importance and sensitivity. *There is probably no judicial attribute on which the community puts more weight than impartiality.* It is the central theme of the judicial oath of office, although the same words of that oath also embrace the concepts of independence and integrity, and indeed, in many cases, those concepts are involved in acting impartially. ... It is easy enough to state the broad indicia of impartiality in court - to be fair and even-handed, to be patient and attentive, and to avoid stepping into the arena or appearing to take sides." (Emphasis added)

102 Attention should also be drawn to [4.1] of the CCJ Guide which states that a "judge should remember that informal exchanges between the judge and counsel may convey an impression that the judge and counsel are treating the proceedings as if they were an activity of an exclusive group. This is a matter to be borne in mind particularly in a case in which there is an unrepresented litigant, but the caution extends to all cases."

103 The Judge's interaction with the Solicitor Advocate reveals a deeply concerning absence of detachment on the part of a new Judge, admittedly inexperienced in the criminal law, pontificating in an utterly unjudicial and partial manner about the practice of the Crown in prosecutions in New South Wales. The remarks of which the Director complains constitute a serious departure from accepted standards of judicial behaviour. In this respect the Director's complaint is substantiated. We also draw attention in this context to remarks made by the Judge directed to the Solicitor Advocate at a different part of the transcript – *"For you to go and get instructions and do the right thing, but that's not going to happen, so we just rule that out, don't we?"* - and which are dealt with more fully at [120] below.

Section 294CB of the Criminal Procedure Act

104 The next aspect of criticism relates to the judge's statement that "*I consider the trial was conducted in such a way that it was profoundly unfair to the Applicant*" (Judgment at [7]). The Director observed, somewhat sardonically, that the trial

was presided over by the Judge. This, no doubt, was intended to convey that any unfairness in the conduct of the trial lay at the door of the Judge. The observation overlooks that the true – and clear – suggestion by the Judge was that the unfairness that he perceived derived from the *application* of legislation. It was not, and in the context of the Judgment, could not be taken to suggest, unfairness in the manner in which the trial had been conducted. The Director's observation was unhelpful.

105 Nevertheless, the Judge's characterisation of the legislation as having unfair consequences needs to be considered, in conjunction with the next aspect of the Complaint, which also concerns the Judge's attitude to the legislation and the charge that the Judge "*has set himself against the current law of the State*", referring to s 294CB of the *Criminal Procedure Act*, the substance of which has been set out at above at [92]. The Director contended that, if a judge has views about law reform of "this important provision", reasons for judgment in a costs decision is "a decidedly inappropriate forum in which to ventilate those opinions."

106 Paragraph [7] of the Judgment was in these terms:

> "The trial commenced before me and a jury of 12 on Thursday, 23 November 2023, and concluded yesterday, Monday 4 December 2023, where after approximately one hour's deliberation, the jury delivered verdicts of not guilty on all four counts. For reasons I will explain, that was the result notwithstanding that I consider the trial was conducted in such a way that it was profoundly unfair to the Applicant. That is not to say that I disagree with Shead DCJ's decision, indeed I think her Honour was correct on the proper application of the exclusionary provision; but *I think the consequence of the application of that law in the peculiar circumstances of this case resulted in a trial that was unfair to the Applicant.*" (Emphasis added)

107 The reference to Shead DCJ's decision was to the pre-trial ruling, mentioned above, the context of which was supplied in [4]-[6] of the Judgment:

> "…. One of the applications was for leave to call evidence about the other allegations notwithstanding the provisions of s 294CB of the *Criminal Procedure Act 1986*; which, as is well known, makes inadmissible, other than in very narrow circumstances, evidence relating to the sexual reputation or evidence that discloses or implies that the Complainant has or may have had sexual experience or a lack of sexual experience. Such evidence is prima face inadmissible in prescribed sexual offence cases of which this is one.

> That application was partially successful in that evidence from one of the five other gentlemen against whom the Complainant has made allegations of sexual assault, who is referred to in her Honour's judgment, and I will refer to as CG, was allowed, notwithstanding the provisions of 294CB.
>
> When the matter came up during the trial before me, I allowed that evidence as tendency evidence but on a very narrow basis, that is, I allowed it as evidence that might prove that the Complainant had a tendency to drink alcohol to the point of alcoholic blackout, to then have sex with men, and then to assert, only because she did not remember the event, that she had been sexually assaulted."

108 In his first response to the Commission, the Judge described these aspects of the Complaint as without merit and/or trivial. The Judge said in his second response to the Commission in relation to these two aspects of the Complaint that:

> "It is unclear whether this aspect of the complaint is intended to be serious; if it is, it discloses a fundamental misunderstanding of my judgment.
>
> ... I do not think my comments demonstrate that I had 'set myself against the laws of the State' although I must confess, I do not really understand what [the Director] means by this. Suffice to say, ... I do not accept that a judge is not entitled, while accepting and applying he [sic] law, to point out that the facts of a particular case suggest a need for reform of that same law. No one I have spoken to about the judgment has suggested there is any issue in this regard. That being said, I am happy to stand corrected if the Commission feels judges ought not make such observations, but I do not understand how this could warrant consideration by the Commission."

109 Mr Boulten submitted that:

> "His Honour's comment in this part of the judgment reflected his opinion that the operation of s.294CB in the circumstances of the instant case operated rather unfairly to the accused. He was not submitting that the prosecution counsel was deliberately being unfair. Nor was the comment an acceptance that his own handling of the trial created unfairness for the accused."

He also drew attention to [77]-[79] of the Judgment where the Judge reviewed case law relating to s 294CB and stated that that any unfairness to the accused flowing from the operation of that section was not such an unfairness as to warrant a stay of proceedings. He also pointed to the Judge's willingness, as indicated in his second response to the Commission set out above, to stand corrected if the Commission felt that he should not make such observations.

110 We disagree with the Director's contention that a judgment is an "inappropriate forum" for the ventilation of judicial views about legislation. It is not uncommon for judges to point out unexpected or unforeseen consequences of the application of legislation.

111 Properly understood and, on balance, we accept the Judge's submission that the complained of statement in [7] of the Judgment was not a generalised observation about the merits of the policy underlying that law but a reference to *its application on the facts of the particular case* before him, although there is some tension between that submission and his Honour's characterisation of what he said as "suggest[ing] a need for reform of that same law". It does not read in that way and if a judge is to make an observation as to the need for law reform in a judgment, that should be expressly stated and the reasoning set out. A judge, whose role it is to apply the law, whether he or she agrees with it or not, must be careful not to conflate his or her disagreement with the policy underlying a particular law with its impartial application, and a party, including the Director, should not be criticised for placing reliance upon the law of the State as it stands.

112 Given our conclusion in the previous paragraph, we do not consider that what the Judge said in [7] of the Judgment demonstrates a failure in "judicial impartiality, detachment and demeanour".

Belittling, harassment and bullying of the prosecutor

113 The next criticism related to what the Director described as the "belittling, harassment and bullying of the prosecutor." The Director referred to an extensive passage on Day 5 of the trial (T338-352) which included the Judge asking the solicitor, with reference to another officer of the ODPP, "*how would I know if that person's got any more brains than you?*" (T342.40), calling the ODPP "*gutless*" (T345.30) and telling the solicitor "*ethically you're on bloody thin ice*" (T346.40). The Complaint was not limited to these limited extracts and the entirety of the 15 page passage complained of has been reproduced in Appendix C to this Report.

114 We note at the outset of our consideration of this aspect of the Complaint that the Judge, by his letter of 4 July 2024, ultimately accepted that his behaviour as set out in the extended passage of the transcript "*can properly and should properly be branded as judicial bullying.*"

115 To place the matter in context, the exchange occurred (in the absence of the witness and the jury) whilst the Crown was still in its case. The immediate context of the exchange related to some evidence that had been given by a Crown witness to the effect that the complainant was "not conscious" or was "in and out of consciousness" on the night of the alleged sexual assault. A pre-trial evidentiary ruling in relation to the witness' statement had ruled similar evidence inadmissible. There followed this exchange:

> "HIS HONOUR: That's not admissible. So what are you proposing we do? And by the way, I know this because it's a matter of public record. Both the complainant and this witness have given evidence in this Court, either this week, or late last week, on very similar topics, so she is not an inexperienced witness. So how did this happen? And what am I supposed to do about it?
>
> CROWN PROSECUTOR: All right. That was a mistake, clearly.
>
> HIS HONOUR: No there's not a mistake by you, and I'm not convinced it was a mistake by her. I'm assuming you've done your job properly. Is that a fair assumption? Is that a fair assumption?
>
> CROWN PROSECUTOR: Sorry, your Honour.
>
> HIS HONOUR: I'm assuming you did your job properly and you told her beforehand what she wasn't allowed to say, and if you didn't, you better explain why, cause at the moment I think she's done this deliberately.
>
> CROWN PROSECUTOR: I had a conference with [the witness] yesterday, and I can tell your Honour that I did not tell her. It was a quick conference.
>
> HIS HONOUR: Why not?
>
> CROWN PROSECUTOR: It was an oversight on my behalf.
>
> HIS HONOUR: That's extraordinary.
>
> CROWN PROSECUTOR: It was immediately—"

116 As the Solicitor Advocate was endeavouring to answer this question, the Judge spoke over him, saying in a forceful tone: "This is the most extraordinary case. You appreciate that, don't you?" The exchange continued:

"HIS HONOUR: *What on earth are you doing running this case? What evidence do you actually have? Can you tell me?* You've got evidence that they had sexual intercourse on four occasion, only because he's admitted it; right?

CROWN PROSECUTOR: Correct.

HIS HONOUR: You've got evidence that, objectively, there was enthusiastically enthusiastic consent; right? You've got evidence from him that he didn't know that she wasn't consenting and that he thought she was consenting, and that he made inquiries from her as to her consent; right?

CROWN PROSECUTOR: Yes.

HIS HONOUR: *So you're not going to win.* You can't make a submission that he didn't actually know, and you can't make a submission that he was reckless; right? Cause he did turn his mind to it.

CROWN PROSECUTOR: Yes.

HIS HONOUR: And he was conscious of the need. All of that is a given; right?

CROWN PROSECUTOR: Yes.

HIS HONOUR: And that feeds in at two levels. Your case is, you're going to invite them to find she is so intoxicated that, when they factored that into the other factors, which include enthusiastic consent, that there's no consent. That's your first submission, and your second submission is, in all the circumstances, even though you have to accept that he honestly thought that she had consented, that it wasn't reasonable to do so.

CROWN PROSECUTOR: That's correct, yes.

HIS HONOUR: *That's a hopeless case. It's a hopeless case, and I don't know--*

CROWN PROSECUTOR: May be so.

HIS HONOUR: *--what you're doing running it,* and obviously the complainant thinks she's been sexually assaulted because she wrongly thinks that if you have sex with someone and you can't remember it, that's sexual assault, and she thinks you can have a standing non-consent, so she's completely wrong. So everything she says about it being assault is wrong, and I'm going to tell them that. Obviously you're going to tell them that as well. They can't take any notice of her opinion that she was assaulted, cause it's based on fundamental misconceptions of the law.

CROWN PROSECUTOR: Yes.

HIS HONOUR: And now you've called her best friend, who gave evidence in another case, very similar facts, last week, in support of the complainant, and she has blurted out in admissible [sic. inadmissible] evidence." (Emphasis added)

117 Interpolating here, this exchange occurred before the Crown had closed its case which, as the Solicitor Advocate was to explain to the Judge, included what the Crown contended were admissions made by the accused in the ERISP. Before the Solicitor Advocate was able to point to that material, the Judge continued:

> "So I have two choices. *I keep going with this hopeless case,* and there's a risk that the accused gets convicted, or I discharge the jury and we start again, and we waste a whole lot more time, *cause no doubt, your instructions will be to keep running this till the death*; am I right?" (Emphasis added)

The Solicitor Advocate answered that he suspected that that was the case.

118 The Judge then pressed the Solicitor Advocate as to why the witness had not been "prepped" that she was not to give any evidence of the complainant's state of consciousness, and what the judge was to do. The Solicitor Advocate replied with the entirely appropriate suggestion that the judge should correct the record and so instruct the jury (which he ultimately did). The Solicitor Advocate also acknowledged to the Judge that he had made a legal error in his opening of the case which led to the following exchange as recorded in the transcript:

> "HIS HONOUR: Which does make me thing [scil- think] that no one in your office has actually properly considered this case, and whether it should be run or not, because if your understanding of the law is your office's understanding of the law, no one has thought about this properly.
>
> CROWN PROSECUTOR: That's not the case, your Honour.
>
> HIS HONOUR: Well, what is the case? How do you know?
>
> CROWN PROSECUTOR: Well firstly, I didn't certify this matter. It was certified by somebody else.
>
> HIS HONOUR: Right. *So how would I know if that person's got any more brains than you?*
>
> CROWN PROSECUTOR: Well, your Honour, I made the--
>
> HIS HONOUR: How would I know that?
>
> CROWN PROSECUTOR: Your Honour, I made the mistake.
>
> HIS HONOUR: No, it's not a mistake. It's more than a mistake. You opened a serious criminal case on the complete and utter wrong proposition of law.
>
> CROWN PROSECUTOR: All right.

HIS HONOUR: *Why would I assume that anyone else in your office has any better understanding of the law than you? That's what you're asking me to infer, isn't it?*

CROWN PROSECUTOR: Well, yes, and I don't think that's –" (Emphasis added)

119 His Honour then cut off the Solicitor Advocate three times in a row as the Judge directed rapid fire questions at him. Shortly after there was this exchange:

"HIS HONOUR: And the question is this: *why would I infer that anyone else in your office has any more idea about the criminal law than you do?*

CROWN PROSECUTOR: Well, I don't know. I can't answer that question, your Honour.

HIS HONOUR: Well *is it an unreasonable assumption to think that they're all bereft of any knowledge of the relevant law?*

CROWN PROSECUTOR: It would be unreasonable, your Honour, yes." (Emphasis added)

120 Shortly after, the Judge said:

"... It is a complete and utter waste of public money, and the accused - to have to sit there and put up with this - is extraordinary. *Only because the Crown's too scared to never run a case of sexual assault.* So, what I now want you to tell me, what is your submission?

CROWN PROSECUTOR: Well, your Honour said there's three options. Discharge the jury; to tell the jury that, because of - in effect - incompetence on behalf of the Crown, that the witness has given evidence that shouldn't have been adduced; and the third option, your Honour, was - to discharge the jury"

The Judge then cut over the Solicitor Advocate and said: "*For you to go and get instructions and do the right thing, but that's not going to happen, so we just rule that out, don't we?*" The exchange then continued:

"CROWN PROSECUTOR: I - well. I've got to be careful about what I say, your Honour.

HIS HONOUR: Why? You've got to be frank with me. You're appearing before me. You answer my questions.

CROWN PROSECUTOR: The - well, I can say about my experience, generally, with prosecutions of this type, is that the office, generally speaking, would proceed with the matter - matters like this.

HIS HONOUR: *If I may [say] so, it's because they're gutless.*" (Emphasis added)

121 The Judge had a brief exchange with the Solicitor Advocate about whether to discharge the jury or to proceed. The exchanges continued:

"HIS HONOUR: I'm sick of it. *I'm sick of sitting here, listening to this nonsense.*

ORMAN-HALES: I hear you, your Honour.

HIS HONOUR: It's not your fault.

ORMAN-HALES: No. I know. I appreciate that.

HIS HONOUR: It's not his - well, it is his fault. You are the Crown. You can't sit there and go, 'Oh it's my office'. You're a lawyer running this case before this Court. You have professional obligation. You're not allowed to run cases that have no realistic possibility of success. I don't care about what instructions you have. That's not a matter for instructions. *So, ethically, you're on bloody thin ice. You understand?*

CROWN PROSECUTOR: Yes, your Honour.

HIS HONOUR: I don't - you cannot stand there and go, 'It's a matter for instructions'. That's not how it works with lawyers. You have an independent obligation to this Court to not run cases that have no prospect of success, and I think that's what you're doing.

CROWN PROSECUTOR: All right, your Honour. Well--

HIS HONOUR: So you think about that--

CROWN PROSECUTOR: Yes, your Honour.

HIS HONOUR: --and don't hide behind instructions.

CROWN PROSECUTOR: All right, your Honour.

HIS HONOUR: Because you're not allowed to. You understand that, don't you?

CROWN PROSECUTOR: Yes, I do. I do.

HIS HONOUR: Yes. Right. I'm talking about your independent ethical obligation.

CROWN PROSECUTOR: Yes.

HIS HONOUR: Maybe you should get some advice about that, but I'm serious.

CROWN PROSECUTOR: All right. It's noted, your Honour." (Emphasis added)

122 After further forceful (on the part of the Judge) exchange with the Solicitor Advocate, and after the Judge, having made his repeated pronouncements as to how "hopeless" the Crown case was, how "gutless" the Crown was and how the Crown would not "do the right thing" and withdraw the claim, the Solicitor Advocate said: "But, just so you know, your Honour, the accused did make some rather damning admissions." The Judge asked "Where?" to which the Solicitor Advocate replied "in his interview with police". This then followed:

> "HIS HONOUR: Okay, well I'm looking forward to seeing that, because that must be all you've got. That must be all you've got, because if you think the admissions in the text messages are damning, they're not even admissions. They're the opposite. They're, 'We had consent'.
>
> CROWN PROSECUTOR: Indeed, yes. That's right.
>
> HIS HONOUR: All right, so, I don't know. I haven't seen the whole case, so I could be wrong. It might be a good case.
>
> CROWN PROSECUTOR: It's certainly a strengthened a great deal by the accused's ERISP.
>
> HIS HONOUR: All right. Good. Well, that's promising for you. That might mean you've got a basis to run the case, but I haven't it—
>
> CROWN PROSECUTOR: Yes, that's right.
>
> HIS HONOUR: --so I haven't formed a view about that. I will form a view when I've seen it."

123 The Judge's statement that he had not formed a view of the strength of the Crown's case may be open to some doubt in view of his earlier strident and unqualified observations as to its hopelessness. Any doubt about the matter would seem to have disappeared, however, very soon after as is seen in the following extract:

> "HIS HONOUR: Then, *notwithstanding the fact that she's obviously off her trolley, a reasonable person would think that he got consent. That's my view.* It's my view, the only inference you can draw from those facts. *Which means the case is lost even if you prove no actual consent,* because of the level of intoxication. *That's why I think it's a hopeless case.*
>
> CROWN PROSECUTOR: Well, it is the - the Crown case at the moment is not strong. That's something that I can see, but--

HIS HONOUR: At the moment - I want to say this to you - if the Crown case stopped now, there is no case to answer. There is no doubt in my mind about that, so it's going to need to get better.

CROWN PROSECUTOR: It does, your Honour.

HIS HONOUR: *And if it doesn't get better, that's your responsibility, and I'm going to hold you responsible.*

CROWN PROSECUTOR: It's the accused's ERISP, your Honour, which strengthens the matter considerably.

HIS HONOUR: Good. Well, *you should have started with that*, you've got. It's the only way you prove the sex act.

CROWN PROSECUTOR: That's right. That's right." (Emphasis added)

124 A number of observations should be made about this passage. First, the Judge repeats his view that the case was hopeless although put on notice by the Solicitor Advocate that there was important further evidence which the Judge had not yet seen. Second, in the second emphasised passage, the Judge engaged in a completely inappropriate personalised threat to the Solicitor Advocate, having earlier told him (without having even reached the closing of the Crown case), that he was ethically on "thin ice". Third, it was not for the Judge to say to the Solicitor Advocate in the course of the case how he should have presented the prosecution case. Fourth, in any event, on Day One of the trial, in opening the Crown case, the Solicitor Advocate said the following to the jury:

"The accused was arrested on 3 June 2021. Upon his arrest he was conveyed to Hornsby Police Station where he participated in what, again, is colloquially known as an ERISP, which stands for electronically recorded interview with a suspected person. That interview went, as I recall, for around about two hours. That interview will be played and tendered in the Crown case. *In that ERISP, the accused said a number of things and the Crown relies upon the things that the accused said as admissions to having committed a number of offenses upon [the Complainant]* and I'll tell you, briefly, what the accused said.

What he said, obviously, amongst a whole lot of other side, bearing in mind that the interview went for about two hours. He said this, that he arrived at [the Complainant's] flat at about 7pm, that he saw her to be intoxicated, that after he arrived, he also began drinking, that [the Complainant] was, '*Clearly intoxicated*,' that she was, '*Beyond the point of consent*,' and that, '*No consent was ever possibly given*,'" (T4.1-4.16) (Emphasis added)

125 It may be noted that, in the course of the hearing of the costs certificate application, the Judge said to the Solicitor Advocate (T18.24):

> "I mean really, were you ever going to prove consent. I mean that's where I was up to before I saw the record of interview *and you were right to pull me up on that. I was prejudging your case.*" (Emphasis added)

126 In our view, the characterisation by the Director of this extended passage of the transcript as "belittling, harassment and bullying of the prosecutor" is amply warranted. Indeed, on listening to the voice file of this extended exchange, and given that it occurred *prior to* the completion of the Crown case, the conduct in question is even worse. The rapidity with which the Judge spoke over the Solicitor Advocate as he was attempting to deal with the Judge's torrent of questions, together with the firmness of the Judge's tone, is not fully captured in the transcript.

127 The Judge's first response to this aspect of the Complaint was as follows:

> "whilst I do not accept that what I was doing can properly be branded as bullying, harassment or belittling the prosecutor I do accept that some of my comments were inappropriate. They reflected the exasperation and agitation I was feeling at the time. I immediately regretted that exchange and soon after (either that day or the next, I cannot remember which) I apologised in chambers to the Solicitor Advocate in the presence of the accused's barrister. I understood at the time that the Solicitor Advocate accepted my apology."

Later in his response, the Judge said that he accepted (in a limited respect) that this aspect of the Complaint "fell short of the standards I expect of myself." He did not elaborate further in his second response in relation to this aspect of the complaint.

128 In his letter of 4 July 2024, the Judge indicated that, since penning his first and second responses, he had listened to a sound recording of the exchange in question. The Judge said the following:

> "As I explained in my earlier letter, immediately after that exchange I appreciated that I had behaved inappropriately. That is why I apologised to the Solicitor Advocate in chambers shortly afterwards. At the time, *I appreciated and accepted that my comments were unprofessional, rude, unduly aggressive*, and were something that I was very sorry for. I said words to that effect to him in that conversation.

> *Having now listened to the tape, I appreciate that my behaviour was even worse than I perceived at the time.* I'm embarrassed and ashamed as to my conduct. I now accept that my behaviour can properly and should properly be branded as judicial bullying." (Emphasis added)

129 It must be observed that his Honour's statement in this letter that he appreciated at the time that his comments were "unprofessional", "rude" and "unduly aggressive" does not find support in his first response to the Commission where he was only prepared to go so far as to say that he accepted that "*some of my comments were inappropriate*". At the very least, this gives some cause for pause as to the Judge's insight into the seriousness of this aspect of the Complaint relating to his conduct. The second paragraph from his letter which we have extracted above, representing his reaction having listened to the tape recording of the exchange, contains a frank acknowledgment by the Judge that his "behaviour can properly and should properly be branded as judicial bullying."

130 We agree with that characterisation. "Bullying by a judge is unacceptable", as is unequivocally stated in [4.1] of the CCJ Guide. Courts throughout the country have worked hard in recent decades to clamp down on judicial bullying, and it is a topic that one would have expected the Judge to be well familiar with. Indeed, in his letter to the Commission, he states that as a barrister, he was subject to judicial bullying, does not approve it, like it or agree with it. The Judge in his letter has stated clearly that he does not want to be a judicial bully and that "[t]his is why I am so deeply regretful as to my conduct. It represents conduct that I have experienced myself that I dislike and strongly disapprove of."

131 In the words of Chief Justice Ferguson of Victoria:[2]

> "The community expects that judicial officers treat all people with respect, both in and out of the courtroom. There is no excuse for judicial bullying. Judicial bullying poses a risk to the health and wellbeing of those experiencing it and can impact upon those observing the conduct. It also has the potential to diminish public confidence in the judiciary and legal system more broadly. It is

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[2] Judicial Commission of Victoria, *Judicial Conduct Guideline Judicial Bullying* (online, May 2023), available at <https://files.judicialcommission.vic.gov.au/2023-05/Judicial%20Conduct%20Guideline%20-%20Judicial%20Bullying.pdf>.

conduct that breaches the standard of conduct expected of judicial officers and is unacceptable.

Judicial officers have a responsibility to ensure they create a safe and respectful workplace and model appropriate workplace behaviour."

132 The passages from the transcript that we have extracted above also presaged some of the matters about which complaint is made and which are considered under Ground 4 of the Complaint.

133 Mr Boulten made the following submission on behalf of the Judge:

> "In his correspondence to the Judicial Commission, Judge Newlinds accepts that his conduct, language and demeanour fell short of acceptable judicial standards in several respects. *He has fully accepted that his conduct towards the Trial Advocate at one point of the trial was most inappropriate and constituted judicial bullying.* He apologised to the Trial Advocate during the trial. He has come to a growing realisation over time that his conduct towards the prosecuting counsel was most inappropriate.
>
> In the period immediately following the exchange which is the subject of the complaint (particularised at [26](g)), his Honour realised his errors and apologised directly to [the Solicitor Advocate] in Chambers in the presence of defence counsel. Upon his Honour's initial receipt of the complaint, and in the light of his review of the transcript of that exchange, he expressed insight into his wrongdoing in his initial response.
>
> After a conversation with the Chief Judge of the District Court in which her Honour invited Judge Newlinds to listen to the sound recording of the relevant exchange, his Honour further reflected on his conduct and, in his further response of 4 July 2024, accepted that his behaviour could be branded as judicial bullying. He expressed deep regret for it.
>
> Judge Newlinds has deeply reflected on the incident and has consulted with a number of experienced judges to discuss how he should handle situations of courtroom tension. More recently, Judge Newlinds sought out the Chief Judge of the District Court again and, during a lengthy conversation with her, apologised for his behaviour and undertook that he would not repeat that conduct. His Honour and [the Chief Judge] have agreed to maintain a continuing, informal dialogue that will assist his Honour to maintain appropriate judicial decorum in his court." (Emphasis added)

134 We note, but do not accept, Mr Boulten's characterisation of the Judge's first response in relation to this aspect of the complaint as expressing insight into his wrongdoing. Such insight as there was was only of a very limited nature. The Judge only came to accept what was an extended and disgraceful example of bullying after he had been asked to listen to what he in fact said in Court in

his interactions with the Solicitor Advocate so as fully to understand how he dealt with the Solicitor Advocate.

135 That conduct included demeaning insults to the Solicitor Advocate, the most egregious but by no means the only example of which was the Judge's statement: "So how would I know if that person's got any more brains than you?". It also involved threats to report the Solicitor Advocate for ethical breaches in circumstances where the Solicitor Advocate was rightly holding his ground in relation to disclosure of the officer within the ODPP who certified the prosecution – a matter that had no relevance to the question before the Judge. There were also many gratuitous insults to the ODPP. The repeated hectoring of the Solicitor Advocate as to the hopelessness of the case coupled with the threats to report him for ethical breaches and to hold him personally responsible if the matter did not come up to proof was entirely unsatisfactory. This was all compounded, moreover, by the fact that the Crown case had not closed and the Judge had not heard or seen all the evidence that was to be relied upon, including what the Crown contended were admissions contained in the ERISP.

136 The extended passage complained of raises extremely serious questions as to the Judge's understanding of the judicial role and the reasonable expectations as to how a judge should conduct him or herself. There was also within this extended exchange evidence of a strong want of impartiality on the part of the Judge: "*because they're gutless*" and "*For you to go and get instructions and do the right thing, but that's not going to happen, so we just rule that out, don't we?*". This unequivocal partiality also manifested itself in what has been seen in our discussion of the Judge's comments in relation to tendency evidence and the Crown's use of it: see [91] ff above.

137 It must be said in unequivocal terms that such behaviour is apt to bring the judiciary into disrepute. It is conduct that is anathema to the judicial oath and societal expectations of proper judicial conduct. This aspect of the Complaint is made out.

Strident denunciation of the Crown case in respect of consent

138 This aspect of Ground 2 focuses on [51] and [62]-[68] of the Judgment. To repeat the complaint, it is as to "the strident denunciation of the Crown case in respect of consent in circumstances where, even on the face of the text messages and ERISP admissions referred to in the Judgment, there was reason to consider that there was a real question to be tried as to the issue of consent."

139 Paragraph [51] sets out a number of text message exchanges between Mr Martinez and the complainant. Paragraphs [62]-[68] of the Judgment are reproduced below:

> "[62] The answer in part is the prosecution's view of Applicant's record of interview which goes for about an hour and a half. The Crown's ultimate submission to the jury and on this application to me, is that within that record of interview there is contained an admission by the Applicant that at the time they knew that the Complainant was so intoxicated that she was not capable of giving consent (this is not actually the way the Crown put the matter to the jury, but for the purposes of this application that is how it has been put to me). It was that evidence that the Solicitor Advocate invited me to wait before forming a concluded view as to the prospects of success of the case.
>
> [63] I was profoundly disappointed by this evidence.
>
> [64] True it is that within the record of interview there are some statements by the Applicant which, if taken out of context, could be said to support a submission that there was such an admission.
>
> [65] For example, the Applicant said things like, 'could tell she was intoxicated', 'clearly intoxicated', and 'beyond the point of consent'. They also from time to time talked about what they described as their 'duty of care', and how they were concerned they might have breached it.
>
> [66] However, the record of interview is also replete with the Applicant emphatically saying on more than one occasion that they did not think the Complainant was so drunk as to not be able to consent. The balance of what they say is entirely consistent with what they said in the text messages, vis, she enthusiastically initiated and participated in the sex and that the Applicant satisfied themselves on the night that she was consenting and that whilst they were aware that she was drunk they did not think she was so drunk as to not be able to consent.
>
> [67] The debate before me and to the jury between the parties was whether the Crown was impermissibly lifting out of context a couple of answers

of the Applicant in the whole of the record of interview, without reading those in the context of the full record of interview; but more importantly, whether it was apparent that the Applicant was operating with the benefit of hindsight when they acknowledged the level of intoxication.

[68] To my mind it was abundantly clear that whatever the Applicant was intending to convey by those particular answers, they were using the benefit of hindsight and had factored into their consideration by the time they were speaking to the police the fact that the Complainant had already told them that in her opinion she was too drunk to consent. That was not, however, what they understood on the evening, and it was entirely clear when the police officers conducting the interview directing them back to just explaining what actually happened on the evening and what they was thinking on the evening that there was no such admission. In fact they said the opposite."

140 Mr Boulten in his submissions characterised this aspect of the Complaint as really being to the effect that the Judge's conclusions about the relevance of the text messages and ERISP admissions were not open to him. He submitted that it is inappropriate for the Conduct Division to, in effect, rule on the differences of opinion between the Director and the Judge in this respect, particularly when the Conduct Division does not have before it the relevant text messages and the ERISP. He has submitted that, in any event, "so far as can be ascertained from the trial transcript and the costs judgment, his Honour's characterisation of the relevance and probative force of the text messages and the 'admissions' in the ERISP was completely appropriate and certainly not such as to be so unreasonable as to equate to bias, lack of detachment or inappropriate demeanour."

141 The Judge's statement in [62] that the Crown did not actually put the matter to the jury in the way his Honour sets out by reference to what the Crown described as admissions in the ERISP is difficult to fathom in light of the following part of the Crown's closing address (T540-541):

"As I have already said, the accused said that there were four separate acts of penile/vaginal sexual intercourse. That the accused said there were four acts of sexual intercourse amount[s] to admissions and, as I said, there's no dispute in relation to that. What the accused then went on to say about [the complainant's] intoxication are also, on the Crown case, admissions. I will just go through them. At answer 164 of that interview, the accused said that when they spoke to [the Complainant] on the phone, she was 'clearly intoxicated' and as such - and this is going down to two answers later, answer 166 - was 'worried about her wellbeing'. At answer 174, the accused arrived at [the

> Complainant's] premises and said, in the police interview, 'She was intoxicated already. I could tell this but wasn't sure just how bad it is'; and then a bit later on in the interview, at answer 223, said that she was 'clearly intoxicated'. Then further on in the interview, importantly, at answer 359, the accused said a number of things, including that, 'She ... was beyond the point of consent'."

142 The balance of the Judge's reasoning and his conclusion may be subjected to the criticism that, especially in circumstances where the matter was left to the jury, it trespassed into their constitutional role, with it being at least open to the jury to find that what Mr Martinez said in the ERISP amounted to inculpatory admissions. This having been said, the actual language used by the Judge was not, in our view, overly strident. It gives a clear exposition of his Honour's reasoning, even if that reasoning was open to criticism. It is not our role to rule on the legal correctness of that reasoning in the context of considering whether it evidences any failure in judicial impartiality, detachment and demeanour. In our view, it does not.

Conclusion as to charges of failures in judicial impartiality, detachment and demeanour

143 While not all of the eight examples relied upon in support of this aspect of the Complaint have been sustained, we are nevertheless of the view that the charge made under Ground 2 has been substantiated. It gives us no pleasure but it is our duty to conclude that there was:

- a demonstrated failure of judicial impartiality (including conceded prejudgment) bordering on manifested and generalised prejudice against the Crown: [91]-[103] above and [169]-[189] below;
- a want of proper judicial detachment; and
- a gross failure in judicial demeanour in the extended passage of the transcript which the Judge has conceded amounted to judicial bullying: [113]-[137] above. Shortcomings in judicial demeanour are also evidenced by aspects of Ground 3 of the Complaint to which we now turn.

Ground 3 - Unreasonable criticism/vilification of a sexual assault complainant

144 Under Ground 3, the Director complained of three aspects of the Judgment, and two comments made by the Judge in the course of the trial. The first matters raised by the Director were said to arise from three paragraphs in the Judgment ([53], [95], and [97]).

145 In [53], the Judge was discussing the strength of the Crown case against Mr Martinez. The Judge construed evidence given by the complainant as conveying a belief on her part that, if she had no recollection of engaging in sexual activity, then the sexual activity constituted sexual assault. The Judge referred to this belief as "[the complainant's] own idiosyncratic definition of sexual assault" and "a misguided understanding of the law". In [97], he repeated the epithet "idiosyncratic", to which he added "wrongheaded". The Judge then referred to the allegations of sexual assault made by the complainant against other men (including a man referred to as CG, who gave evidence in the defence case in the trial). The Judge described the complainant's allegations against CG as "eerily similar" to those made against Mr Martinez.

146 In [95], the Judge was critical of the DPP's decision to prosecute. We detect nothing in this paragraph that could fairly be characterised as "unreasonable criticism or vilification of the complainant" although other aspects of what the Judge said in [95] are central to the complaint as it is advanced under Ground 4 and which is dealt with at [169] ff below.

147 The second aspect of the complaint under this ground was directed to [83]-[86] of the Judgment. In those paragraphs the Judge repeated his view that the trial was unfair to Mr Martinez (by reason of the application of s294CB of the *Criminal Procedure Act*). He referred to the complainant's history of accusing men of rape in similar circumstances and observed that, if the jury had been aware of that history, "their time of deliberation would have been measured in minutes".

148 In [86], the Judge said:

> "I do not know very much about the other complaints against the other four gentlemen, but as far as I can glean from the evidence at least two of them are the subject of extant prosecutions and at least one of them is based on extremely similar facts and turn on the evidence of at least the Complainant concerning her level of intoxication. They are all somewhere in the criminal justice system of New South Wales. Each of the Accused say the Complainant consented in similar circumstances and it would seem as things currently stand each of these cases will go before separate juries in circumstances where none of those juries will have any sort of clear picture of the tally of sexual assault allegations that the Complainant has to her credit up to this time."

149 The Director complained that this paragraph contained "remarkable criticism", which "suggests something inherently discreditable or implausible about a vulnerable person complaining of more than one sexual assault. It assumes the falsity of the other complaints with no basis for that assumption."

150 The final aspect of this ground of complaint was of what was said to be "the use of loaded, stigmatising and gendered language". Particular reference was made to the use of the word "gentlemen" in relation to the men the subject of the complainant's other allegations, to "the complainant's history of accusing...", and the complainant's "tally of sexual assault allegations...to her credit".

151 The Director also pointed to two comments made by the Judge during the course of the trial, in the absence of the jury, but which the Director understood were audible to the complainant. The first of these was made on the fifth day of the trial during a discussion after a witness had given evidence of her perception of the complainant's state of consciousness, evidence that had previously been ruled inadmissible in advance of the trial. The discussion veered into a consideration of the strength of the Crown case, which the Judge said was "hopeless". The Judge said:

> "Then, notwithstanding the fact that she's obviously *off her trolley*, a reasonable person would think that he had got consent". (T348.35) (Emphasis added)

After the conclusion of the evidence, while discussing with counsel the directions to be given to the jury, the Judge said:

> "But, on the other hand, they can't judge the complainant *on the basis that she's a raging alcoholic*: that's a lifestyle choice" (T525.35) (Emphasis added)

152 The Director complained that these comments "involved gratuitous and insulting criticism of the complainant", were "unbalanced and unjudicial" and were very likely to cause unnecessary hurt to the complainant.

153 In his first response to the Commission the Judge maintained that the complainant's misunderstanding of what constitutes sexual assault had been made relevant by the way the Solicitor Advocate had conducted the trial. He did not comment on his description of the complainant's view of the law as "idiosyncratic", "misguided" or "wrongheaded". (To be fair, the Director's complaint in this respect lacked specificity. She merely enumerated the paragraphs of which she complained, without identifying particular language that she contended constituted "unreasonable criticism" or "vilification".)

154 The Judge dismissed the complaint concerning [83]-[86] of the Judgment by saying that the evidence excluded by s294CB of the *Criminal Procedure Act* would otherwise have been relevant to the resolution of the trial. He did not address the Director's clearly stated contention that, in those paragraphs, he had, without basis, assumed that the complainant's allegations were false.

155 The Judge described the Director's complaint of the language used as "trivial", and not meriting a complaint or a finding. He said that the "off her trolley" and "raging alcoholic" comments were made in the absence of the jury, and, that, as far as he could recall, the only people in the court were the lawyers and Mr Martinez. In his second response, he described the complaints about [83]-[86] as exposing a fundamental misunderstanding of the Judgment. He said that the tendency exposed on the part of the complainant was not to make false complaints, but to make honest complaints that were misconceived. That exposes a misunderstanding of the nature of the Director's complaint, which was that the Judge made unwarranted assumptions about the veracity of the complainant's allegations against others, which the Judge did not address.

156 In relation to the complaint about the use of the terms "gentlemen" and "tally", the Judge said that nobody to whom he had spoken about the judgment suggested that there was any issue, that he was happy to consider alternative language but did not understand how that language could be thought to warrant consideration by the Commission.

157 In his submissions, Mr Boulten supported the Judge's contention that the complainant's understanding of the criminal law was relevant and argued that the language used was "not unbalanced, let alone unjudicial". In relation to [86] of the Judgment, Mr Boulten again supported the Judge's response, noting that as the Judge was apparently in possession of the judgment of Shead DCJ on the s 294CB application, he was entitled to form the view that the complainant's allegations had "relevant similarities" and to conclude that there was no reasonable prospect of conviction in any of those cases, where the complainant's evidence was likely to be the same.

158 Mr Boulten argued that the Director's complaint of loaded, stigmatising and gendered language was "a baseless allegation", and that the language was not stigmatising and could not be considered "gendered". He accepted that the "off her trolley" and "raging alcoholic" remarks may have been "unwise" but, he submitted, they did not amount to unreasonable criticism, much less vilification.

Analysis

159 It may be accepted that the Judge was in error in two respects, first in considering that a complainant's understanding of what constitutes the absence of consent in a charge of sexual intercourse without consent is relevant to the DPP's decision to prosecute (see [63]-[68] above), and second, in considering that the decision of the DPP to prosecute is relevant to the determination of an application for a costs certificate under the *Costs in Criminal Cases Act* (see [52]-[62] above). For the purposes of the determination of Ground 3 of the complaint, those errors may be put to one side. It is not the role of the Conduct Division to sit as a court of appeal on the orders made by the Judge on the costs certificate application. The errors do, however, cast some light on the

circumstances in which the matters the subject of complaint arise. The question for present determination is whether the language used in describing the complainant's belief as to proof of the absence of consent in a trial of sexual offences constituted unreasonable criticism or vilification. The language was, to repeat, "idiosyncratic", "misguided" and "wrongheaded". It is to be borne in mind that the complainant was not on trial, let alone for her understanding of the law.

160 Although we consider that far more restrained language could and should have been used, especially in place of the pejorative "wrongheaded", on balance, we do not accept that the language used amounts to vilification, although it bordered on unreasonable criticism.

161 It is otherwise with respect to the second and third aspects of ground 3. The nub of the second aspect lies in [86] of the Judgment. The Director contends that underlying [86] is an assumption that the complainant's allegations against the other men were false.

162 There is no explicit statement in [86] to that effect. However, the Judge's comment in [83] that, had the jury "known of the full picture of the complainant's history of accusing men of rape in similar circumstances, their time of deliberation would have been measured in minutes" necessarily assumed that the complainant would not have been believed and that her complaints were mischievous and so lacking in credibility that they would be almost instantly dismissed.

163 That this inference would be drawn was accepted by Mr Boulten in his submissions where he argued that the Judge was entitled to form the view that the complainant's evidence was likely to be the same in all areas and there was no reasonable prospect of conviction.

164 We reject the submission made by Mr Boulten that the Judge was entitled, having regard to the reasons of Shead DCJ on the s 294CB application, to conclude that all allegations made by the complainant suffered from the same defects. So far as can be ascertained, the application to Shead DCJ did not

involve any assessment of the credibility of the complainant. It was confined to whether any of the limited exceptions provided by s 294CB to the basic provision (excluding evidence of a complainant's sexual history) should be applied. Moreover, Mr Boulten's submission recorded in [157] above that the Judge was entitled to conclude that there was no reasonable prospect of conviction in any of the other cases was entirely inconsistent with the opening words of [86] of the Judgment: "I do not know very much about the other complaints against the other four gentlemen".

165 The assumption that the complainant's allegations against the other men were false entailed unreasonable and, in light of the Judge's information about the other charges, quite unjustified criticism of the complainant and can properly, in context, be characterised as vilification of the complainant. In this respect the Complaint is substantiated.

166 The assumption that the complainant's allegations lacked credibility is also reflected in the pejorative references to "the complainant's *history of accusing...*", and "*tally* of sexual assault allegations... *to her credit*" (which carry the clear implication that the accusations were not credible). These comments are included in the third aspect of Ground 3, together with the descriptions of the complainant as "off her trolley" and "a raging alcoholic".

167 For the same reason that the assumption identified constitutes unreasonable criticism and vilification of the complainant, so also do the Judge's descriptions of the complainant as "off her trolley" and "a raging alcoholic". These descriptions of the complainant (even in the absence of the jury) as "off her trolley" and "a raging alcoholic" were quite unnecessary, disrespectful and likely to cause unnecessary hurt to the complainant. In this context, we draw attention to [4.12] of the CCJ Guide which, under the heading "Critical comments", provides:

> "Particular care should be taken to avoid causing unnecessary hurt in the exercise of the judicial function. This includes taking care about comments made in court (see 4.1 above) and observations made in reasons for judgment or in remarks on sentence. The legitimate privacy interests of those involved in litigation and of third parties should also be borne in mind. As Gleeson CJ put

it in his monograph 'Aspects of Judicial Performance' published in The Role of the Judge, Education Monograph 3, Judicial Commission of New South Wales (2004) at 5:

> 'The absolute privilege which attaches to fair reports of court proceedings should lead judges to be conscious of the harm that may be done, unfairly, to third parties by an incautious manner of expressing reasons for judgment. It is not only fairness to the parties that should be operating as part of a judge's concern. Non- parties can often be seriously damaged by a judge's manner of expressing reasons for judgment. Sometimes this may be the result of mere thoughtlessness. A judge should never cause unnecessary hurt.'"

We do not find it necessary to comment on the use of the term "gentlemen" other than to note that its respectful connotations may be contrasted with the disrespectful tone of the descriptors used of the complainant.

168 This aspect of Ground 3 is also substantiated.

Ground 4 - Baseless criticism of the Director of Public Prosecutions and the Office of the Director of Public Prosecutions

169 Particular reference was made under this ground to paragraphs [3], [84] and [95] of the Judgment. Paragraph [3] has been set out at [56] above. The key aspects of what was said in that paragraph which are relevant to this ground of the Complaint are as follows:

> "... *This prosecution* is a miscarriage of justice. That has occurred largely as a consequence of *the prosecutor* – relevantly the Office of the Director of Public Prosecutions *either not properly considering its power to prosecute, or if it did, by wholly misapplying the law.* On any basis *the decision to prosecute* and continue to prosecute was legally wrong." (Emphasis added)

170 Paras [84] and [95] were as follows (with emphasis added):

> "[84] However, my point is not that. My point is, if it be right that the evidence was properly excluded, and if it be right that there was not sufficient circumstances to justify a permanent stay, then the only "check and balance" left in the system to prevent an injustice was prosecutorial discretion. *That discretion was sadly lacking here. I do not believe it was properly considered at all.* Rather, I think *the prosecution* took the lazy and perhaps politically expedient course of identifying that the Complainant alleged she had been sexually assaulted and *without*

properly considering the question of whether there was any evidence to support that allegation, just prosecuted so as to let the jury decide.

....

[95] Most importantly, I do wish to record that I am left with a deep level of concern that there is some sort of unwritten policy or expectation in place in the Office of the Director of Public Prosecutions of this State to the effect that *if any person alleges that they have been the subject of some sort of sexual assault then that case is prosecuted without a sensible and rational interrogation of that complainant so as to at least be satisfied that they have a reasonable basis for making that allegation*, which would include to at least being satisfied that the complainant has a correct understanding of the legal definition of sexual assault or sexual intercourse without consent." (Emphasis added)

171 The essence of the Director's Complaint was that, in a context where the statutory inquiry under s 3(1) of the *Costs in Criminal Cases Act* did not require or permit an investigation into the actual decision to prosecute and there was no evidence before the Judge about that decision, the Judge engaged in unwarranted speculation and made unjustified findings about how the Director discharged her functions in this particular case and more generally, and that this amounted to accusations – and findings or speculation – of dereliction of duty on her part and on the part of those working within the ODPP. It was complained that the Judge published unjustified slurs against the Director and the ODPP, including that:

(a) the ODPP did not properly consider its power to prosecute;

(b) if it did, it wholly misapplied the law;

(c) no proper consideration was given to the decision to prosecute;

(d) no discretion was exercised;

(e) a "*lazy and perhaps politically expedient course*" was taken to prosecute without considering the evidence; and

(f) "... *there is some sort of unwritten policy or expectation in place*" that if an allegation of sexual assault is made then it will be prosecuted, without interrogation of the allegation.

172 The Director complained that the Judge had no basis to suggest that such a process occurred in this particular case, let alone to suggest the existence and application of a more generally applicable policy or expectation.

173 The Director also complained that "the malign speculation in the Judgment at [3], [84] and [95] could not fail to reduce public confidence in the administration of criminal justice, in particular, in respect of decision-making by me and the ODPP when commencing and maintaining sexual assault trials."

174 In his first response, in relation to ground 4 of the Complaint, the Judge said:

> "Whilst accepting criticism as to parts of my tone and language I believe I otherwise dealt with the matter judicially. *To be clear I do regret the sentence extracted from paragraph [84] of the reasons. With the benefit of hindsight, I accept that I ought not have said it and that if I had reserved, I have little doubt that it would not have found its way into my considered reasons.* I also accept that my observation at [95] *perhaps* went further than was necessary for the purposes of deciding the application. However, my remark reflected my deep concern at how this case could have been brought and maintained. This view was reinforced by the way the Solicitor Advocate had sought to justify the prosecution when arguing the costs application by reference to cases concerning 'word on word' or 'credit' of complainants. This seemed to me to disclose a fundamental misunderstanding of the entire evidentiary basis of the prosecution's case." (Emphasis added)

The Judge did not add to this answer in his second response.

175 In submissions filed on behalf of the Judge, reference was made to the Judge's first response. Mr Boulten submitted that:

> "... his Honour has accepted that his commentary about the decision to prosecute was *imperfectly phrased*. ... the case that his Honour was considering did clearly concern him and it was open to him to conclude that any consideration of the merits of the matter had been inadequate prior to the matter reaching trial." (Emphasis added)

176 Mr Boulten also submitted that "Nor should it be concluded that the costs judgment was 'very likely to have eroded public confidence in the administration of justice' or 'to have reduced public respect for the institution of the judiciary'."

177 The expression "imperfectly phrased" used by Mr Boulten is, in our view, wholly inapposite. The Judge has correctly accepted that the statement from paragraph [84] of the Judgment, namely:

> "I think the prosecution took the lazy and perhaps politically expedient course of identifying that the Complainant alleged she had been sexually assaulted and without properly considering the question of whether there was any evidence to support that allegation, just prosecuted so as to let the jury decide"

ought not have been made and has indicated that he regrets it. It was not a mere matter of "imperfect phrasing". There were a number of reasons why that statement should not have been made.

178 First, the question of *how the actual decision to prosecute came to be made* was not before the Judge. His Honour expressly acknowledged this in the course of exchange with the Solicitor Advocate on the costs certificate application, saying (T20.6):

> "I don't know what they looked at but it actually doesn't matter because my question is, *the question for me is not what the DPP did in this case* it's what the hypothetical prosecutor reasonably should have done." (Emphasis added)

179 Within two transcript pages of this part of the record, that is to say, within two or three minutes of further exchange, the Judge embarked on his *ex tempore* Judgment, the third paragraph of which (set out in emphasis at [169] above), did precisely what he had explicitly said was *not* his task, namely to comment on what the DPP did in the case before him and to characterise the prosecution as involving a miscarriage of justice.

180 Second, the Judge had no evidence before him on the question of the Director's actual decision to prosecute.

181 Third, and most fundamentally, the Director and ODPP were not given the opportunity to address the Judge's very serious criticism of the decision to prosecute, either by way of a submission that the *decision* to prosecute was not a matter before the Judge on the costs application and/or by leading any evidence relevant to it. All of this amounted to a fundamental denial of

procedural fairness, compounded by the strength of the language the judge chose to employ which he now accepts (at least in relation to [84] of the Judgment) he ought not to have employed.

182 As for what was said in [95] of the Judgment, the Judge's response that he accepts that his observation at "[95] *perhaps* went further than was necessary for the purposes of deciding the application" (our emphasis) is unsatisfactory, and it is a matter of real concern that the Judge sought to qualify his response in that way, and that his senior counsel (whose submissions the Judge must be taken to have approved) also sought to pass it off as "imperfect drafting". To restate what was said:

> "I am left with a deep level of concern that there is some sort of unwritten policy or expectation in place in the Office of the Director of Public Prosecutions of this State to the effect that if any person alleges that they have been the subject of some sort of sexual assault then that case is prosecuted without a sensible and rational interrogation of that complainant so as to at least be satisfied that they have a reasonable basis for making that allegation which would include to at least being satisfied that the complainant has a correct understanding of the legal definition of sexual assault or sexual intercourse without consent."

183 This statement carries with it the same shortcomings we have already noted about what was said at [84] of the Judgment but is, if anything, even more unsatisfactory. First, what the Judge charges in this paragraph contained at least two elements going to the *general practice* of the Director and the ODPP: (a) the existence of an "unwritten policy" [i.e. something that is not transparent] or expectation in place in the ODPP; and (b) that no "sensible or rational interrogation" of sexual assault allegations is made by the Director or the ODPP so as to at least be satisfied that the complainant has a reasonable basis for making the allegation.

184 Neither of these serious charges was put by the Judge to the Solicitor Advocate at the hearing of the costs certificate application, let alone to the Director. Accordingly, there was no opportunity given to answer them. This was profoundly unfair and was done in violation of a cardinal element of judicial conduct, namely not making adverse (let alone highly adverse) comments about a party or person involved in litigation without putting the party or person

on notice of the charges or allegations, and giving a reasonable opportunity to respond, by submissions and/or evidence.

185 Any response that the introductory words to [95] of the Judgment – "I am left with a deep level of concern" – meant that what was said fell short of a judicial finding does not improve the position. That would then translate what was said in [95] to speculation, having no basis in evidence that was before the Judge to sustain it. Even as speculation, it is tainted by the same vice as already identified, namely that what was said was without any notice to the Director or ODPP, and therefore afforded the Director no opportunity to rebut it. The vice in the speculation engaged in by the Judge was compounded by his statement in the course of argument on the costs application, after the Solicitor Advocate expressed a concern that the costs issue was or may be being used to circumvent the Guidelines, that "the director might be bound by those guidelines but I'm not and I don't know what they are so I don't really care about the director's guidelines." (T20.18).

186 We agree with the Director's complaint that statements made in [3], [84] and [95] of the Judgment could have and, indeed, given the extensive publicity subsequently given to the decision and of which we are aware, are likely to have had the effect of reducing public confidence in the administration of criminal justice, in particular, in respect of decision-making by the Director and the ODPP when commencing and maintaining sexual assault trials.

187 Swingeing criticisms by a District Court judge adverse to a statutory office holder and in relation to the general practice of the Director and the ODPP would readily be assumed by the public (a) to have a basis in evidence before the judge and (b) only to have been made after an inquiry into the matter based on evidence and a fair opportunity having been given to the object of the criticism to address it. None of that occurred.

188 This was far more serious than a matter of inapposite, over strong or imperfect language. It was fundamentally unjudicial conduct and inimical to basic

procedural fairness of the most basic kind. It entailed, in our view, an abuse by the Judge of his power in giving reasons for his decision on the matter in hand.

189 It is no part of a judge's function to offer a high-handed commentary on the conduct and general practices of a statutory office holder unless those matters are squarely before the judge in properly constituted proceedings, supported by admissible evidence, and the charge is attended by the most basic requirements of procedural fairness. This criticism is compounded by the fact that the adverse commentary was propounded by a recently appointed judge who, in his own words spoken during the trial, doesn't "do criminal law" (T343.31) and was ignorant of the provisions of the *DPP Act* and the Guidelines and their status, as explained at [36]-[51] above.

Submissions as to consequences

190 In his letter to the Commission, the Judge has raised a number of matters for the Commission's consideration. He says that he has:

- reflected deeply on the incident (referring to the now conceded bullying);
- consulted a number of experienced judges whom he respects and has sought their advice as to how to handle such situations;
- put in place informal mentoring arrangements with Judges Mahoney and Bennett, who have agreed to stay in touch and speak to him when necessary, on an ad hoc basis; and
- sought out the Chief Judge of the District Court and had a lengthy conversation with her in which he has apologised to her for his behaviour and explained to her in detail why he thinks that it occurred and why it is that he is confident that it will not happen again.

191 His Honour's letter offers the further reflection that, in pursuing a firm and robust approach to trial conduct consistent with his extensive background in commercial law, he "may have been seeking to place too much emphasis on efficiency and the use of scarce public resources when dealing with criminal trials."

192 Mr Boulten submitted on the Judge's behalf that, in relation to the bullying of the Solicitor Advocate, his Honour now has "full insight into this aspect of his conduct and not only has apologised for it but has taken positive steps to ensure that it will not reoccur."

193 Mr Boulten also submitted that because the Complaint deals with an isolated incident, the misconduct does not warrant parliamentary consideration of his Honour's removal from office. While it is true that the Complaint relates to a single case and in that sense is a "one-off", the Complaint entailed a number of different facets in relation to the Judge's ability (in the criminal jurisdiction) and behaviour. As has already been made plain, a number of the Director's complaints in addition to the conceded example of judicial bullying have been substantiated.

194 Mr Boulten also submits that, in relation to those aspects of the conduct complained about in Ground Two and/or Ground Four concerning his Honour's criticism of the Director and the ODPP, "again, Judge Newlinds accepts that his consideration of the issue would have benefited from further time to think about his judgment. His Honour recognises the pitfalls in delivering *ex tempore* judgments that are likely to involve controversy." Mr Boulten submitted that the Judge "now has better insight and he is unlikely to repeat any such mistake."

195 Mr Boulten then submitted that no significant utility is to be gained by further referring the Judge to the Chief Judge of the District Court for further supervision. We take that submission to mean that the Judge should not formally be referred back to the Chief Judge as head of jurisdiction as contemplated by s 28(1)(b) of the Act. It is submitted that "[a]lmost certainly, there will continue to be ongoing communication between the Chief Judge and Judge Newlinds in any event."

Conclusions

196 The Complaint covered a number of different grounds, particularised by specific examples.

197 We note that the Judge has accepted that, in a number of respects, the Complaint made against him is warranted and/or that he regrets and "ought not to have said" certain things in the Judgment about which complaint is made.

198 While not every particular advanced by the Director has been substantiated as an example of the four grounds advanced in the Complaint, we have found the Complaint substantiated in a number of respects beyond those limited matters conceded by the Judge.

199 To be clear, we have accepted as substantiated:

(a) the Director's complaint that the Judge "demonstrates a lack of awareness or misunderstanding of the law as it applies to the conduct of criminal trials and related applications";

(b) aspects of the Complaint relating to failures in judicial impartiality, detachment and demeanour, including the Judge's comments about the Crown and his admitted bullying of the Solicitor Advocate;

(c) the complaint of unreasonable criticism/vilification of a sexual assault complainant; and

(d) the complaint of baseless criticism of the Director of Public Prosecutions and the ODPP, particularly having regard to the sweeping nature of that criticism and the making of highly critical statements without notice or evidence.

200 We regard these matters as extremely serious and have given careful consideration to whether they merit a report to the Governor and a reference to Parliament under s 28(1) of the Act.

201 In that context, we have been concerned about the Judge's dismissal as trivial or without merit of a number of the aspects of the Complaint that have been substantiated. So, too, the Judge's initial failure to appreciate the seriousness of his conduct directed towards the Solicitor Advocate dealt with in the bullying aspect of the Complaint is a matter of concern on the question of his insight into his conduct.

202 Apart from the bullying aspect of the Complaint, we are concerned about an apparent lack of proper appreciation by the Judge of the need to conduct himself in Court in an impartial, even-handed and respectful way. One of the Judge's statements in particular – "*they love the way that it is unfair*" – revealed a generalised prejudice against the Crown that renders it inappropriate that the Judge continue to sit in cases involving state criminal matters. This was supplemented by other comments that we have highlighted in our reasons: see [137] above.

203 As will also be apparent, we are deeply concerned by what we regard as the Judge's improper comments in his published judgment about the practices of the Director and the ODPP in relation to decisions to prosecute in cases involving allegations of sexual assault – comments of a highly adverse and generalised nature that were made without evidence, notice or an opportunity to respond. This was conduct fundamentally at odds with proper judicial behaviour, and the Judge's qualified response to the criticism of what he said in [95] of the Judgment discloses, in our view, a very serious lack of insight, contrary to the submissions advanced on his behalf by Mr Boulten.

204 Words matter, especially when published by a judge in a publicly available and readily accessible judgment delivered in circumstances of absolute privilege, that is to say, with immunity from any liability for defamatory imputations and loss and damage that might be sustained as a result of such publication.

205 The Judge's hot-headed, impulsive and undisciplined interventions in the course of argument and critical statements in various places of his Judgment about the Director and the ODPP (in some cases, underwritten by the Judge's

imperfect knowledge of the law relating to public prosecutions in the State) raise serious concerns about the Judge's capacity to adhere to appropriate standards of judicial conduct. In addition to these matters are those dealt with under Ground 1.

206 In our view, this is a borderline case for the purposes of s 28 of the Act: see [18] above.

207 After careful reflection and, on balance, we do not consider that the grounds that we have found to be substantiated are such, *on this occasion*, to warrant Parliamentary consideration of removal from office. A judicial officer may be removed, by Parliament, only on the ground of "proved misbehaviour or incapacity": *Constitution Act 1902* (NSW), s 53. A repetition of such or similar conduct may well lead a subsequent Conduct Division to a different view.

208 As a consequence, we propose to refer the matter back to the Chief Judge of the District Court with a number of recommendations set out below. These are designed to assist the Judge to address the issues which this Report has highlighted.

209 In reaching the conclusion set out in [207-[208] above, we have had regard to the fact that the Judge was a relatively recent appointment with very little experience in criminal law (a matter of more relevance to Ground 1 than the other grounds), the fact that the Complaint emerged from a single "matter" (although there are a number of strands to it and the conduct complained of extended over a number of days) and concessions properly made by the Judge together with a professed willingness to learn from his mistakes.

210 In our view, the conclusions we have reached raise questions of suitability of temperament and appropriateness of the Judge continuing to sit in criminal cases in the District Court. Although judges of the District Court can be expected to exercise both civil and criminal jurisdiction, we understand that arrangements in that Court are such as to take advantage of the experience of judges prior to their appointment. The Judge stated in the trial now under

consideration that his experience in the criminal jurisdiction was limited (saying at T343.31 – "*And I don't do criminal law. You know that, don't you?*") and, as a matter of public record, his professional practice had been overwhelmingly in commercial litigation.

211 The issues of temperament raised in this complaint are not obviously confined to criminal cases. They disclose a lack of proper awareness of the judicial role – that is the same in both the criminal and the civil jurisdiction. Nevertheless, as it is accepted by the Judge that he will seek (and need) some judicial mentoring from experienced colleagues, we consider that the interests of justice would be best served if he were restricted to sitting in cases in areas of law where he is most experienced. That does not include criminal cases. Indeed, in the area of State crime, we are of the view that the Judge's generalised adverse statements about the Director and ODPP that we have highlighted in this Report render it inappropriate that he sit in State criminal matters for the foreseeable future.

212 Pursuant to s 28(3) of the Act, we make a recommendation to that effect to the Chief Judge of the District Court to whom the matter will be referred. It will be a matter for the Chief Judge to assign the Judge to the criminal jurisdiction only if and when she considers it appropriate to do so.

213 We would also recommend that, in any event, the Judge should continue to be mentored by more experienced judges in the District Court, whether he sits in civil or criminal cases, and that this should be on a formal basis rather than being left to some ad hoc arrangement.

214 We would also recommend that the Judge be required to read (or re-read) and carefully study:

(a) the Guide to Judicial Conduct;

(b) "Judicial Bullying: the view from the Bar";[3]

(c) the Judicial Bullying Guideline issued by the Judicial Commission of Victoria.;[4]

(d) the following publications contained in the Handbook for Judicial Officers:[5]

- "Impartiality and emotion in judicial work" by Professor S Roach Anleu and Emerita Professor K Mack;
- "Doing right by 'all manner of people'" by the Hon. T F Bathurst AC and Ms Sarah Schwartz; and
- "Attributes of a good judge" by the Hon. Justice E Kyrou

and to attend upon the Hon. T F Bathurst AC KC at a mutually convenient time to discuss those publications and judicial conduct, temperament and behaviour.

215 Finally, we note the terms of s 28(6) of the Act that "[t]he Commission may give a copy of the report (or a summary of the report) to the complainant *unless the*

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[3] K Nomchong SC, "Judicial bullying: the view from the bar" (2018) 30(10) *Judicial Officers Bulletin* 95, available at <https://www.judcom.nsw.gov.au/publications/benchbks/judicial_officers/judicial_bullying_view_from_the_bar.html#ftn.id-1.5.3.2.1.4.1.1>.

[4] Judicial Commission of Victoria, *Judicial Conduct Guideline Judicial Bullying* (online, May 2023), available at <https://files.judicialcommission.vic.gov.au/2023-05/Judicial%20Conduct%20Guideline%20-%20Judicial%20Bullying.pdf>.

[5] See, generally, Judicial Commission of NSW, *Handbook for Judicial Officers*, available at <https://www.judcom.nsw.gov.au/publications/benchbks/judicial_officers/index.html>.

Conduct Division has notified the Commission in writing that this should not occur "(emphasis added).

216 We do not hold that opinion. It would, in our view, be entirely appropriate for the Commission to provide a copy of this Report to the Director, but that is a matter for the Commission.

19 August 2024

The Hon Andrew Bell

The Hon Carolyn Simpson AO KC

Prof Nalini Joshi AO

APPENDIX A – EXTRACT FROM DPP GUIDELINES

5.6 Consultation resolving charges and discontinuing prosecutions

The victim must be consulted prior to making any of the following decisions, unless they have expressed a desire not to be consulted or their whereabouts cannot be ascertained after reasonable inquiry:

1. to substantially change the charges
2. not to proceed with some or all of the charges
3. to resolve the matter by accepting a plea to a less serious charge (see Chapter 4: Charge resolution).

Consultation with a victim regarding charge resolution requires an explanation of the full implications of proceeding on fewer or lesser charges, including:

1. an explanation of the current charges and any proposed substitution of them
2. a summary of the reasons why charge resolution is being considered
3. the respective maximum penalties of the charges
4. the impact of any charge resolution on the evidence to be presented on sentence, including the statement of agreed facts and any Victim Impact Statement
5. where relevant, the implications of a matter being dealt with as a Form 1 offence.

In advising a victim of a possible discontinuance of all charges, a summary of the reasons why discontinuance is being considered should be provided. Providing a summary of reasons does not constitute a waiver of legal privilege.

Victims must be given adequate time to form their views, having regard to the nature and urgency of the decision. This includes giving victims the opportunity to obtain assistance from a parent or carer (other than the accused) or a support person, before providing their views.

The views of the victim must be taken into account and given due consideration but are not determinative. It is the public interest, not any private individual or sectional interest, that must be served. The decision to proceed by way of charge resolution or to discontinue all charges rests with the Director or the Director's delegate.

There are cases when the victim requests that proceedings be discontinued. This can occur in proceedings for domestic violence offences (see Guideline 5.9), non-domestic sexual assault offences and in other contexts. Careful consideration must be given to any request by a victim to discontinue proceedings in determining whether a prosecution is in the public interest, but other factors are also relevant, including where there is other evidence implicating the accused person, where there is a history of similar offending and the gravity of the alleged offence

APPENDIX B – EXTRACTS FROM GUIDE TO JUDICIAL CONDUCT

2.1 Impartiality

The large volume of case law involving challenges to judicial impartiality testifies to its importance and sensitivity. *There is probably no judicial attribute on which the community puts more weight than impartiality. It is the central theme of the judicial oath of office*, although the same words of that oath also embrace the concepts of independence and integrity, and indeed, in many cases, those concepts are involved in acting impartially. The application of the requirement of impartiality is always subject to considerations of necessity. This may mean that in a small court, or in a court that sits in an isolated location, or in a court such as the High Court where members have a constitutional responsibility to sit, the significance of the matters identified later will differ. It is easy enough to state the broad *indicia of impartiality in court – to be fair and even-handed, to be patient and attentive, and to avoid stepping into the arena or appearing to take sides.* None of this, however, debars the judge from asking questions of witnesses or counsel which might even appear to be "loaded" in order to gain a better understanding and eventual evaluation of the facts, or submissions on fact or law.

4 CONDUCT IN COURT

4.1 Conduct of hearings

It is important for judges to maintain a standard of behaviour in court that is consistent with the status of judicial office and does not diminish the confidence of litigants in particular, and the public in general, in the ability, the integrity, the impartiality and the independence of the judge. It is therefore desirable to display such personal attributes as punctuality, courtesy, patience, tolerance and good humour. The trial of an action, whether civil or criminal, is a serious matter but that does not mean that occasional humour is out of place in a courtroom, provided that it does not embarrass a party or witness. Indeed it sometimes relieves tension and thereby assists the trial process.

Nevertheless, *the entitlement of everyone who comes to court – counsel, litigants and witnesses alike – to be treated in a way that respects their dignity* should be constantly borne in mind. *Bullying by the judge is unacceptable.* It is worth remembering that many complaints to the Judicial Commission of New South Wales by litigants and their lawyers have had as their foundation remarks made by judicial officers in the course of proceedings. The absence of any intention to offend a witness or a litigant does not lessen the impact.

A judge must be firm but fair in the maintenance of decorum, and *above all evenhanded in the conduct of the trial.* This involves not only observance of the principles of natural justice, but the need to protect a party or witness from any display of racial, sexual or religious bias or prejudice. Judges should inform themselves on these matters so that they do not inadvertently give offence.

A judge should remember that informal exchanges between the judge and counsel may convey an impression that the judge and counsel are treating the proceedings as if they were an activity of an exclusive group. This is a matter to be borne in mind particularly in a case in which there is an unrepresented litigant, but the caution extends to all cases.

4.2 Understanding social and cultural factors

Judges should strive to be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national

origin, disability, age, marital status, sexual orientation, gender identity or expression, social and economic status and other like causes ('irrelevant grounds'). Consciousness of social and cultural factors is desirable not just for the purpose of avoiding inadvertently giving offence, but also to achieve equality before the law, judicial impartiality and the appearance of impartiality.

It is the duty of a judge to be free of bias or prejudice on any irrelevant grounds. A judge should attempt, by appropriate means, to remain informed about changing attitudes and values in society and to take advantage of suitable educational opportunities (which ought to be made reasonably available) that will assist the judge to be, and appear to be, impartial.

4.3 Equality in proceedings

Judges should avoid comments, expressions, gestures or behaviour that may reasonably be interpreted by the hypothetical observer as showing insensitivity to or disrespect for anyone. Examples include inappropriate comments based on stereotypes linked to gender, race, ethnicity, religion, culture, sexual orientation, gender identity or expression, differing mental or physical abilities, age and socioeconomic background, *or other conduct that may create the impression that persons before the court will not be afforded equal consideration and respect. Inappropriate statements by judges, in or out of court, have the potential to call into question their commitment to equality and their ability to be impartial.*

4.4 Avoidance of stereotypes

Judges should not make assumptions based on general characterisations or attach labels to people that invite stereotypical assumptions about their behaviour or characteristics.

Reliance on stereotypes may arise for different reasons, often unintentionally. Judges may not properly appreciate that their reasoning is linked to stereotypical thinking. A judge may be unfamiliar with cultural traditions that would, if known, provide a greater understanding of a party's or a witness's appearance, mannerisms or behaviour.

Judges should educate themselves on the extent to which assumptions rest on stereotypical thinking and should become and remain informed about changing attitudes and values. Such education should include learning about other cultures and communities that are different from the judge's own life experiences, to expand their knowledge and understanding.

4.5 Participation in the trial

It is common and often necessary for a judge to question a witness or engage in debate with counsel, but *the key to the proper level of such intervention is moderation.* A judge must be careful not to descend into the arena and thereby *appear to be taking sides or to have reached a premature conclusion."*

4.12 Critical comments

Particular care should be taken to avoid causing unnecessary hurt in the exercise of the judicial function. This includes taking care about comments made in court (see 4.1 above) and observations made in reasons for judgment or in remarks on sentence. The legitimate privacy interests of those involved in litigation and of third parties should also be borne in mind. As Gleeson CJ put it in his monograph 'Aspects of Judicial Performance' published in The Role of the Judge, Education Monograph 3, Judicial Commission of New South Wales (2004) at 5:

> *'The absolute privilege which attaches to fair reports of court proceedings should lead judges to be conscious of the harm that may be done, unfairly, to third parties by an incautious manner of expressing reasons for judgment. It is not only fairness to the parties that should be operating as part of a judge's concern. Non- parties can often be seriously damaged by a judge's manner of expressing reasons for judgment. Sometimes this may be the result of mere thoughtlessness. A judge should never cause unnecessary hurt.'*

And see the monograph generally, especially at 4 and 5.

Judicial officers exercising an appellate or review jurisdiction should approach the exercise of that function with similar considerations in mind. It is one thing to correct error but quite another to criticize unnecessarily or thoughtlessly the primary judicial officer or tribunal."

APPENDIX C – EXTRACTS FROM TRANSCRIPT

IN THE ABSENCE OF THE JURY AND WITNESS

HIS HONOUR: So red line means not admissible, right? In the statement. So what are you going to do, Mr Crown?

CROWN PROSECUTOR: I'm sorry, what was that, your Honour?

HIS HONOUR: Yellow with a red line through it means it's been ruled in admissible.

CROWN PROSECUTOR: Right.

HIS HONOUR: So she said she appeared unconscious at least twice.

CROWN PROSECUTOR: Yes.

HIS HONOUR: That's not admissible. So what are you proposing we do? And by the way, I know this because it's a matter of public record. Both the complainant and this witness have given evidence in this Court, either this week, or late last week, on very similar topics, so she is not an inexperienced witness. So how did this happen? And what am I supposed to do about it?

CROWN PROSECUTOR: All right. That was a mistake, clearly.

HIS HONOUR: No there's not a mistake by you, and I'm not convinced it was a mistake by her. I'm assuming you've done your job properly. Is that a fair assumption? Is that a fair assumption?

CROWN PROSECUTOR: Sorry, your Honour.

HIS HONOUR: I'm assuming you did your job properly and you told her beforehand what she wasn't allowed to say, and if you didn't, you better explain why, cause at the moment I think she's done this deliberately.

CROWN PROSECUTOR: I had a conference with [redacted] yesterday, and I can tell your Honour that I did not tell her. It was a quick conference.

HIS HONOUR: Why not?

CROWN PROSECUTOR: It was an oversight on my behalf.

HIS HONOUR: That's extraordinary.

CROWN PROSECUTOR: It was immediately--

HIS HONOUR: This is the most extraordinary case. You appreciate that, don't you?

CROWN PROSECUTOR: I do, your Honour, yes.

HIS HONOUR: What on earth are you doing running this case? What evidence do you actually have? Can you tell me? You've got evidence that they had sexual intercourse on four occasion, only because he's admitted it; right?

CROWN PROSECUTOR: Correct.

HIS HONOUR: You've got evidence that, objectively, there was enthusiastically enthusiastic consent; right? You've got evidence from him that he didn't know that she wasn't consenting and that he thought she was consenting, and that he made inquiries from her as to her consent; right?

CROWN PROSECUTOR: Yes.

HIS HONOUR: So you're not going to win. You can't make a submission that he didn't actually know, and you can't make a submission that he was reckless; right? Cause he did turn his mind to it.

CROWN PROSECUTOR: Yes.

HIS HONOUR: And he was conscious of the need. All of that is a given; right?

CROWN PROSECUTOR: Yes.

HIS HONOUR: So what that leaves you with is intoxication.

CROWN PROSECUTOR: Yes.

HIS HONOUR: And that feeds in at two levels. Your case is, you're going to invite them to find she is so intoxicated that, when they factored that into the other factors, which include enthusiastic consent, that there's no consent. That's your first submission, and your second submission is, in all the circumstances, even though you have to accept that he honestly thought that she had consented, that it wasn't reasonable to do so.

CROWN PROSECUTOR: That's correct, yes.

HIS HONOUR: That's a hopeless case. It's a hopeless case, and I don't know--

CROWN PROSECUTOR: May be so.

HIS HONOUR: --what you're doing running it, and obviously the complainant thinks she's been sexually assaulted because she wrongly thinks that if you have sex with someone and you can't remember it, that's sexual assault, and she thinks you can have a standing non-consent, so she's completely wrong. So everything she says about it being assault is wrong, and I'm going to tell them that. Obviously you're going to tell them that as well. They can't take any notice of her opinion that she was assaulted, cause it's based on

fundamental misconceptions of the law.

CROWN PROSECUTOR: Yes.

HIS HONOUR: And now you've called her best friend, who gave evidence in another case, very similar facts, last week, in support of the complainant, and she has blurted out in admissible evidence.

CROWN PROSECUTOR: Right.

HIS HONOUR: So I have two choices. I keep going with this hopeless case, and there's a risk that the accused gets convicted, or I discharge the jury and we start again, and we waste a whole lot more time, cause no doubt, your instructions will be to keep running this till the death; am I right?

CROWN PROSECUTOR: I suspect that that's the case—

HIS HONOUR: How could that possibly--

CROWN PROSECUTOR: --your Honour, yes.

HIS HONOUR: --be right? How could you recommend this case proceed, in light of what's fallen out?

CROWN PROSECUTOR: All right. Just so your Honour knows.

HIS HONOUR: Look, I am cross, because that was disgraceful conduct.

CROWN PROSECUTOR: Yes, all right, and I have to take full responsibility for it.

HIS HONOUR: Well you do. If you didn't conference her—

CROWN PROSECUTOR: That's right.

HIS HONOUR: --you have to take full responsibility. Full responsibility. I actually suspect she knew exactly what she was doing, but that's where it's worse If you, as the prosecutor, are responsible. Why wouldn't you have a conference with her of an appropriate length? Why wouldn't you?

CROWN PROSECUTOR: I can put forward all sorts of excuses.

HIS HONOUR: No, but just tell me. Is it just slackness? Is it laziness?

CROWN PROSECUTOR: No, it was a rushed conference I had yesterday.

HIS HONOUR: Why?

CROWN PROSECUTOR: Because Court was about to start.

HIS HONOUR: So what. Why did you have a conference lined up? She's been in the Court building for the last two weeks. I know that.

CROWN PROSECUTOR: I mean I don't know about that.

HIS HONOUR: Course you know that.

CROWN PROSECUTOR: Well no, I don't, your Honour. I didn't know that.

HIS HONOUR: How could you not know that?

CROWN PROSECUTOR: I had nothing to do with the other trial.

HIS HONOUR: It's a matter of public record?

CROWN PROSECUTOR: All right, but I had nothing to do with it. I had no certification--

HIS HONOUR: But your office knows--

CROWN PROSECUTOR: --of it.

HIS HONOUR: --about it.

CROWN PROSECUTOR: Well, the office knows about it.

HIS HONOUR: Of course the office - the office knows it's running two cases based on the same complainant against different men, using some of the same witnesses.

CROWN PROSECUTOR: That's right, with different prosecutors. Different instructing solicitors.

HIS HONOUR: But it's the same Crown. The office knows.

CROWN PROSECUTOR: Yes, that's right.

HIS HONOUR: Someone in the office knows this is going on. The other jury discharged in half an hour, I'm told.

CROWN PROSECUTOR: Yes, not guilty, I hear. Yes. HIS HONOUR: Not guilty.

CROWN PROSECUTOR: That's right. I heard something.

HIS HONOUR: And you know it's very similar. That one she said she was unconscious.

CROWN PROSECUTOR: No, I didn't know that

HIS HONOUR: And this witness said she was unconscious and the jury obviously didn't believe her. So what are we going to do?

CROWN PROSECUTOR: Well, that I don't know, your Honour.

HIS HONOUR: Well, what is your submission?

CROWN PROSECUTOR: Well, I don't know if Ms Orman-Hales has got an application.

HIS HONOUR: No, I don't care what her application is. What is your submission as to the appropriate thing to do? You are the prosecutor. This is your case.

CROWN PROSECUTOR: To correct the error, your Honour. Those words can be struck from the record.

HIS HONOUR: And will I say it was deliberately done by the witness, or will I say it was done because of the, again, the complete and utter non-preparedness of the Crown? You are, after all, the person you who opened this case on the wrong proposition of law.

I

CROWN PROSECUTOR: I did, your Honour, yes.

HIS HONOUR: Which does make me thing that no one in your office has actually properly considered this case, and whether it should be run or not, because if your understanding of the law is your office's understanding of the law, no one has thought about this properly.

CROWN PROSECUTOR: That's not the case, your Honour.

HIS HONOUR: Well, what is the case? How do you know?

CROWN PROSECUTOR: Well firstly, I didn't certify this matter. It was certified by somebody else.

HIS HONOUR: Right. So how would I know if that person's got any more brains than you?

CROWN PROSECUTOR: Well, your Honour, I made the--

HIS HONOUR: How would I know that?

CROWN PROSECUTOR: Your Honour, I made the mistake.

HIS HONOUR: No, it's not a mistake. It's more than a mistake. You opened a serious criminal case on the complete and utter wrong proposition of law.

CROWN PROSECUTOR: All right.

HIS HONOUR: Why would I assume that anyone else in your office has any better understanding of the law than you? That's what you're asking me to infer, isn't it?

CROWN PROSECUTOR: Well, yes, and I don't think that's--

HIS HONOUR: That's why I think this case hasn't been properly considered, cause you thought you could win this case just by proving that she's severely intoxicated, didn't you?

CROWN PROSECUTOR: Well that would be what the Crown's relying upon, yes. I'm not saying necessarily I personally felt it could be won. I didn't think it necessarily was a--

HIS HONOUR: No, you thought you could put to the jury that they could convict if they find severe intoxication full stop. Cause that's what you told--

CROWN PROSECUTOR: Until I was corrected, that was what was--

HIS HONOUR: That's what you thought.

CROWN PROSECUTOR: Well, based upon what I opened on, I would have to concede that that is the case. That would be part of my closing address.

HIS HONOUR: And that, we now know, only cause I looked it up.

CROWN PROSECUTOR: Correct.

HIS HONOUR: And I don't do criminal law. You know that, don't you? That was utterly wrong.

CROWN PROSECUTOR: Yes.

HIS HONOUR: And the question is this: why would I infer that anyone else in your office has any more idea about the criminal law than you do?

CROWN PROSECUTOR: Well, I don't know. I can't answer that question, your Honour.

HIS HONOUR: Well is it an unreasonable assumption to think that they're all bereft of any knowledge of the relevant law?

CROWN PROSECUTOR: It would be unreasonable, your Honour, yes.

HIS HONOUR: Why? Who certified this?

CROWN PROSECUTOR: A person who is now a Crown Prosecutor.

HIS HONOUR: Okay. What's their name?

CROWN PROSECUTOR: Your Honour, I'm just a bit reluctant to give these bits of information on the basis that--

HIS HONOUR: Why?

CROWN PROSECUTOR: Well, on the basis that--

HIS HONOUR: I'm asking you who certified this?

CROWN PROSECUTOR: Your Honour, I'm not prepared to do that. It's privileged information.

HIS HONOUR: It's not privileged. That is not privileged at all.

CROWN PROSECUTOR: Well, I need to get her authorisation.

HIS HONOUR: I won't authorise it. I want to know who certified this case, and I want to know what your submission is as to what we should do now. There are three possibilities. We go ahead with the distinct possibility that there will be a conviction based on evidence that should not have been before the jury. That's one possibility. The second possibility is, I discharge the jury, and we start again right now, and we go through this fiasco again, but I'm telling you this. The complainant will give her evidence in person.

CROWN PROSECUTOR: Well, the complainant's already given her evidence.

HIS HONOUR: I don't - when we have a - if we have a retrial. We're not going to have it on video.

CROWN PROSECUTOR: Well that's what would need to happen, your Honour.

HIS HONOUR: I know, and it's so unfair on the accused. Or, you get instructions to drop this case, which I know you won't.

CROWN PROSECUTOR: Yes, I can't speak for what the office will do, but from my point of view--

HIS HONOUR: Well, what are we going to do right now? I want to know what you say. Those are the only three possibilities I can think of. I'm tempted to bat on, and for me to tell the jury that that was a deliberate - no. For me to tell the jury that, because of your inattention to preparation for this case, that evidence got before them and it shouldn't have. It wasn't an honest mistake. It was a reckless mistake.

CROWN PROSECUTOR: Can your Honour--

HIS HONOUR: No. No, I'm going to blame you. You've told me to blame

you. My other option is to blame the witness. That was my natural instinct, because I know what an experienced witness she is. The problem is, she's given evidence in another trial last week, and it's been all about unconscious. But you should have been aware of that, and so I can now see how, perhaps, it wasn't deliberate on her part, because that's what she's been thinking about recently. It is a complete and utter waste of public money, and the accused - to have to sit there and put up with this - is extraordinary. Only because the Crown's too scared to never run a case of sexual assault. So, what I now want you to tell me, what is your submission?

CROWN PROSECUTOR: Well, your Honour said there's three options. Discharge the jury; to tell the jury that, because of - in effect - incompetence on behalf of the Crown, that the witness has given evidence that shouldn't have been adduced; and the third option, your Honour, was - to discharge the jury--

HIS HONOUR: For you to go and get instructions and do the right thing, but that's not going to happen, so we just rule that out, don't we?

CROWN PROSECUTOR: I - well. I've got to be careful about what I say, your Honour.

HIS HONOUR: Why? You've got to be frank with me. You're appearing before me. You answer my questions.

CROWN PROSECUTOR: The - well, I can say about my experience, generally, with prosecutions of this type, is that the office, generally speaking, would proceed with the matter - matters like this.

HIS HONOUR: If I may so, it's because they're gutless. All right, what do you say I should do?

ORMAN-HALES: Your Honour, would I - my instructor who is normally with me, just had to be somewhere else this morning - I would just like, your Honour, if I could just have a few minutes just to speak to my client, I would appreciate that, and then I--

HIS HONOUR: I think what I'm minded to do is to direct them, that it shouldn't have got before them. To say it was because of the gross negligence of the prosecution, who haven't prepared this case properly at all from start to finish, and that they should put it out of their mind, and by the way, she's not qualified to tell you whether someone was conscious or unconscious. And this case is not about conscious or unconscious.

ORMAN-HALES: That's true.

HIS HONOUR: But, that's all I can do. I mean, obviously, it's very probative of serious intoxication.

ORMAN-HALES: Absolutely, yes. If I could just have a few minutes to speak

to my client, just outside, if your Honour would allow me? And your Honour, I've just got to turn my mind to whether I look at the other issue, of discharge. But I appreciate what your Honour said.

HIS HONOUR: I know. I know, but I mean, I don't want to discharge.

ORMAN-HALES: No, I appreciate that.

HIS HONOUR: It's not good for your client.

ORMAN-HALES: No, I know that, but your Honour—

HIS HONOUR: And the case has gone well for you.

ORMAN-HALES: Yes, I know that. If I could have a few minutes, your Honour, I'd be - I would really appreciate it.

HIS HONOUR: Yes, that's all right. I'm going to give you to half past, but I'm not going to delay this. We're going to get on with this case.

ORMAN-HALES: I understand, your Honour.

HIS HONOUR: We're either going to discharge, or get on with it.

ORMAN-HALES: Yes, no, I understand.

HIS HONOUR: I'm sick of it. I'm sick of sitting here, listening to this nonsense.

ORMAN-HALES: I hear you, your Honour.

HIS HONOUR: It's not your fault.

ORMAN-HALES: No. I know. I appreciate that.

HIS HONOUR: It's not his - well, it is his fault. You are the Crown. You can't sit there and go, "Oh it's my office". You're a lawyer running this case before this Court. You have professional obligation. You're not allowed to run cases that have no realistic possibility of success. I don't care about what instructions you have. That's not a matter for instructions. So, ethically, you're on bloody thin ice. You understand?

CROWN PROSECUTOR: Yes, your Honour.

HIS HONOUR: I don't - you cannot stand there and go, "It's a matter for instructions". That's not how it works with lawyers. You have an independent obligation to this Court to not run cases that have no prospect of success, and I think that's what you're doing.

CROWN PROSECUTOR: All right, your Honour. Well--

HIS HONOUR: So you think about that—
CROWN PROSECUTOR: Yes, your Honour.

HIS HONOUR: --and don't hide behind instructions.

CROWN PROSECUTOR: All right, your Honour.

HIS HONOUR: Because you're not allowed to. You understand that, don't you?

CROWN PROSECUTOR: Yes, I do. I do.

HIS HONOUR: Yes. Right. I'm talking about your independent ethical obligation.

CROWN PROSECUTOR: Yes.

HIS HONOUR: Maybe you should get some advice about that, but I'm serious.

CROWN PROSECUTOR: All right. It's noted, your Honour.

HIS HONOUR: I mean, the complainant's evidence was hopeless. Just didn't prove anything. Just didn't prove anything, so this record of interview better be good, all right? Because unless there's some evidence in that, I don't know what you've got.

CROWN PROSECUTOR: It's the - yes, well, it is--

HIS HONOUR: It's the intoxication, which you thought was all you needed.

CROWN PROSECUTOR: The consideration to certify this matter and, ultimately, prosecute it, as I said, wasn't made by me--

HIS HONOUR: I know, but that's irrelevant--

CROWN PROSECUTOR: --so it was - so—

HIS HONOUR: --to whether you run this case.

CROWN PROSECUTOR: Yes, I understand.

HIS HONOUR: Irrelevant. That's like a private lawyer saying, I've got instructions to run this case. Irrelevant.

CROWN PROSECUTOR: But, just so you know, your Honour, the accused did make some rather damning admissions.

HIS HONOUR: Where?

CROWN PROSECUTOR: In his interview with police.

HIS HONOUR: Okay, well I'm looking forward to seeing that, because that must be all you've got. That must be all you've got, because if you think the admissions in the text messages are damning, they're not even admissions. They're the opposite. They're, "We had consent".

CROWN PROSECUTOR: Indeed, yes. That's right.

HIS HONOUR: All right, so, I don't know. I haven't seen the whole case, so I could be wrong. It might be a good case.

CROWN PROSECUTOR: It's certainly a strengthened a great deal by the accused's ERISP.

HIS HONOUR: All right. Good. Well, that's promising for you. That might mean you've got a basis to run the case, but I haven't it--

CROWN PROSECUTOR: Yes, that's right.

HIS HONOUR: --so I haven't formed a view about that. I will form a view when I've seen it.

CROWN PROSECUTOR: Yes. The - I would have to concede, your Honour, that--

HIS HONOUR: Because at the moment, I can't see if you accept the accused's account - which is they had backwards and forwards consent, at each stage of the sex - right? You accept that that actually happened, and it seems to me that's the only evidence as to what actually happened in the moment.

CROWN PROSECUTOR: Correct, yes.

HIS HONOUR: Then, notwithstanding the fact that she's obviously off her trolley, a reasonable person would think that he got consent. That's my view. It's my view, the only inference you can draw from those facts. Which means the case is lost even if you prove no actual consent, because of the level of intoxication. That's why I think it's a hopeless case.

CROWN PROSECUTOR: Well, it is the - the Crown case at the moment is not strong. That's something that I can see, but--

HIS HONOUR: At the moment - I want to say this to you - if the Crown case stopped now, there is no case to answer. There is no doubt in my mind about that, so it's going to need to get better.

CROWN PROSECUTOR: It does, your Honour.

HIS HONOUR: And if it doesn't get better, that's your responsibility, and I'm going to hold you responsible.

CROWN PROSECUTOR: It's the accused's ERISP, your Honour, which strengthens the matter considerably.

HIS HONOUR: Good. Well, you should have started with that, because it's all you've got. It's the only way you prove the sex act.

CROWN PROSECUTOR: That's right. That's right.

HIS HONOUR: I'm going to give your opponents - and I'm going to go and cool down - and I'm going to give your opponent some time to decide what she wants to do.

ORMAN-HALES: Thank you, your Honour. I appreciate it. Thank you.

HIS HONOUR: But if there is a discharge, we are starting again whenever there's a panel, and I don't care about people's availability.

ORMAN-HALES: Yes, your Honour.

HIS HONOUR: And I don't care about witnesses' availability.

ORMAN-HALES: Yes, your Honour.

SHORT ADJOURNMENT

HIS HONOUR: Okay. What does anyone want me to do?

ORMAN-HALES: Yes. Your Honour, I do have an application. I thank your Honour for that time, and it's on the basis that in admissible evidence has gone before the jury in terms of what this witness has said about unconscious. It's a risk to our client that the jury - well, the jury's heard it now, so that would be an issue they may perceive her intoxication is more than it is, or it is more than it's--

HIS HONOUR: Would otherwise be proved.

ORMAN-HALES: Would otherwise be proved. So that's my application, your Honour.

HIS HONOUR: Isn't the trouble that the test is I have to satisfied there will be a miscarriage of justice?

ORMAN-HALES: That's right, exactly.

HIS HONOUR: You've just put it upon the basis that there's a risk, but that's not high enough.

ORMAN-HALES: No, that's true.

HIS HONOUR: It's a very, as I read the cases, it's a very high threshold.
ORMAN-HALES: It is.

HIS HONOUR: And I have to be positively satisfied that there will be, and it seems that it always comes down to asking the question, can whatever's happened be cured by direction?

ORMAN-HALES: That's correct.

HIS HONOUR: All right, and I've concluded it can be by an appropriate direction.

ORMAN-HALES: The Court pleases. Thank you.

HIS HONOUR: And that's what I'm going to do. I'm going to do it now.

ORMAN-HALES: Yes, thank you. Yes, I appreciate that. Thank you.

HIS HONOUR: Before you cross-examine.

ORMAN-HALES: I'm sorry?

HIS HONOUR: But one thing though, before the cross-examination starts, I think someone should confer with the witness to make sure she doesn't blurt it out again.

CROWN PROSECUTOR: Yes. Yes, indeed.

HIS HONOUR: Cause it is conceivable.

ORMAN-HALES: Yes, that's right. Well, she doesn't know.
HIS HONOUR: No, she doesn't know, and in the context of some questions you ask, she might say it again.

ORMAN-HALES: She might, that's right.

HIS HONOUR: Through no fault of her own. So can someone just do that?

CROWN PROSECUTOR: Yes, your Honour. My instructing solicitor's in a position where he can do it, but I think it might be--

HIS HONOUR: I think it'd be greater if it came from you.

CROWN PROSECUTOR: I was going to say that too, yes--

HIS HONOUR: I do.

CROWN PROSECUTOR: --your Honour.

HIS HONOUR: I do.
CROWN PROSECUTOR: Yes, so then she can understand what's gone wrong and then I can say--

HIS HONOUR: You tell her it's not her fault.

CROWN PROSECUTOR: No, of course. No, that's right. I'll say it's my fault and that's what I should have outlined to her.

HIS HONOUR: Yes, okay. Well why don't you do that. I'll just wait here.

CROWN PROSECUTOR: Yes.

HIS HONOUR: And then we'll get them back in. I'll give the direction. Then you start your cross-examination.

ORMAN-HALES: YEs, your Honour.

HIS HONOUR: I think I've given sufficient reasons for declining your application.

ORMAN-HALES: Yes.

HIS HONOUR: Balancing what you fairly put is a risk, and I very much agree it is a risk. I think in light of the direction that I have in mind, I can't be satisfied there will be some miscarriage of justice.

ORMAN-HALES: The Court pleases. Thank you.

CROWN PROSECUTOR: Your Honour, I just was wondering, before your Honour goes ahead with that course of action, would it assist you if you were to see the transcripts of the accused's ERISP?

HIS HONOUR: No.

CROWN PROSECUTOR: All right.

HIS HONOUR: I've heard what you've said and I'll keep an open mind until I see the ERISP.

CROWN PROSECUTOR: All right, and in terms of what--

HIS HONOUR: So everything I've said is based on the evidence to date.

CROWN PROSECUTOR: All right, and in terms of what your Honour's intending to say about me, just so I can brace myself, is it along the lines of what you were contemplating before?

HIS HONOUR: Yes, but it wasn't deliberate.

CROWN PROSECUTOR: Yes, but negligent. In which case I just have to live with it.

HIS HONOUR: I'm sorry.

CROWN PROSECUTOR: No, I understand, and I apologise too, and I can't go against that because it was.

HIS HONOUR: Okay.

CROWN PROSECUTOR: Unfortunately.

HIS HONOUR: But I think I will also say it's the second big mistake you've made. So whatever that does to your credibility, you'll have to live with as well.

CROWN PROSECUTOR: All right. All right, thank you.

HIS HONOUR: But don't worry. I've made lots of mistakes.

CROWN PROSECUTOR: Yes. All right. Be about three minutes, I think, your Honour.

HIS HONOUR: How many times did you think she said it? I got twice. Did you get two?

ORMAN-HALES: If I could just have a moment, your Honour, I'll check. My notes, such as they are, your Honour, I have twice.

HIS HONOUR: Yes, I have twice.

ORMAN-HALES: Yes, thank you.

HIS HONOUR: One was very clear not conscious.

ORMAN-HALES: Yes.

HIS HONOUR: And one other one was in and out of—

ORMAN-HALES: That's what I have, correct. Thank you.

HIS HONOUR: I am going to make an order that it be struck from the transcript.

ORMAN-HALES: Yes.

HIS HONOUR: So at some point, your solicitor might find overnight where it is in the transcript so someone can actually do that.

ORMAN-HALES: Yes, I thank your Honour for that. Thank you.