The Hon. Michael John DALEY, MP- Attorney General

Budget Estimates Hearing
4 September 2024

Supplementary Questions

Question #	Member	SQ title	Supplementary Question	Answer
1	Dr Amanda Cohn MLC	Data on historical homosexual offences	(1) How many individuals were charged with offences that have become eligible for extinguishment, as specified in the Extinguishment of Historical Homosexual Offences.	I am advised: Part 4A of the Criminal Records Act 1991 defines an eligible homosexual offence for which a conviction may be extinguished under the Extinguishment of Historical Homosexual Offences Scheme. This includes a number of former offences which are listed in the Act and the Criminal Records Regulation 2019. However, for a number of the offences listed, there are additional criteria that must be satisfied in order to confirm it is an eligible offence. A determination of what may be eligible for extinguishment under the scheme therefore requires thorough consideration of the factual circumstances of each relevant offence, including reviewing historical court and police records. The Department of Communities and Justice is therefore not able to confirm how many individuals in New South Wales have been charged with offences that may now be eligible for extinguishment under the Act.
2	Dr Amanda Cohn MLC	Data on historical homosexual offences	(2) How many charges were laid of offences now eligible to be extinguished?	Please refer to the response to question 1.
3	Dr Amanda Cohn MLC	Data on historical homosexual offences	(3) How many individuals have applied for extinguishment?	I am advised: The Department of Communities and Justice has received 43 applications since the scheme commenced in 2014. One applicant may have multiple applications and one application may seek the extinguishment of multiple convictions. As at 16 September 2024, 33 convictions have been extinguished, and there are currently two applications relating to two convictions under consideration. When an application is received, the Department will obtain relevant information (with the applicant's consent) to support the consideration of the application. The Secretary of the Department (or his delegate) is also able to under the Act, request further information from the courts and the NSW Police Force about the conviction. The application is then considered by the Secretary (or his delegate) and the applicant is notified of the decision.
4	Dr Amanda Cohn MLC	Data on historical homosexual offences	(4) How many individual offences have been extinguished?	Please refer to the response to question 3.

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5	Dr Amanda Cohn MLC	Data on historical homosexual offences	(5) What, if any, funding or resourcing has been provided to community legal centres to assist clients seeking to extinguish historical offences since the scheme was introduced?	I am advised: No additional funding has been allocated to Community Legal Centres through the Community Legal Centres Program to assist with applications for expungement of historical homosexual offences in 2024/25 or previous years.
6	Dr Amanda Cohn MLC	Data on historical homosexual offences	(6) How many pieces of correspondence have been sent to notify individuals of their eligibility for extinguishment?	I am advised: The Department of Communities and Justice has received 43 applications since the scheme commenced in 2014. The Department does not otherwise have details on persons that may be eligible to apply for extinguishment of their conviction(s) under the Criminal Records Act 1991.
7	Dr Amanda Cohn MLC	Data on historical homosexual offences	(7) With regard to Question Nos 1- 6, in circumstances where it is not possible for responses or data to be provided, as indicated in the hearing, please provide an explanation of the relevant limitations.	Please refer to the responses to questions 1 to 6.
8	Ms Abigail Boyd MLC	Disability Royal Commission recommendations under the remit of Attorney General	(8) Which recommendations does the Attorney General have partial or full responsibility for?	I am advised: Allocations of Ministerial responsibility for particular recommendations from the Disability Royal Commission are a decision of Cabinet. Per the publicly available NSW Government 2024/25 Implementation Plan includes our commitments and actions over the first 12 months of activity and includes the NSW Government agency with lead responsibility for actions.

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9	Ms Abigail Boyd MLC	Disability Royal Commission recommendations under the remit of Attorney General	9) On the recommendations relating to trustee and guardianship reforms and supported decision making which were rejected as "subject to further consideration", the NSW Government commented that "a Guardianship Working Group, made up of both government and non-government stakeholders has been engaged to inform the development of the NSW response to these recommendations. The Government is also undertaking a detailed assessment of the operational and resourcing impacts of reforms." What will this detailed assessment entail? (a) Who is responsible for the assessment? (b) What is the timeline for the assessment? (c) Please provide a list of the government and non-government stakeholders on the Guardianship Working Group. (d) Who is responsible for coordination of the Guardianship Working Group? (e) How many times has the Guardianship Working Group met and for how long?	I am advised: 9) These Recommendations are subject to further consideration and have not been rejected. Per the publicly available response to the Disability Royal Commission, NSW is implementing key actions under the 2024/25 Implementation Plan and is supporting regular reporting on progress by all governments on the DRC recommendations. The first report is expected to cover the period to March 2025 with reports every six months after that. (9)(a), (b) The Department of Communities and Justice has provided advice on operational and resourcing considerations of the reforms for the NSW Trustee and Guardian and NSW Civil and Administrative Tribunal, which the Government is considering. (c) The members of the Guardianship Working Group are: Council for Intellectual Disability, Dementia Australia, Emeritus Professor Terry Carney, Intellectual Disability Rights Service, Law Society of NSW, Mental Health Coordinating Council, National Disability Services, People with Disability Australia, Seniors Rights Service, Synapse - Australia's Brain Injury Organisation, Aboriginal Affairs NSW, Ageing and Disability Commission, Department of Communities and Justice, Department of Customer Service, Legal Aid NSW, Mental Health Commission of NSW, Mental Health Review Tribunal, NSW Civil and Administrative Tribunal, NSW Health, NSW Trustee and Guardian, The Cabinet Office. (d) The Department of Communities and Justice. (e) Five meetings of the Group have been held over a six month period.
10	Ms Abigail Boyd MLC	Disability Royal Commission recommendations under the remit of Attorney General	(10) The NSW Government responded to recommendation 6.6 Supported decision-making principles with "subject to further consideration". Why was NSW one of only 2 states that responded this way, when the majority of states responded with "accept in principle"?	I am advised: Refer to the response in Question 9. I cannot comment on the position of other states and territories.

11	Ms Abigail Boyd MLC	Disability Royal Commission recommendations under the remit of Attorney General	The NSW Government responded to recommendation 8.24 Disability-inclusive definition of family and domestic violence with "subject to further consideration". What is being considered by the government in relation to this? (a) Has the Attorney General engaged with any stakeholders in relation to disability-inclusive definitions of domestic and family violence? (b) Will the NSW Government commit to undertake an analysis in relation to disability-inclusive definitions of domestic and family violence, noting that the Victorian Government accepted this recommendation in principle and committed to undertaking a detailed analysis in relation to this?	I am advised: Per the publicly available response to the Disability Royal Commission, NSW is implementing key actions under the 2024/25 Implementation Plan and is supporting regular reporting on progress by all governments on the DRC recommendations. The first report is expected to cover the period to March 2025 with reports every six months after that. The NSW Government will hold a series of stakeholder forums with a particular focus on progressing the recommendations that require further consideration.

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12	Ms Abigail Boyd MLC	Disability Royal Commission recommendations under the remit of Attorney General	(12) The NSW Government responded to recommendations 11.14 Establishing disability death review schemes and 11.15 Disability death review scheme requirements with “subject to further consideration”. What is the NSW Government considering in relation to this? (a) Has the Attorney General engaged with any stakeholders in relation to reviewing disability deaths? (b) According to the NSW Ombudsman Annual Report 2021-2022, the NSW Ombudsman indicated it would table its final public report about its disability death function in late 2022, however it has not been tabled to date. Is the NSW Government aware of the progress of this report?	I am advised: Per the publicly available response to the Disability Royal Commission, NSW is implementing key actions under the 2024/25 Implementation Plan and is supporting regular reporting on progress by all governments on the DRC recommendations. The first report is expected to cover the period to March 2025 with reports every six months after that. The NSW Government will hold a series of stakeholder forums with a particular focus on progressing the recommendations that require further consideration.
13	Ms Abigail Boyd MLC	Disability Royal Commission recommendations under the remit of Attorney General	(13) The NSW Government accepted in full recommendation 11.17 Nationally consistent reportable conduct schemes. Will the Attorney General have responsibility for ensuring this commitment is followed through? (a) In relation to the Government's commitment to amend our reportable conduct legislation to explicitly include organisations that provide disability services to children, including NDIS providers, can the NSW Government provide a timeline for this? (b) The NSW Government commented it “will progress the elements of this recommendation that relate to improving data collection and reporting as part of our joint efforts with other jurisdictions to progress the broader data-related recommendations in Volume 12, Beyond the Royal Commission with other jurisdictions.” What is the timeline for which the government will be progressing these elements?	I am advised: Per the publicly available response to the Disability Royal Commission, NSW is implementing key actions under the 2024/25 Implementation Plan and is supporting regular reporting on progress by all governments on the DRC recommendations. The first report is expected to cover the period to March 2025 with reports every six months after that.
14	Hon Tania Mihailuk MLC	DPP Review into sexual assault trials	(14) With respect to the review into all adult sexual assault trials listed between 1 April of 2023 and 31 December 2024, can you please confirm of the 330 cases, how many were discontinued once the review commenced? (a) How many adult sexual assault cases set for trial were discontinued in the lead up to the review being commenced: i. Specifically 1 week before the review commenced? ii. Specifically 2 weeks prior to the review commencing? iii. Total number of sexual assault cases discontinued from 1 March 2023 to 1 April 2023?	(14)I am advised: The review commenced on 1 April 2024, not 1 April 2023. Of the 330 cases reviewed, 16 were discontinued, either on evidentiary grounds, discretionary grounds or on a combination of the two. There is a single matter that is still under consideration as at 24 September 2024. (a) i. 0 ii. 2 iii. 3, taking this question to refer to the period from 1 March 2024 to 1 April 2024 prior to the commencement of the review.

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15	Hon Tania Mihailuk MLC	Case law	(15) Please provide the name of the individual or title of the individual who instructed that the case R v Smith handed down on 27 February 2024 be removed and listed as restricted from the 23rd of August 2024? (a) Was this pursuant to an order or an administrative decision? (b) Will the restriction be lifted? If so, when? If not, why not?	I am advised: The publication of a decision of the District Court on NSW Caselaw is at the discretion of each individual judge. The judgments for R v Martinez and R v Smith (a pseudonym) are both noted as restricted. The Department does not record the reasons for restricting publication. Further information on restricted decisions is available at https://www.caselaw.nsw.gov.au/policy.
16	Hon Tania Mihailuk MLC	Case law	(16) Please provide the name of the individual or title of the individual who instructed that the case R v Martinez handed down on 5 December 2023 be removed and listed as restricted from the 29th of August 2024? (a) What this pursuant to an order or an administrative decision? (b) Will the restriction be lifted? If so, when? If not, why not?	See 15.
17	Hon Chris Rath MLC (on behalf of the Opposition)	Protocols - DPP	Mindful of the statement made to the Committee by the DPP which flagged the importance of a recognising interference which undermines trust in government and the legal system, is there a written protocol or similar document concerning contact between the Director of Public Prosecutions and the Chief Judge of the District Court? (a) If yes, where is it available? (b) If yes and the document is not publicly available, please provide a copy. (c) If not, what do you understand are the appropriate conventional or ethical limitations as to issues that may be raised in contact between the DPP and CJ of the DC?	I am advised: There is no such protocol. There is a long-standing convention set by the head of each court that there should be open communication with the DPP as the head of the State's prosecution agency. This encompasses issues concerning the administration of criminal jurisdiction before that Court. The Director acts in accordance with her ethical and professional obligations as a statutory office holder, public sector senior executive and head of the State's prosecution agency
18	Hon Chris Rath MLC (on behalf of the Opposition)	Protocols - DPP	Is there a written protocol or similar document concerning complaints made by the Director of Public Prosecutions to the Chief Judge of the District Court? (a) If yes: i. please produce a copy; and ii. please identify how many times complaints have been made pursuant to that protocol.	I am advised: There is no such protocol. See answer to Question 17.

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19	Hon Chris Rath MLC (on behalf of the Opposition)	Protocols - DPP	Is there a written protocol or similar document concerning contact between the Director of Public Prosecutions and the Chief Justice of the Supreme Court? (a) If yes, please produce a copy. (b) If not, what do you understand are the appropriate conventional or ethical limitations as to issues that may be raised in contact between the DPP and CJ of the SC?	I am advised: There is no such protocol. See answer to Question 17.
20	Hon Chris Rath MLC (on behalf of the Opposition)	Protocols - DPP	Is there a written protocol or similar document concerning complaints made by the Director of Public Prosecutions to the Chief Justice of the Supreme Court? (a) If yes: i. please produce a copy; and ii. please identify how many times complaints have been made pursuant to that protocol.	I am advised: There is no such protocol. See answer to Question 17.
21	Hon Chris Rath MLC (on behalf of the Opposition)	Protocols - DPP	(21) On how many occasions this calendar year (excluding social interactions) has the Director of Public Prosecutions corresponded directly, by any means, with: (a) Judge of the District Court? i. On how many occasions did this correspondence make a complaint or raise any issue with the conduct of a matter by a judge or justice? (b) A Justice of the Supreme Court? i. On how many occasions did this correspondence make a complaint or raise any issue with the conduct of a matter by a judge or justice? (c) On how many occasions were each of these relevant pieces of correspondence an ex parte communication?	I am advised: (a) The Director does not maintain a record of the frequency or content of communications with individual judges. (i) Nil. (b) The Director does not maintain a record of the frequency or content of communications with individual judges. (i) Nil. (c) The Director does not engage in ex parte communications
22	Hon Chris Rath MLC (on behalf of the Opposition)	Protocols - DPP	(22) On how many occasions in the calendar year 2023 (excluding social interactions) did the Director of Public Prosecutions corresponded directly, by any means, with: (a) a Judge of the District Court? (b) A justice of the Supreme Court? (c) On how many of these occasions did this correspondence make a complaint or raise any issue with the conduct of a matter by a judge or justice? (d) On how many of these occasions was this correspondence an ex parte communication?	I am advised: See answer to Question 21

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23	Hon Chris Rath MLC (on behalf of the Opposition)	Protocols - DPP	(23) Given that the Director stated that her "office's decisions are rigorously overseen by the courts", why did the Director consider that any ex parte communication was appropriate?	I am advised: n/a
24	Hon Chris Rath MLC (on behalf of the Opposition)	Communications with members of the judiciary	24) In what circumstances can litigants properly communicate directly with members of the judiciary?	I am advised: Litigants can properly communicate with the judicial officer hearing their matter when in court and when their matter is called by the judicial officer, or as otherwise may be instructed by the judicial officer when hearing the matter in court.
25	Hon Chris Rath MLC (on behalf of the Opposition)	Communications with members of the judiciary	(25) In what circumstances can clients of barristers or solicitors, with a matter before the court, properly communicate directly with members of the judiciary?	I am advised: Clients of barristers or solicitors, with a matter before the court, can properly communicate with the judicial officer hearing their matter when in court, through either their barrister or solicitor or directly with the judicial officer when their matter is called by the judicial officer, or as otherwise may be instructed by the judicial officer when hearing the matter in court.
26	Hon Chris Rath MLC (on behalf of the Opposition)	Conduct of matters - DPP	(26) Since 1 June 2023, how many indictable matters have been or are being prosecuted by or on behalf of the Director of Public Prosecutions? (a) In how many of those matters has a different prosecutor had carriage of the matter after committal?	I am advised: (26) Between 1 June 2023 and 20 September 2024 (when the data was retrieved) the ODPP received 5,608 prosecutions for indictable offences. A total of 3,975 prosecutions for indictable offences were finalised in the District Court during this period, either after trial or sentence. (a) The ODPP does not maintain the specific data sought in an accessible form.
27	Hon Chris Rath MLC (on behalf of the Opposition)	Conduct of matters - DPP	(27) Since 1 June 2023: (a) How many sexual assault, sexual touching or similar prosecutions have been finalised in the District Court? i. Of those, in how many was the lead advocate: 1. A salaried crown prosecutor? 2. A barrister from the private bar? 3. A solicitor?	I am advised: (a) Between 1 June 2023 and 20 September 2024 (when the data was retrieved), the ODPP finalised a total of 408 adult sexual assault prosecutions in the District Court. (i) The ODPP does not maintain the specific data sought in an accessible form.

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28	Hon Chris Rath MLC (on behalf of the Opposition)	DPP Audit	(28) The DPP gave evidence that prior to the current audit by the ODPP of sexual assault cases, 23 matters had already been identified as raising issues for further consideration, and so were excluded from the review. From 1 June 2023 to 1 September 2024 how many sexual assault cases in total were identified by the prosecution team as requiring further consideration by either the Director or a Deputy Director? (a) On how many occasions were issues identified by a solicitor with carriage of the matter? (b) On how many occasions were issues identified by a barrister with carriage of the matter? (c) On how many occasions were issues identified by a member of Director's chambers who did not have carriage of the matter?	I am advised: A matter is referred to the Director's Chambers when the legal team considers that a decision needs to be made which has not been delegated to any person in the office outside of Director's Chambers. In the calendar year 2023, the Director's Chambers made decisions in 3369 matters. (a)-(c) The ODPP does not maintain the specific data sought in an accessible form.
29	Hon Chris Rath MLC (on behalf of the Opposition)	DPP Audit	(29) With respect to the matters identified in the previous question: (a) On how many occasions was the matter discontinued? (b) On how many occasions on which a barrister with carriage of the matter raised the issue was the matter discontinued? (c) On how many occasions on which a solicitor with carriage of the matter raised the issue was the matter discontinued?	I am advised: See answer to question 28.
30	Hon Chris Rath MLC (on behalf of the Opposition)	Structure of DPP office	(30) What is the career progression path for a solicitor in the ODPP?	I am advised: The ODPP offers various career pathways for solicitors. Many solicitors begin their careers in the office through the Legal Development (paralegal) Program. Junior solicitors have the opportunity to build their legal knowledge and practical experience. As they develop in seniority, they may wish to pursue specialisation in areas such as advocacy, management, appellate litigation or legal research and advice. Appointees to the role of Crown Prosecutors are often drawn from solicitor advocates within the office.
31	Hon Chris Rath MLC (on behalf of the Opposition)	Structure of DPP office	(31) What is the career progression path for a Crown Prosecutor in the ODPP?	I am advised: Crown Prosecutors are appointed to their role by the Governor under s 4 of the Crown Prosecutors Act 1986. Experienced Crown Prosecutors may seek appointment as a Deputy Senior Crown Prosecutor, a Senior Crown Prosecutor or a Deputy Director.
32	Hon Chris Rath MLC (on behalf of the Opposition)	Structure of DPP office	(32) Who is responsible for mentoring staff and staff development in the ODPP?	I am advised: There are multiple specific mentoring programs running in different areas of the ODPP's operation. For example, ODPP managers ensure that junior solicitors are assigned an experienced solicitor as a mentor, to assist with

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				their professional development. The Trial Development List program offers experienced solicitors an opportunity to conduct non-complex trials under the supervision of a senior advocate, usual a Crown Prosecutor. The ODPP is currently consolidating its mentoring arrangements in an office-wide mentoring framework. This project commenced in July 2024. The project is expected to be delivered by December 2024. The ODPP has a dedicated learning and development team who coordinate and facilitate staff development across the ODPP workforce.
33	Hon Chris Rath MLC (on behalf of the Opposition)	Structure of DPP office	(33) How are staff encouraged to develop the necessary professional skill of autonomous decision making?	I am advised: The capacity to make legal decisions with respect to the conduct of prosecutions within the ODPP is governed by the Legal Delegations issued by the Director pursuant to s 33 of the Director of Public Prosecutions Act 1986. The Delegations mandate the level of seniority and experience required in those making various types of decisions in prosecutions. The level of seniority required increases with the complexity and seriousness of the decision. Once a matter is committed for trial, and in certain circumstances such as matters involving a death, charges can only be withdrawn with the approval of the Director or a Deputy Director. As a result of these arrangements, junior solicitors invariably gain significant experience in the prosecution of criminal matters run by the ODPP before they are given the power to make important prosecutorial decision themselves. For example, during the charge certification process, a solicitor with carriage of a matter will provide an initial advice with a recommendation how to proceed, with a further report provided by a managing solicitor before a decision is ultimately made by the certifier, as the Director's delegate. Bi-annual Professional Development sessions are used by managers to review performance, identify opportunities for improvement and assign performance goals and training. CLE sessions are often run on specific topics of relevance to prosecutorial decision making.

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34	Hon Chris Rath MLC (on behalf of the Opposition)	Structure of DPP office	(34) What is the unit known as Director's Chambers? (a) How many staff are employed there? (b) Please provide roll titles and the years of experience of each person employed in Director's Chambers (c) What is the total yearly salary expenditure of Director's Chambers? (d) What are the communication channels between regional offices and the Director's Chambers? (e) How are staff recruited to join Director's Chambers? i. Do employed solicitors and Crown Prosecutors rotate through Director's Chambers as part of their career development? (f) If conflicting advice about a matter is provided by a Crown Prosecutor and a member of Director's Chambers, is there a protocol or practice to resolve any conflict? i. If yes, please provide a copy. ii. ii. If no, please provide a summary of how the last 30 conflicts were resolved.	I am advised: The Director's Chambers is composed of the Director of Public Prosecutions, two Deputy Directors of Public Prosecutions, and an Acting Deputy Director of Public Prosecutions. All four are statutory appointees under the Director of Public Prosecutions Act 1986. (a) The Director's Chambers employs two Principal Legal Advisors and six Senior Legal Advisors. In addition to the legal staff, Director's Chambers is also supported by: • An Executive Assistance to the Director • An Executive Assistance to the Deputy Directors • A Secretariat, consisting a Secretariat Manager and three Legal Support Officers • A media and communications team consisting of a Manager Media and a Media Liaison and Communications Officer, • The ODPP's Chief Risk Officer. (b) Assuming this question refers only to legal staff, the Director and two permanent Deputy Directors are each Senior Counsel. The Acting Deputy Director role is filled by experienced Deputy Senior Crown Prosecutors or the Senior Crown Prosecutor. The current Principal Legal Advisors have 14 and 16 years post admission experience respectively. The six Senior Legal Advisors have between 6 and 14 years post admission experience respectively. (c) The total yearly salary expenditure for Director's Chambers for FY23/24 (including the Director, the Deputy Directors, and all legal and non-legal staff employed in the Director's Chambers) was $5,184,532. (d) The primary point of contact for all matters referred to the Director's Chambers is through the Secretariat, which deals with the administrative functions of this high-volume work unit. Urgent oral directions and advice is sought from the Director and Deputy Directors via the Executive Assistants. Staff from all offices are also able to communicate directly with Principal and Senior Legal Advisors by telephone or email. (e) Staff for Director's Chambers are recruited through a merit-based selection process, pursuant to the Government Sector Employment Act 2013. Senior Legal Advisors are ordinarily employed for a period of 12 months in Director's Chambers. This provides suitably qualified solicitors with an important developmental opportunity. There are currently two permanently appointed Deputy Directors, and a third acting role. A number of experienced Deputy Senior

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				Crown Prosecutors have been appointed as acting Deputy Directors, who rotate through this role depending on operational needs, as does the Senior Crown Prosecutor. (f) The role of the Principal and Senior Legal Advisors is, amongst other things, to provide legal advice to the Director or Deputy Director on matters referred to the Director's Chambers. This advice will sometimes differ from the advice provided by the Crown Prosecutor or the solicitor who has referred the matter to the Director's Chambers. The final determination is always made by the Director or the Deputy Director, having regard to the advice provided to them by the various report writers and relevant material referred to in the reports. The only protocol for guiding the final decision maker is the Prosecution Guidelines.
35	Hon Chris Rath MLC (on behalf of the Opposition)	Structure of DPP office	(35) Other than the published Prosecution Guidelines are salaried Crown Prosecutors the subject of standing instructions from the Director, a Deputy Director, or any other part of the ODPP? (a) If yes, please provide copies. (b) If yes, what is the source of power relied on to give those instructions?	I am advised: The functions of a salaried Crown Prosecutor are set out in s 5(1) of the Crown Prosecutors Act 1986, and include conducting and appearing as counsel in proceedings on behalf of the Director, finding bills of indictment in the name of and on behalf of the Director, providing advice to the Director, and carrying out other functions of counsel as approved by the Director. In fulfilling these functions, Crown Prosecutors must comply with the Prosecution Guidelines, the Consolidated Instrument of Delegations, Order and Powers any statutory obligations, and any policies or standing instructions issued by the Director. These various obligations have been incorporated into the document titled "Crown Prosecutors – Requirements for Direction, Approval, Instruction from the Director or a Deputy Director" (attached)
36	Hon Chris Rath MLC (on behalf of the Opposition)	Crown Prosecutors and Bar Rules	(36) Have salaried Crown prosecutors ever had the discretion to discontinue or not proceed with a prosecution that has been assigned to them if they are of the opinion that there are no reasonable prospects of success?	I am advised: The power to terminate proceedings in the Local Court has been widely delegated to Crown Prosecutors and solicitors of specific seniority. This power must be exercised in accordance with the Consolidated Instrument of Delegations, Order and Powers and the Prosecution Guidelines. Crown Prosecutors have no power to discontinue or not proceed with a prosecution that has been committed for trial or sentence to a higher court. Section 5(3)

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				of the Crown Prosecutor's Act 1986 explicitly provides that: "A Crown Prosecutor does not have the function of determining that no bill of indictment be found or directing that no further proceedings be taken against a person." The Director has this function by virtue of ss 7(2)(a) and (b) of the Director of Public Prosecutions Act 1986, which, per ss 33(2)(a) and (b), may not be delegated except to a Deputy Director.
37	Hon Chris Rath MLC (on behalf of the Opposition)	Crown Prosecutors and Bar Rules	(37) Do salaried Crown prosecutors currently have the discretion to discontinue or not proceed with a prosecution that has been assigned to them if they are of the opinion that there are no reasonable prospects of success?	I am advised: See question 36.
38	Hon Chris Rath MLC (on behalf of the Opposition)	Crown Prosecutors and Bar Rules	(38) If a salaried Crown prosecutor advises that a prosecution should either not proceed or should be discontinued, and the Director decides that it should proceed, is the matter re-assigned to another Crown prosecutor?	A Crown Prosecutor who considers that they have an ethical conflict arising from direction to proceed with a prosecution in which they are briefed can raise this conflict with the Senior Crown Prosecutor or the Director's Chambers. If the ethical conflict cannot be resolved, the matter will be briefed to another Crown Prosecutor.
39	Hon Chris Rath MLC (on behalf of the Opposition)	Crown Prosecutors and Bar Rules	(39) If not, what measures are in place to ensure compliance by the salaried Crown prosecutor with Rule 86 of the Legal Profession Uniform Conduct (Barristers) Rules 2015?	I am advised: See answer to Question 38.
40	Hon Chris Rath MLC (on behalf of the Opposition)	Crown Prosecutors and Bar Rules	(40) On how many occasions since 1 June 2023 have salaried Crown Prosecutors returned briefs because of ethical concerns or as a result of the Legal Profession Uniform Conduct (Barristers) Rules 2015? (a) If in fewer than 5% of all matters do you have concerns that the culture of the ODPP makes it difficult for salaried Crown Prosecutors to fulfil their ethical responsibilities?	I am advised: (40) Nil (a) No. The ODPP has a robust system of checks and balances to ensure that, consistent with the Prosecution Guidelines, matters in which there are no reasonable prospects of conviction do not proceed to trial.
41	Hon Chris Rath MLC (on behalf of the Opposition)	Crown Prosecutors and Bar Rules	(41) Rule 4 of the Legal Profession Uniform Conduct (Barristers) Rules 2015 provides at paragraph (e) that "barristers should exercise their forensic judgements and give their advice independently and for the proper administration of justice, notwithstanding any contrary desires of their clients". Given the DPP's testimony (draft p 68) that the DPP is the client in NSW Criminal prosecutions what processes are in place in the ODPP to ensure that Crown Prosecutors can fulfil the ethical requirements imposed by Rule 4 without influence by the DPP client?	I am advised: Crown Prosecutors are not relieved of their professional ethical obligations because their client is the Director. A Crown Prosecutor's statutory functions and the scope of their authority as set out in the response to Question 35, which provides the framework in which their ethical obligations apply.
42	Hon Chris Rath MLC (on behalf of the Opposition)	Crown Prosecutors and Bar Rules	(42) Are opening or closing addresses of Crown Prosecutors ever reviewed by other staff in the ODPP? If yes, please explain what processes are in place to ensure that Rule 64 of the Legal Profession Uniform Conduct (Barristers) Rules 2015 is met.	I am advised: Crown Prosecutors may seek guidance from senior colleagues in the exercise of their functions. Crown Prosecutions are required to ensure they comply with their professional obligations.

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43	Hon Chris Rath MLC (on behalf of the Opposition)	Complaints against the DPP	(43) Is or has the current DPP been the subject of any complaints by any sitting judicial officer? (a) If yes, what is the manner that such a complaint is made; (b) To whom is the complaint made? (c) When was/were the complaints made? (d) By whom were any complaints made? (e) What is the current status of any investigation or consideration of any complaint?	I am advised: On 23 September 2024 the Director was notified of complaints against her by Judge Wass and Mr Alan Cornwall. The Director understands that the complaint is currently under consideration.
44	Hon Chris Rath MLC (on behalf of the Opposition)	Complaints by the DPP	(44) Since 1 June 2023 has the DPP made any formal complaints in relation to any sitting judicial officer? (a) If yes, when and to whom were the complaints made? (b) In respect of which judicial officer(s) were complaints made? (c) What is the current status of any investigation or consideration of any complaint? (d) Please provide a copy of any complaint made. (e) In respect of each complaint, why was a complaint rather than an appeal against the decision of the judicial officer the appropriate manner for the DPP to ventilate the issues which were the subject of the complaint in the matter?	I am advised: (44) Yes. (a)-(b) On 19 December 2023 the Director lodged a complaint with the Judicial Commission concerning the conduct of Judge Grant of the District Court, pursuant to Part 6 of the Judicial Officers Act 1986. On 26 February 2024 the Director lodged a complaint with the Judicial Commission concerning the conduct of Judge Newlinds SC of the District Court, pursuant to Part 6 of the Judicial Officers Act 1986. On 8 April 2024 the Director lodged a complaint with the Judicial Commission concerning the conduct of Judge Whitford SC of the District Court, pursuant to Part 6 of the Judicial Officers Act 1986. (c) Concerning the complaint against Judge Grant, the Director was notified by the Judicial Commission on 13 May 2024 that the complaint had been upheld in part, and that the matter had been referred to the Chief Judge of the District Court with a recommendation to the Chief Judge that Judge Grant be counselled as to the proper limits of case management in criminal matters and that questions as to the reasonable prospects of a prosecution are for the Director of Public Prosecutions and not for a trial judge. Concerning the complainant against Judge Newlinds, the Director was notified by the Judicial Commission on 13 May 2024 that the Judicial Commission had resolved to refer the complaint to the Conduct Division of the Judicial Commission. On 19 August 2024, the Conduct Division released its findings in relation to the complaint against Judge Newlinds. The Conduct Division upheld the Director's complaint, finding as substantiated: 1. 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; 2. Aspects of the Director's complaint relating to failure of judicial impartiality, detachment and demeanour, including the Judge's comments about the Crown and his admitted bullying of the Solicitor Advocate;

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				3. The complaint of unreasonable criticism/vilification of a sexual assault complainant; 4. The complaint of baseless criticism of the Director and the ODPP, particularly having regard to the sweeping nature of that criticism and the making of highly critical statements without notice of evidence.. The Conduct Division referred the matter to the Chief Judge of the District Court with the following recommendations: 5. It is not appropriate for Judge Newlinds to sit in State criminal matters for the foreseeable future. 6. Judge Newlinds should continue to be mentored by more experienced judges on a formal basis. 7. Judge Newlinds should be required to read or re-read important texts on judicial conduct and attend on former Supreme Court Chief Justice the Hon T F Bathurst AC KC to discuss those publications and judicial conduct, temperament and behaviour. Regarding the complaint against Judge Whitford, the Director was notified by the Crown Solicitor's Office on 16 August 2024 that the NSW Judicial Commission had resolved to refer the complaint to the Conduct Division of the Judicial Commission for further examination. The Director understands that the complaint is still under consideration by the Conduct Division. (d) Copies of the complainants made against Judge Grant and Judge Newlinds are attached, along with the responses to each provided by the Judicial Commission, including its findings with respect to Judge Newlinds. As the complaint concerning Judge Whitford is yet to be determined, it would not be appropriate to disclose the complaint at this time. (e) This question misapprehends the nature and purpose of a complaint to the Judicial Commission, which is different to the nature and purpose of an appeal. An appeal is in the nature of a review by a higher court of an order or decision of a lower court. Appeals may only be brought in circumstances expressly provided for by statute, generally only where there has been an error of law or fact, or where the exercise of judicial discretion has miscarried. An appeal does not lie where the issue at hand is the ability or behaviour of a judicial officer. Conversely, s 15(1) of the Judicial Officer's Act 1986 expressly provides that any person may bring a complaint to the NSW Judicial Commission about a matter that concerns or may concern the ability or behaviour of a judicial officer. The Judicial Commission, which is constituted by the head of each NSW Court as well as four additional members appointed by the Governor, has conferred upon it the function of

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				examining complaints made to the Judicial Commission against judicial officers. The Judicial Commission does not have the function of determining contested disputes. Where the Commission finds that a complaint is substantiated, it may refer the matter to the relevant head of jurisdiction or, where it considers that the matter could justify parliamentary consideration of the removal of the judicial officer from office, it may refer the matter to the Governor
45	Hon Chris Rath MLC (on behalf of the Opposition)	Union membership	(45) Are you a member of a union? (a) If yes, what union?	I am advised: The Constitution (Disclosures by Members) Regulation 1983 (the Regulation) sets out Members' obligations to disclose relevant pecuniary and other interests in periodic returns to Parliament. Clause 13 of the Regulation relevantly requires the disclosure of the name of each trade union and each professional or business association 'in which he or she held any position' as at specified dates. The Regulation does not require Members to disclose membership of a trade union. Membership of Unions can be disclosed on a discretionary basis. The Clerk of the Parliaments has confirmed that this view is consistent with guidance provided to Members.
46	Hon Chris Rath MLC (on behalf of the Opposition)	TikTok	(46) Are you on TikTok? (a) If yes, do you access TikTok from a NSW Government device?	I am advised: The Circular DCS-2023-01 Cyber Security NSW Directive - Protecting NSW Government information on government-issued devices sets out how NSW Government agencies are to manage the risk of using TikTok. More information is available at: https://www.nsw.gov.au/sites/default/files/public%3A//2023-05/TikTok%20Ban%20-%20Frequently%20Asked%20Questions%20%282%29.pdfTikTok%20Ban%20-%20Frequently%20Asked%20Questions%20%282%29.pdf

Question #	Member	SQ title	Supplementary Question	Answer
47	Hon Chris Rath MLC (on behalf of the Opposition)	Land audit – Department(s)/Agency(s)	Land audit – Department(s)/Agency(s) (47) Has your portfolio department(s)/agency(s) undertaken a land audit of surplus government property in any of the following postcodes: (a) 2077? (b) 2079? (c) 2080? (d) 2081? (e) 2082? (f) 2083? (g) 2117? (h) 2118? (i) 2119? (j) 2120? (k) 2121? (l) 2125? (m) 2126? (n) 2151? (o) 2154? (p) 2156? (q) 2157? (r) 2158? (s) 2159? (t) 2756? (u) 2775? i. If yes to (a) to (u), how many properties have been identified?	I am advised: The Department of Communities and Justice participated in the NSW governments Land and Property Audit lead by Property and Development NSW to identify any government land that is surplus or underutilised which could be used to increase housing supply. The Department identified no surplus government properties in any of the postcodes. Homes NSW within the Department continuously reviews its portfolio to address the needs of tenants. This is achieved by developing and acquiring new properties and redeveloping existing properties. This review considers high housing demand, growth opportunities, areas of low environmental risk, and good access to transport and services. This is done in a consistent and coordinated manner that will see homes delivered where and when they are needed.
48	Hon Chris Rath MLC (on behalf of the Opposition)	Signal	(48) Are you on Signal? (a) If yes, do you access Signal from a NSW Government device?	I am advised: Like the former Coalition Government, a range of communications are used by the NSW Government.

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				I comply with the State Records Act 1998 and I expect all staff members to comply with their obligations under the State Records Act 1998.
49	Hon Chris Rath MLC (on behalf of the Opposition)	CFMEU membership	(49) Have you ever been a member of the Construction, Forestry and Maritime Employees Union (CFMEU)? (a) If yes, when?	I am advised: The Constitution (Disclosures by Members) Regulation 1983 (the Regulation) sets out Members' obligations to disclose relevant pecuniary and other interests in periodic returns to Parliament. Clause 13 of the Regulation relevantly requires the disclosure of the name of each trade union and each professional or business association 'in which he or she held any position' as at specified dates. The Regulation does not require Members to disclose membership of a trade union. Membership of Unions can be disclosed on a discretionary basis. The Clerk of the Parliaments has confirmed that this view is consistent with guidance provided to Members.
50	Hon Chris Rath MLC (on behalf of the Opposition)	Department(s)/Agency(s) Annual Reports	(50) In what month will the 2023-24 annual reports for each department / agency in your portfolio be published?	I am advised: The Department of Communities and Justice 2023/24 Annual Report will be published by 29 November 2024.
51	Hon Chris Rath MLC (on behalf of the Opposition)	Department(s)/Agency(s) Annual Reports	(51) Will the 2023-24 annual reports for the department / agency in your portfolio include a printed copy? (a) If yes, how much is budgeted for printing in 2024-25?	I am advised: The Department of Communities and Justice 2023/24 Annual Report will be digitally published and available at dcj.nsw.gov.au
52	Hon Chris Rath MLC (on behalf of the Opposition)	ETU membership	(52) Have you ever been a member of the Electrical Trades Union (ETU)? (a) If yes, when?	I am advised: The Constitution (Disclosures by Members) Regulation 1983 (the Regulation) sets out Members' obligations to disclose relevant pecuniary and other interests in periodic returns to Parliament. Clause 13 of the Regulation relevantly requires the disclosure of the name of each trade union and each professional or business association 'in which he or she held any position' as at specified dates. The Regulation does not require Members to disclose membership of a trade union. Membership of Unions can be disclosed on a discretionary basis. The Clerk of the Parliaments has confirmed that this view is consistent with guidance provided to Members.

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53	Hon Chris Rath MLC (on behalf of the Opposition)	Paper shredder	(53) Does your ministerial office have a paper shredder?	I am advised; When the NSW Government was elected in 2023, shredders used by the former Liberal and National Government were left in Ministerial and Parliament offices. Office equipment is purchased in line with NSW Government procurement rules.
54	Hon Chris Rath MLC (on behalf of the Opposition)	Department(s)/Agency(s) in Portfolio	(54) What department(s)/agency(s) are included in your portfolio?	I am advised: A detailed breakdown of the Department of Communities and Justice Agency Portfolio is available at https://dcj.nsw.gov.au/documents/about-us/about-dcj/dcj-agency-portfolio.pdf
55	Hon Chris Rath MLC (on behalf of the Opposition)	Former Ministerial Employees	(55) Are there any former employee from your ministerial office now employed by any department/agency within your portfolio responsibilities? (a) If yes, how many?	I am advised; The employment of former Ministerial office staff is not tracked. Under the Government Sector Employment Act 2013, the Secretary of a Department exercises the employer functions of the Government in relation to departmental employees. The Secretary is not subject to the direction or control of a Minister in the exercise of those functions. Similarly, the head of a Public Service agency exercises the employer functions of the Government in relation to non-Public Service senior executives of the agency. A head of a Public Service agency is not subject to the direction or control of a Minister in the exercise of those functions. All NSW government sector employees must comply with the Code of Ethics and Conduct for NSW government sector employees. Employees must also have regard to their relevant agency's code of conduct. Ministerial office staff must comply with their ethical obligations under the NSW Office Holder's Staff Code of Conduct, including after the cessation of the employment.
56	Hon Chris Rath MLC (on behalf of the Opposition)	Qantas Chairman's Club	(56) Are you a Member of the Qantas Chairman's Club? 12 (a) If no, have you ever previously been a member? (b) If yes, when did you cease to be a member? (c) If yes, when did you initially become a member? (d) If yes, when did you make a declaration to The Cabinet Office? (e) If yes, how many times since 28 March 2023 have you used the Qantas Chairman's Club?	I am advised: The Constitution (Disclosures by Members) Regulation 1983 (Regulation) sets out Members' obligations to disclose relevant pecuniary and other interests in periodic returns to Parliament. The Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics Report on Review of the Code of Conduct, Aspects of Disclosure of Interests, and Related Issues (December 2010) notes that: "Advice has been received from the Crown Solicitor that use of the Chairman's Lounge by invitation is not a "gift" for the purposes of clause 10 of the Regulation, as it does not involve disposition of property. However, when the membership leads to an upgrade valued at more than $250, it

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				becomes disclosable as a contribution to travel, and should be reported under clause 11 of the Regulation." Clause 16 of the Regulation allows a Member to, at their discretion, disclose any direct or indirect benefit, advantage or liability, whether pecuniary or not. Relevant disclosures have been made to the Cabinet Office and to the NSW Parliament.
57	Hon Chris Rath MLC (on behalf of the Opposition)	Ministerial Staff – Local Government Councillors	(57) As at 30 June 2024, how many of your ministerial staff were local government councillors?	I am advised: Ministerial staff are employed by Ministers, on behalf of the State, in their capacity as "political office holders" under Part 2 of the Members of Parliament Staff Act 2013 (Act). All Ministerial staff are required to comply with the NSW Office Holder's Staff Code of Conduct, including obligations to seek approval for secondary employment, and to take reasonable steps to avoid, and in all cases disclose, any actual or potential conflicts of interest (real or apparent).
58	Hon Chris Rath MLC (on behalf of the Opposition)	Ministerial Staff – Local Government Councillors	(58) What local government(s) did they serve?	I am advised: Ministerial staff are employed by Ministers, on behalf of the State, in their capacity as "political office holders" under Part 2 of the Members of Parliament Staff Act 2013 (Act). All Ministerial staff are required to comply with the NSW Office Holder's Staff Code of Conduct, including obligations to seek approval for secondary employment, and to take reasonable steps to avoid, and in all cases disclose, any actual or potential conflicts of interest (real or apparent).
59	Hon Chris Rath MLC (on behalf of the Opposition)	ETU meetings	(59) Given ministerial diary disclosures do not include all meetings and provide exceptions to disclosures, since 28 March 2023, have you met with the ETU?	I am advised; In accordance with Premier's Memorandum M2015-05 Publication of Ministerial Diaries and Release of Overseas Travel Information, all Ministers publish extracts from their diaries summarising details of scheduled meetings held with stakeholders, external organisations, third-party lobbyists and individuals. Ministers are not required to disclose details of the following meetings: • meetings involving Ministers, ministerial staff, parliamentarians or government officials (whether from NSW or other jurisdictions) • meetings that are strictly personal, electorate or party political • social or public functions or events

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				• meetings held overseas (which must be disclosed in accordance with regulation 6(1)(b) of the Government Information (Public Access) Regulation 2018 and Attachment B to the Memorandum), and • matters for which there is an overriding public interest against disclosure. Ministers' diary disclosures are published quarterly on The Cabinet Office's website (https://www.nsw.gov.au/departments-and-agencies/the-cabinet-office/access-to-information/ministers-diary-disclosures).
60	Hon Chris Rath MLC (on behalf of the Opposition)	State Records Act	(60) Have you and your ministerial office had training and/or a briefing about the State Records Act from State Records NSW and/or The Cabinet Office and/or Premier's Department? (a) If yes, when?	I am advised; The Ministers' Office Handbook provides guidance in relation to these obligations to assist each Minister's office. The Premier's Department and The Cabinet Office also provide guidance, advice, training and support on these obligations for all Ministers' offices. All Ministers' offices are expected to comply with their obligations under the State Records Act 1998.
61	Hon Chris Rath MLC (on behalf of the Opposition)	Legal Costs	(61) How much did the Department/agencies within your portfolio responsibilities spend in legal costs since 28 March 2023? (a) For what specific purposes or matters was legal advice sought?	I am advised: Legal costs are available in agency annual reports. The Department of Communities and Justice legal is responsible for the provision of legal advice and assistance to divisions and agencies within the Department of Communities and Justice Agency Portfolio.
62	Hon Chris Rath MLC (on behalf of the Opposition)	Media releases and statements	(62) Are all the ministerial media releases and statements issued by you publicly available at https://www.nsw.gov.au/media-releases? (a) If no, why?	I am advised: The Department of Customer Service (DCS) is responsible for managing www.nsw.gov.au/media-releases and the publication of media releases.
63	Hon Chris Rath MLC (on behalf of the Opposition)	Advertising	(63) How much has each Department/agency within your portfolio responsibilities spent on advertising or sponsored posts since 28 March 2023 on the following social media platforms: (a) Facebook (b) Instagram (c) LinkedIn (d) TikTok (e) YouTube (f) X (formerly known as Twitter)	I am advised: Where appropriate, social media is used by agencies alongside other forms of advertising as a cost-effective medium of communication.

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64	Hon Chris Rath MLC (on behalf of the Opposition)	Catering	(64) How much of your ministerial budget was spent on catering in 2023-24?	I am advised: Catering provided for official purposes may be funded from the Ministerial office budget. As Members of Parliament, Ministers have credit facilities extended to them for dining and hospitality at Parliament House. The facilities may be used for business or private purposes.
65	Hon Chris Rath MLC (on behalf of the Opposition)	Catering	(65) Was catering used for external stakeholders? (a) If yes, who were these external stakeholders?	I am advised: Catering provided for official purposes may be funded from the Ministerial office budget. As Members of Parliament, Ministers have credit facilities extended to them for dining and hospitality at Parliament House. The facilities may be used for business or private purposes.
66	Hon Chris Rath MLC (on behalf of the Opposition)	Parliamentary Secretary	(66) Does your Parliamentary Secretary have pass access to your ministerial office?	I am advised: Security passes for the parliamentary precinct and 52 Martin Place are required to be issued in accordance with the Parliament House Security Pass Policy and 52 Martin Place security procedures and the associated Privacy and Surveillance Statement.
67	Hon Chris Rath MLC (on behalf of the Opposition)	Parliamentary Secretary	(67) Does your Parliamentary Secretary have a desk in your ministerial office?	No.
68	Hon Chris Rath MLC (on behalf of the Opposition)	Parliamentary Secretary	(68) Did any catering costs in 2023-24 include expenditure on alcohol?	I am advised: The NSW Office Holder's Staff Code of Conduct, which is Attachment B to the Ministers' Office Handbook, provides that all office holder staff must use State resources for the effective conduct of public business in a proper manner. Office holder staff must be economical and efficient in the use and management of public resources. The Handbook can be found here: https://www.nsw.gov.au/sites/default/files/noindex/2023-12/Ministers-Office-Handbook.pdf
69	Hon Chris Rath MLC (on behalf of the Opposition)	Gin	(69) Since 28 March 2023, have you or your ministerial office purchased 'gin' using your ministerial budget?	I am advised: The NSW Office Holder's Staff Code of Conduct, which is Attachment B to the Ministers' Office Handbook, provides that all office holder staff must use State resources for the effective conduct of public business in a proper manner. Office holder staff must be economical and efficient in the use and management of public resources. The Handbook can be found here: https://www.nsw.gov.au/sites/default/files/noindex/2023-12/Ministers-Office-Handbook.pdf

Question #	Member	SQ title	Supplementary Question	Answer
70	Hon Chris Rath MLC (on behalf of the Opposition)	Ministerial Vehicles and Driving Offences	(70) Since 28 March 2023, have you personally driven your ministerial vehicle?	I am advised: Ministers, the Leader of the Opposition, other nominated public office holders, and certain former office holders are provided with official cars and drivers. Office holders may drive themselves whenever they choose. Cars should be driven only by the office holder, officially employed drivers, the office holder's spouse or approved relative and any other person authorised by the office holder in those circumstances considered to be appropriate.
71	Hon Chris Rath MLC (on behalf of the Opposition)	Ministerial Vehicles and Driving Offences	(71) As a driver since 28 March 2023: (a) Have you been pulled over by the NSW Police Force? (b) Have you been fined for speeding? (c) Have you been fined for school zone related offence? (d) Have you been fined for red light related offence? (e) Have you been involved in an accident that included the NSW Police attending the scene? 14 i. If yes to a) to e), did this include whilst driving your ministerial vehicle?	I am advised: Ministers, like all members of the community are subject to the laws of New South Wales, including Road Rules 2014. Where a fine is incurred, the payment of the fine is the responsibility of the driver of the vehicle.
72	Hon Chris Rath MLC (on behalf of the Opposition)	Speeches	(72) Does your portfolio department(s) / agency(s) draft and write speeches for you?	I am advised: The Department of Communities and Justice only provides written content in a speech form for judicial ceremonial events.
73	Hon Chris Rath MLC (on behalf of the Opposition)	Speeches	(73) How many public servants have undertaken writing speeches in your portfolio department(s) / agency(s)?	I am advised: The Department of Communities and Justice (DCJ) allocates resourcing based on the demand of judicial ceremonial speeches. There is no dedicated speech writing role within DCJ.
74	Hon Chris Rath MLC (on behalf of the Opposition)	Hard hats and/or vests	(74) Do you have a hard hat and/or vest for visiting infrastructure sites? (a) If yes, was it paid from your ministerial budget?	I am advised: Ministers are to comply with the appropriate use of personal protective equipment as per Work Health and Safety Regulation 2017. The NSW Office Holder's Staff Code of Conduct, which is Attachment B to the Ministers' Office Handbook, provides that all office holder staff must use State resources for the effective conduct of public business in a proper manner. Office holder staff must be economical and efficient in the use and management of public resources. State resources are not to be subject to wasteful or extravagant use.

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75	Hon Chris Rath MLC (on behalf of the Opposition)	Ministerial Advisers	(75) How many staff members were employed in your ministerial office in 2023-24 FY?	I am advised: Ministerial Staffing numbers are proactively published on the NSW website - https://www.nsw.gov.au/departments-and-agencies/premiers-department/access-to-information/premier-and-ministers-staff-numbers
76	Hon Chris Rath MLC (on behalf of the Opposition)	Ministerial Advisers	(76) What is the average salary for staff members in your ministerial office in 2023-24 FY?	I am advised: Ministerial Staffing information is proactively published on the NSW website - https://www.nsw.gov.au/departments-and-agencies/premiers-department/access-to-information/premier-and-ministers-staff-numbers
77	Hon Chris Rath MLC (on behalf of the Opposition)	Ministerial disclosures to The Cabinet Office	(77) On what date did you last update/make a ministerial disclosure to The Cabinet Office?	I am advised: The Ministerial Code of Conduct (Ministerial Code) requires Ministers to make certain disclosures to the Premier and the Secretary of The Cabinet Office. I comply with my obligations under the Ministerial Code.
78	Hon Chris Rath MLC (on behalf of the Opposition)	GIPA Applications / Standing Order 52 – Ministerial Office	(78) Does your ministerial office have staff member(s) to undertake Government Information (Public Access) Act application(s) and/or Standing Order 52 requests? (a) If yes, has that ministerial staffer(s) received formal training about their legal obligations?	I am advised; The Cabinet Office provides training for Ministerial staff on their obligations under the Government Information (Public Access) Act 2009 (GIPA Act) and the requirements for responding to orders for papers under Standing Order 52 of the Legislative Council.
79	Hon Chris Rath MLC (on behalf of the Opposition)	GIPA Applications / Standing Order 52 – Ministerial Office	(79) How many GIPA Applications have been received by your ministerial office since 28 March 2023?	I am advised: Information concerning the obligations of a Minister's office as an agency under the Government Information (Public Access) Act 2009 (the Act) is required to be submitted to the Attorney General in accordance with section 125(2) of the Act. The information is included in the annual report of the Department of Communities and Justice in accordance with sections 125(3) and (5) of the Act.
80	Hon Chris Rath MLC (on behalf of the Opposition)	Police Commissioner Gin	(80) Have you received gin from the Police Commissioner?	No.
81	Hon Chris Rath MLC (on behalf of the Opposition)	Cabinet Sub Committees	(81) What cabinet sub committees are you a member of?	I am advised: Details of individual Cabinet committee members and the work of Cabinet committees are not generally made public. This reflects the longstanding Cabinet conventions of confidentiality and collective Ministerial responsibility, which are central to the Westminster system of government. The NSW Cabinet Practice Manual is publicly available on the NSW Government website (www.nsw.gov.au) and provides information on operation of Cabinet and committees in NSW.

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82	Hon Chris Rath MLC (on behalf of the Opposition)	E-Toll	(82) Does your ministerial vehicle have an E-Toll? (a) If yes, is expenditure paid by your by your ministerial budget?	I am advised: Ministers, the Leader of the Opposition, other nominated public office holders, and certain former office holders are provided with official cars and drivers. All costs associated with these vehicles need to be paid from the relevant approved budget. Costs for e-tolls form part of the Premier's Department Annual Report.
83	Hon Chris Rath MLC (on behalf of the Opposition)	Department(s)/Agency(s) Gifts and Hospitality Register	(83) Does your portfolio department(s)/agency(s) have a gifts and/or hospitality register? (a) If yes, is it available online? i. If yes, what is the URL?	I am advised: A detailed breakdown of the Department of Communities and Justice Agency Portfolio is available at https://dcj.nsw.gov.au/documents/about-us/about-dcj/dcj-agency-portfolio.pdf
84	Hon Chris Rath MLC (on behalf of the Opposition)	Workplace complaints	(84) Have you been the subject of any workplace complaints, including bullying, harassment, and sexual harassment since 28 March 2023?	I am advised: Any complaint or disclosure made under the Respectful Workplace Policy is confidential. The Respectful Workplace Policy applies to all Ministerial Offices and staff. As noted in the Goward review, a key aspect of effective workplace complaint policies is confidentiality in the complaint and investigation process. Confidentiality ensures that staff feel safe about raising concerns and confident that action will be taken in response.
85	Hon Chris Rath MLC (on behalf of the Opposition)	Workplace complaints	(85) Has any member of your ministerial staff been the subject of any workplace complaints, including bullying, harassment, and sexual harassment since 28 March 2023?	I am advised: Any complaint or disclosure made under the Respectful Workplace Policy is confidential. The Respectful Workplace Policy applies to all Ministerial Offices and staff. As noted in the Goward review, a key aspect of effective workplace complaint policies is confidentiality in the complaint and investigation process. Confidentiality ensures that staff feel safe about raising concerns and confident that action will be taken in response.
86	Hon Chris Rath MLC (on behalf of the Opposition)	Ministerial staff disclosure of gifts and/or hospitality	(86) Does your ministerial office keep a register of gifts and/or hospitality for staff to make disclosures?	I am advised: All Ministerial staff are required to comply with the Gifts, Hospitality and Benefits Policy for Office Holder Staff attached to the Ministers' Office Handbook and available on the NSW Government website.
87	Hon Chris Rath MLC (on behalf of the Opposition)	Ministerial staff disclosure of gifts and/or hospitality	(87) Have any staff members in your office been the recipient of any free hospitality? (a) What was the total value of the hospitality received? (b) Are these gifts of hospitality declared?	I am advised: All Ministerial staff are required to comply with their disclosure obligations under the Gifts, Hospitality and Benefits Policy for Office Holder Staff and I expect them to do so. A breach of the Policy may be a breach of the Office Holder's Staff Code of Conduct. The Policy includes disclosure obligations for Ministerial staff in respect of gifts, hospitality and benefits over $150. If a Ministerial staff member is required by their role to accompany their Office Holder at an event that the Office Holder is attending as the State's representative, or where the Office Holder has asked the staff member to

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				attend, then attendance at that event would not constitute a gift or benefit for the purposes of the Policy.
88	Hon Chris Rath MLC (on behalf of the Opposition)	Ministerial Code of Conduct	(88) Since 28 March 2023, have you breached the Ministerial Code of Conduct? (a) If yes, what was the breach?	I am advised: All Ministers are expected to comply with their obligations under the NSW Ministerial Code of Conduct (Ministerial Code) at all times. The Ministerial Code sets the ethical standards of behaviour required of Ministers and establishes practices and procedures to assist with compliance. Among other matters, the Ministerial Code requires Ministers to: •disclose their pecuniary interests and those of their immediate family members to the Premier •seek rulings from the Premier if they wish to hold shares, directorships, other business interests or engage in secondary employment (known as 'prohibited interests') •identify, avoid, disclose and manage conflicts of interest •disclose gifts and hospitality with a market value over $500. A substantial breach of the Ministerial Code (including a knowing breach of any provision of the Schedule) may constitute corrupt conduct for the purposes of the Independent Commission Against Corruption Act 1988.
89	Hon Chris Rath MLC (on behalf of the Opposition)	CFMEU meetings	(89) Given ministerial diary disclosures do not include all meetings and provide exceptions to disclosures, since 28 March 2023, have you met with the CFMEU?	I am advised; In accordance with the Premier's Memorandum 2015-05, all Ministers publish extracts from their diaries summarising details of scheduled meetings held with stakeholders, external organisations, third-party lobbyists and individuals. Ministers are not required to disclose details of the following meetings: • meetings involving Ministers, ministerial staff, parliamentarians or government officials (whether from NSW or other jurisdictions) • meetings that are strictly personal, electorate or party political • social or public functions or events • meetings held overseas (which must be disclosed in accordance with regulation 6(1)(b) of the Government Information (Public Access) Regulation 2018 and Attachment B to the Memorandum), and • matters for which there is an overriding public interest against disclosure.

Question #	Member	SQ title	Supplementary Question	Answer
				Ministers' diary disclosures are published quarterly on The Cabinet Office's website (https://www.nsw.gov.au/departments-and-agencies/the-cabinet-office/access-to-information/ministers-diary-disclosures).
90	Hon Chris Rath MLC (on behalf of the Opposition)	Credit Cards	(90) Have you ever been issued with a credit card by a NSW Government department(s) and/or agency(s) since 28 March 2023? (a) If yes, under what circumstance? (b) If yes, what items and expenditure was undertaken?	I am advised: Ministers and Ministerial Staff are not eligible to receive Departmental credit cards except in the case of overseas travel. In cases of overseas travel short-term cards will be issued and returned at the completion of official travel together with a travel diary for fringe benefit tax purposes. Where an NSW Government-issued credit card is provided the credit card must only be used for official overseas business trips and official business purposes, this includes for transport to/from the airport when departing/returning from the trip. NSW Government-issued credit cards for official business trips overseas will be held with government contract bankers and used within credit limits imposed. Credit cards are a useful means of expenditure control, but their use should never be for personal purposes. Costs associated with overseas travel are published on the NSW Government website in line with M2015-05.

Question #	Member	SQ title	Supplementary Question	Answer
91	Hon Chris Rath MLC (on behalf of the Opposition)	Credit Cards	(91) For each department, agency and/or other body in the Minister's portfolio please report: (a) How many credit cards are currently on issue for staff? (Please provide a break-down of this information by grade) (b) What was the value of the largest reported purchase on a credit card for the last year? (c) What was each largest reported purchase for? (d) What was the largest amount outstanding on a single card at the end of a payment period? (e) And what was the card holder's employment grade? (f) How many credit cards have been reported lost or stolen? (g) What was the cost to replace them? (h) How many credit card purchases were deemed to be illegitimate or contrary to agency policy? i. How many purchases were asked to be repaid on the basis that they were illegitimate or contrary to agency policy and what was the total value thereof? ii. Were all those amounts repaid? (i) Are any credit cards currently on issue connected to rewards schemes? i. Do staff receive any personal benefit as a result of those reward schemes? ii. Can a copy of the staff credit card policy please be provided?	I am advised: Cards are issued to staff according to business need and are managed in accordance with Treasury Policy TPP 21-02 Use and Management of NSW Government Purchasing Cards. The policy is available at https://arp.nsw.gov.au/assets/ars/attachments/TPP21-02-Use-and-Management-of-NSW-Govt-Purchasing-Cards.pdf
92	Hon Chris Rath MLC (on behalf of the Opposition)	Department(s)/agency(s) desk or office	(92) Do you have a desk or office in your portfolio department(s)/agency(s) building(s)?	I am advised: I make use of an office in 52 Martin Place, NSW Parliament and my Electorate office. When travelling, Ministers may make ad hoc arrangements to work for periods in Departmental offices.
93	Hon Chris Rath MLC (on behalf of the Opposition)	Senior Executive Drivers	(93) How many senior executives in your portfolio department(s) / agency(s) have a driver?	I am advised: No senior executives in my portfolio department(s)/agency(s) have a driver
94	Hon Chris Rath MLC (on behalf of the Opposition)	Mobile phones	(94) How many mobile phones has your ministerial office been allocated as at 1 July 2024?	I am advised; Ministers' Staff Acceptable Use of Communication Devices Policy provides guidance on the use, loss, theft, and return of communication devices provided for business purposes. Minister's staff may use mobile telephones for business and (reasonable use) private purposes. Under the current mobile plans all local and Australia-wide calls to land lines/mobiles and texts are included in the plan. Premium service calls,

Question #	Member	SQ title	Supplementary Question	Answer
				international calls and global roaming services are outside of the plan and may be still chargeable based on the principles below. Ministers' staff mobile phone charges are paid from the Ministers' office budget except for the items listed below, which need to be paid as a private expense: •Personal international calls from within Australia •Personal travel related global roaming charges •Personal premium number service calls Any personal calls which are outside the plan need to be declared and paid for monthly. Declarations are not required otherwise. The purchasing of technology items is in accordance with standard procurement arrangements. The costs form part of the Premier's Department Annual report.
95	Hon Chris Rath MLC (on behalf of the Opposition)	Mobile phones	(95) How many mobile phones in your ministerial office have been lost or stolen since 28 March 2023?	I am advised; Ministers' Staff Acceptable Use of Communication Devices Policy provides guidance on the use, loss, theft, and return of communication devices provided for business purposes. Minister's staff may use mobile telephones for business and (reasonable use) private purposes. Under the current mobile plans all local and Australia-wide calls to land lines/mobiles and texts are included in the plan. Premium service calls, international calls and global roaming services are outside of the plan and may be still chargeable based on the principles below. Ministers' staff mobile phone charges are paid from the Ministers' office budget except for the items listed below, which need to be paid as a private expense: •Personal international calls from within Australia •Personal travel related global roaming charges •Personal premium number service calls Any personal calls which are outside the plan need to be declared and paid for monthly. Declarations are not required otherwise. The purchasing of technology items is in accordance with standard procurement arrangements. The costs form part of the Premier's Department Annual report.

Question #	Member	SQ title	Supplementary Question	Answer
96	Hon Chris Rath MLC (on behalf of the Opposition)	Efficiency dividends	(96) Was an efficiency dividend applied to your portfolio department(s) / agency(s) within your portfolio responsibilities in: (a) 2023-24? (b) 2024-25? i. If so, what was the efficiency dividend applied to each department/agency? ii. What measures are being considered to achieve this efficiency dividend?	I am advised: The 2024/25 Budget Papers include detailed information on budgeted expenses, revenue, and capital expenditure. This includes detailed financial statements for individual agencies as well as for government as a whole. The 2024/25 Budget Papers also outline the financial impact of measures in the budget on individual portfolios as well as for government as a whole.
97	Hon Chris Rath MLC (on behalf of the Opposition)	Stationery	(97) How much of your ministerial budget was spent on stationery in 2023-24?	I am advised: Spending on office stationery is in accordance with standard procurement arrangements. The costs of stationery are contained within the Premier's Department Annual Report.
98	Hon Chris Rath MLC (on behalf of the Opposition)	Stationery	(98) Did your stationery expenditure include gifts for external stakeholders? (a) If yes, what was the gift(s)? (b) If yes, who received the gift(s)?	I am advised: The Ministers' Office Handbook outlines that the decision to present a gift is at the discretion of the Minister, having regard to both appropriateness and economy. Gifts may be appropriate, for example, where given as a memento of an official visit or as a small token of appreciation. However, gifts should not be given with the purpose, or in circumstances where they could be perceived as having the purpose, of inducing favourable treatment. Gifts may be purchased as needed on an occasional basis or purchased and stored for future use. Gifts need to be purchased in accordance with NSW Government procurement policy.
99	Hon Chris Rath MLC (on behalf of the Opposition)	Consultants	(99) Since 28 March 2023, how many consultancy contracts have been signed in your portfolio agencies, broken down by agency? (a) What was the individual amount of each contract? (b) What is the purpose of each contract? (c) Who was the contract with? (d) Did the contract go through a competitive tender?	I am advised: Financial Statements, including legal, consulting and any other general costs from third party service providers, are available in the Department of Communities and Justice Agency Portfolio annual reports.

Question #	Member	SQ title	Supplementary Question	Answer
100	Hon Chris Rath MLC	GIPA Applications – Department(s)/Agency(s)	(100) Since 28 March 2023, have you and/or your ministerial office given instructions to your portfolio department(s)/agency(s) in relation to Government Information (Public Access) Act application(s)?	I am advised: The Government Information (Public Access) Act 2009 provides that agencies are not subject to the direction or control of any Minister in the exercise of the agency's functions in dealing with a particular access application under the Act (subsection 9(2)). The Act also contains offences prohibiting agency officers from acting unlawfully, and prohibiting persons from directing agencies to make an unlawful decision in relation to an access application (sections 116 and 117 of the Act). It is, however, generally appropriate for agencies to inform the responsible Minister where documents are to be released under the Act, for the Minister's information.
101	Hon Chris Rath MLC	Department(s)/Agency(s) Travel	(101) As Minister, do you approve overseas travel for public servants in your portfolio department(s) / Agency(s)? (a) If yes, how many overseas trips have you approved since 28 March 2023?	I am advised: All international travel undertaken by the Department of Communities and Justice staff requires Ministerial approval. (a) The number of international flights taken each financial year is reported via International Travel as detailed in agency annual reports.
102	Hon Chris Rath MLC	Department(s)/Agency(s) Travel	(102) Since 28 March 2023, how much has been spent on charter air flights by your portfolio agencies, broken down by agency?	I am advised: Department(s)/agency(s) travel is conducted in accordance with relevant NSW Government policies and guidelines including Premier's Department circular C2023-02 and ATO determinations. Department(s)/agency(s) total travel spent is outlined in the annual reports.
103	Hon Chris Rath MLC	Department(s)/Agency(s) Travel	(103) Since 28 March 2023, how much has been spent on domestic flights by your portfolio agencies, broken down by agency? (a) Of these, how many flights were taken in business class?	I am advised: Department(s)/agency(s) travel is conducted in accordance with relevant NSW Government policies and guidelines including Premier's Department circular C2023-02 and ATO determinations. Department(s)/agency(s) total travel spent is outlined in the annual reports.
104	Hon Chris Rath MLC	Department(s)/Agency(s) Travel	(104) Since 28 March 2023, how much has been spent on international flights by your portfolio agencies, broken down by agency? (a) Of these, how many flights were taken in business class? (b) Of these, how many flights were taken in first class?	I am advised: The number of international flights taken each financial year is reported via International Travel as detailed in agency annual reports.

Question #	Member	SQ title	Supplementary Question	Answer
105	Hon Chris Rath MLC	Department(s)/Agency(s) Travel	(105) What was the total expenditure since 28 March 2023 by each Department/agency within your portfolio responsibilities on: (a) Taxi hire? (b) Ridesharing services? (c) Limousine/private car hire? (d) Hire car rental?	I am advised: Department(s)/agency(s) travel is conducted in accordance with relevant NSW Government policies and guidelines including Premier's Department circular C2023-02 and ATO determinations. Department(s)/agency(s) total travel spent is outlined in the annual reports.
106	Hon Chris Rath MLC	Union membership fees	(106) What was the expenditure for you to join a union in: (a) 2022-23? (b) 2023-24? (c) 2024-25?	I am advised: The Constitution (Disclosures by Members) Regulation 1983 (the Regulation) sets out Members' obligations to disclose relevant pecuniary and other interests in periodic returns to Parliament. Clause 13 of the Regulation relevantly requires the disclosure of the name of each trade union and each professional or business association 'in which he or she held any position' as at specified dates. The Regulation does not require Members to disclose membership of a trade union. Membership of Unions can be disclosed on a discretionary basis. The Clerk of the Parliaments has confirmed that this view is consistent with guidance provided to Members.
107	Hon Chris Rath MLC	Training	(107) Since 28 March 2023, have you had training from an external stakeholder that included an invoice and payment paid for using your ministerial budget? (a) If yes, what is the description of training? (b) If yes, how much?	I am advised: Ministers have undertaken a program of Ministerial induction training. Ministers have undertaken Respectful Workplace Policy Training. Members of Parliament are provided with a Skills Development Allowance that may be used in a manner consistent with the Parliamentary Renumeration Tribunal Annual Determination.
108	Hon Chris Rath MLC	Cabinet documents	(108) Since 28 March 2023, have you shared Cabinet documents with your Parliamentary Secretary?	I am advised: The conventions and practice for access to Cabinet documents are outlined in Premier's Memorandum M2006-08 - Maintaining Confidentiality of Cabinet Documents and Other Cabinet Conventions (M2006-8). M2006-08 provides that the unauthorised and/or premature disclosure of Cabinet documents undermines collective ministerial responsibility and the convention of Cabinet confidentiality. It is essential that the confidentiality of Cabinet documents is maintained to enable full and frank discussions to be had prior to Cabinet making decisions.
109	Hon Chris Rath MLC	Website usage	(109) What were the top 20 most utilised (by data sent and received) unique domain names accessed by your ministerial office since 28 March 2023?	I am advised: All acceptable use of IT services must be lawful, appropriate, and ethical. The Ministers' Staff Acceptable Use of Network Services Policy is available in the Ministers' Office Handbook.

Question #	Member	SQ title	Supplementary Question	Answer
110	Hon Chris Rath MLC	Website usage	(110) What were the top 20 most accessed (by number of times accessed) unique domain names accessed by your ministerial office since 28 March 2023?	I am advised: All acceptable use of IT services must be lawful, appropriate, and ethical. The Ministers' Staff Acceptable Use of Network Services Policy is available in the Ministers' Office Handbook.
111	Hon Chris Rath MLC	Department(s)/Agency(s) Employees	(111) How many senior executive service employees were employed by each Department/agency within your portfolio responsibilities on: (a) 28 March 2023? (b) 1 July 2023? (c) 1 January 2024? (d) 1 July 2024?	I am advised: Information in relation to workforce profile data of the Department of Communities and Justice Agency Portfolio is detailed in the annual reports.
112	Hon Chris Rath MLC	Department(s)/Agency(s) Employees	(112) How many public servants within your portfolio department(s)/agency(s) were paid more than the Premier in 2023-24?	I am advised: Information in relation to the overall employee related expenses of the Department of Communities and Justice Agency Portfolio is available in the annual reports.
113	Hon Chris Rath MLC	Department(s)/Agency(s) Employees	(113) How many redundancies were processed by each Department(s)/agency(s) within your portfolio responsibilities since 28 March 2023? (a) Of these redundancies, how many were: i. Voluntary? ii. Forced? (b) What was the total cost of all redundancies in each Department/agency within your portfolio responsibilities?	I am advised: Since 28 March 2023 to 6 September 2024, the Department of Communities and Justice has processed 14 redundancies. All redundancies are managed in accordance with M2011-11 Changes to the Management of Excess Employees. Redundancy information is included in the department(s)/agency(s) annual reports.

Question #	Member	SQ title	Supplementary Question	Answer
114	Hon Chris Rath MLC	Ministerial visits	(114) Since 28 March 2023, have you visited any of these postcodes: (a) 2077? (b) 2079? (c) 2080? (d) 2081? (e) 2082? (f) 2083? (g) 2117? (h) 2118? (i) 2119? (j) 2120? (k) 2121? (l) 2125? (m) 2126? (n) 2151? (o) 2154? (p) 2156? (q) 2157? (r) 2158? (s) 2159? (t) 2756? (u) 2775? i. If yes to (a) to (u): 1. What was the purpose of the visit(s)? 2. Did you make a funding announcement(s)?	I am advised: Ministers' diary disclosures are publicly available. Premier's and Ministers' domestic travel information is published on the Premier's Department's website at: https://www.nsw.gov.au/departments-and-agencies/premiers-department/access-to-information/premier-and-ministers-domestic-travel

Question #	Member	SQ title	Supplementary Question	Answer
115	Hon Chris Rath MLC	Camera, video recorder and microphones	(115) Does your ministerial office have the following paid by your ministerial budget: (a) Handheld camera? (b) Handheld video recorder? (c) Microphone? i. If yes to (a) to (c), how much is each worth when purchased?	I am advised: Ministers' Staff Acceptable Use of Communication Devices Policy provides guidance on the use, loss, theft, and return of communication devices provided for business purposes. The purchasing of technology items is in accordance with standard procurement arrangements. The costs form part of the Premier's Department Annual Report.
116	Ms Sue Higginson MLC	section 85 to request provision of a restoration service to a child or young person or their family	(116) In each of the 19/20, 20/21, 21/22, 22/23, 23/24 and current financial years, how many times has the Children's Court exercised the power in section 85 to request provision of a restoration service to a child or young person or their family, in order to facilitate the safe restoration of the child or young person to their family? (a) Please include a breakdown of: i. the nature of the service requested; ii. how many requests were directed to ACCOs; and iii. how many requests were in relation to a First Nations child or young person.	I am advised: Data relating to requests made by the Childrens Court under section 85 of the Children and Young Persons (Care and Protection) Act 1998 is only available from December 2022. In 2022/23 (part period from December 2022 until June 2023), 3 requests were made. i. All requests related to housing alone ii. Nil iii. 1 In 2023/24, 5 requests were made. i. All requests related to housing where 1 of the requests also related to disability services and the Suspension of Job Seeker requirements. ii. Nil iii. Nil For 2024/25 (to date), 1 request has been made. i. This request related to housing ii. Nil iii. Nil Note: The data outlined may not capture requests noted manually on a physical court file but not recorded in the case management system.

Question #	Member	SQ title	Supplementary Question	Answer
117	Ms Sue Higginson MLC	children and young people charged under new post and boast offences	(117) Since March 2024, how many children and young people aged 10-12 have been charged under new post and boast offences? (a) Of whom, how many i. Are First Nations? ii. Have a disability? iii. Have at any time been in the out-of-home care system? iv. Were the subject of a DCJ ROSH report? v. Were refused bail? vi. Were refused bail under section 22C of the bail act?	I am advised: BOCSAR data show that from April 2024 to June 2024 (inclusive), no legal actions were commenced for young people aged 10 to under 12 for offences under s154K of the Crimes Act.
118	Ms Sue Higginson MLC	children and young people charged under new post and boast offences	(118) Since March 2024, how many children and young people aged 12-14 have been charged under new post and boast offences? (a) Of whom, how many i. Are First Nations? ii. Have a disability? iii. Have at any time been in the out-of-home care system 22 iv. Were the subject of a DCJ ROSH report? v. Were refused bail? vi. Were refused bail under section 22C of the bail act?	I am advised: BOCSAR data show that from April 2024 to June 2024 (inclusive), no legal actions were commenced for children and young people aged 12 to under 14 for offences under s154K of the Crimes Act.
119	Ms Sue Higginson MLC	children and young people charged under new post and boast offences	(119) Since March 2024, how many children and young people aged 14-16 have been charged under new post and boast offences? (a) Of whom, how many i. Are First Nations? ii. Have a disability? iii. Have at any time been in the out-of-home care system iv. Were the subject of a DCJ ROSH report? v. Were refused bail? vi. Were refused bail under section 22C of the bail act?	I am advised: BOCSAR data show that from April 2024 to June 2024 (inclusive), NSW Police commenced nine legal actions against young people aged 14 to under 16 for offences under s154K of the Crimes Act. Six of these young people were issued with a Court Attendance Notice, and three were issued with a caution under the Young Offender Act. (a) Of these young people: i. Five were Aboriginal ii. – vi. data is not readily available

Question #	Member	SQ title	Supplementary Question	Answer
120	Ms Sue Higginson MLC	children and young people charged under new post and boast offences	(120) Since March 2024, how many children and young people aged 16-18 have been charged under new post and boast offences? (a) Of whom, how many i. Are First Nations? ii. Have a disability? iii. Have at any time been in the out-of-home care system iv. Were the subject of a DCJ ROSH report? v. Were refused bail? vi. Were refused bail under section 22C of the bail act?	I am advised: BOCSAR data show that from April 2024 to June 2024 (inclusive), NSW Police commenced eight legal actions against young people aged 16 to under 18 for offences under s154K of the Crimes Act. Seven of these young people were issued with a Court Attendance Notice, and one were issued with a caution under the Young Offender Act. (a) Of these young people: i. Seven were Aboriginal ii. - vi. data is not readily available
121	Ms Sue Higginson MLC	children and young people refused bail under s22c of the Bail Act	(121) Since March 2024, how many children and young people aged 10-12 were refused bail under section 22c of the bail act? (a) Of these, how many i. Are First Nations? ii. Have a disability? iii. Have at any time been in the out-of-home care system? 23 iv. Were the subject of a ROSH report? (b) Of these, how many were held in remand for i. Less than 24 hours ii. 1-3 days iii. 3-7 days iv. More than a week (c) Of these, provide a breakdown of the number of bail refusals by court	I am advised: No young people aged 10 and under 12 have been bail refused under section 22C of the Bail Act, as this section only applies to young people who were aged 14 to under 18 at the time of the commission of the offence.

Question #	Member	SQ title	Supplementary Question	Answer
122	Ms Sue Higginson MLC	children and young people refused bail under s22c of the Bail Act	(122) Since March 2024, how many children and young people aged 12-14 were refused bail under section 22c of the bail act? (a) Of these, how many i. Are First Nations? ii. Have a disability? iii. Have at any time been in the out-of-home care system? iv. Were the subject of a ROSH report? (b) Of these, how many were held in remand for i. Less than 24 hours ii. 1-3 days iii. 3-7 days iv. More than a week (c) Of these, provide a breakdown of the number of bail refusals by court	I am advised: No young people aged 12 to under 14 have been bail refused under section 22C of the Bail Act, as this section only applies to young people who were aged 14 to under 18 at the time of the commission of the offence.
123	Ms Sue Higginson MLC	children and young people refused bail under s22c of the Bail Act	(123) Since March 2024, how many children and young people aged 14-16 were refused bail under section 22c of the bail act? (a) Of these, how many i. Are First Nations? ii. Have a disability? iii. Have at any time been in the out-of-home care system? iv. Were the subject of a ROSH report? 24 (b) Of these, how many were held in remand for i. Less than 24 hours ii. 1-3 days iii. 3-7 days iv. More than a week (c) Of these, provide a breakdown of the number of bail refusals by court	I am advised: BOCSAR's preliminary analysis have identified that between April 2024 to June 2024 (inclusive), 28 first bail appearance in scope of section 22C of the Bail Act resulting in bail refusal involved young people aged 14 to under 16. (a) Of these first bail appearances: i. 26 involved an Aboriginal young person ii. -iv. data is not readily available (b)& (c) data is not readily available

Question #	Member	SQ title	Supplementary Question	Answer
124	Ms Sue Higginson MLC	children and young people refused bail under s22c of the Bail Act	(124) Since March 2024, how many children and young people aged 16-18 were refused bail under section 22c of the bail act? (a) Of these, how many i. Are First Nations? ii. Have a disability? iii. Have at any time been in the out-of-home care system? iv. Were the subject of a ROSH report? (b) Of these, how many were held in remand for i. Less than 24 hours ii. 1-3 days iii. 3-7 days iv. More than a week (c) Of these, provide a breakdown of the number of bail refusals by court	I am advised: BOCSAR's preliminary analysis have identified that between April 2024 to June 2024 (inclusive), 24 first bail appearance in scope of section 22C of the Bail Act resulting in bail refusal involved young people aged 16 to under 18. (a) Of these first bail appearances: i. 20 involved an Aboriginal young person ii.-iv. data is not readily available (b)&(c) data is not readily available
125	Ms Sue Higginson MLC	First Nations people in custody	(125) In the 22/23, 23/24 and current financial year, how many First Nations people (a) have been held in remand? (b) Have served or are serving a custodial sentence?	I am advised: BOCSAR data shows that: a) Aboriginal people on Remand: as at June 2023, 1466; as at June 2024, 1891 b) Aboriginal people in Sentenced Custody: as at June 2023, 2230; as at June 2024, 2148
126	Ms Sue Higginson MLC	Balmain Courthouse	(126) What plans does the NSW Government have, if any, for a future community use of the Balmain Courthouse?	I am advised: No decisions or plans have been agreed to in relation to the future use of the Balmain Courthouse. The Department of Communities and Justice continues to support the work of the Inner West Council's precinct planning process.
127	Ms Sue Higginson MLC	Review of the Young Offenders Act	(127) What is the status of the review of the Young Offenders Act? (a) Will there be a public submissions process? (b) Will there be targeted consultation? 25 i. If so, with whom? (c) Is it anticipated there will be draft legislation? If so when?	I am advised: The Department of Communities and Justice, including Youth Justice NSW, and the NSW Police Force, undertook a targeted review of the Young Offenders Act 1997. The Review considered relevant recommendations made by the Legislative Assembly Law and Safety Committee. The Review is currently being considered by the NSW Government.

Question #	Member	SQ title	**Supplementary Question**	**Answer**
128	Ms Sue Higginson MLC	Project Pathfinder	(128) How many young people have been enrolled in one-on-one mentorship through Project Pathfinder? (a) What, if any, positive outcomes have been observed as a result of the program?	I am advised: This question is for the Hon Yasmin Catley MP, in her capacity as the Minister for Police and Counter-terrorism.

Crown Prosecutors – Requirements for Direction, Approval, Instruction from the Director or a Deputy Director

Preamble

Crown Prosecutors are statutory officers appointed under the *Crown Prosecutors Act 1986* (CP Act). Crown Prosecutors' functions are set out in s 5 of the CP Act. A Crown Prosecutor is responsible to the Director for the due exercise of the Crown Prosecutor's functions.[1]

CPs conduct and appear in as counsel in proceedings on behalf of the Director: s 5(1)(a) of the CP Act and the Director is our client.

Pursuant to the *Director of Public Prosecutions Act 1986* (DPP Act), the Director may furnish guidelines to prosecutors with respect to the prosecution of offences, including guidelines as to the exercise of specific functions (whether statutory or not). Guidelines may not be furnished in relation to particular cases.[2]

Guidelines are to be provided to the Attorney General and referred to in the Annual Report, which is laid before parliament: s 34 DPP Act. Persons to whom guidelines are furnished are subject to the guidelines.[3]

Subject to important exceptions set out in the DPP Act, the Director may delegate in writing any of the Director's functions to a Crown Prosecutor.[4]

The Director may advise and assist Crown Prosecutors in respect of the conduct of criminal proceedings.[5]

The Director has furnished Prosecution Guidelines and has delegated functions to Crown Prosecutors. The Director has provided instruction, advice and assistance on aspects of the conduct of criminal proceedings. This is generally by way of legal policy, written memorandum/email and papers delivered.

The schedule sets out the matters/issues that require referral to Director's Chambers for a direction, approval, or instruction. The schedule identifies the source of the requirement to refer to Director's Chambers.

[1] s 4(4) of the CP Act.
[2] s 13 Director of Public Prosecutions Act 1986.
[3] s 15 of the DPP Act.
[4] s 33 of the DPP Act.
[5] s 20(2) of the DPP Act.

Direction previously made by the Director or a Deputy Director – exercise of delegation or function in manner inconsistent		
Exercising a delegation or function in any manner that would be inconsistent with a direction previously made by the Director or a Deputy Director.	Direction required from the Director or a Deputy Director.	Legal Delegations - Preamble 1(b)
Disclosure		
Where the prosecutor and the police disagree as to what should be disclosed, and there is no claim of public interest immunity.	Matter is to be referred to the Director or a Deputy Director for advice.	Prosecution Guideline 13.3
Request to the CDPP that the NSW ODPP take over and prosecute a Commonwealth charge		
Request to the CDPP that the NSW ODPP take over and prosecute a Commonwealth charge.	Approval of the Director or a Deputy Director required.	Not delegated to Crown Prosecutors
Pre-Charge Advice to Police and Other Investigatory Agencies		
Pre-charge advice in relation to: • Matters involving death, • Coronial referral, • Extradition, • Sanction offences and • Sensitive prosecutions. Advice as to operational or investigative matters. Advice as to jurisdiction. Waiver of privilege to third parties that advice has been sought or provided by.	Direction required from the Director or a Deputy Director.	Prosecution Guideline 12 Consolidated Instrument of Delegations, Orders and Powers - preamble (1)(a) (death matters); delegation item 16; Protocol for advice between NSWPF and ODPP MOU between ICAC and ODPP MOU between LECC and ODPP

The Local Court and the Children's Court		
Offences that require approval, sanction or consent of the Director		
Annexure 1 is a list of charges that require the approval, sanction, or consent of the Director before a prosecution can be commenced.	Direction required from the Director or a Deputy Director.	Legislative requirement
Partial withdrawal of charges		
Proceeding on fewer charges, or charges carrying a lesser maximum penalty, or substituting a charge with another charge carrying the same or higher maximum penalty in any case where death has been occasioned (including accessorial liability and concealing such an offence).	Direction required from the Director or a Deputy Director.	Legal Delegations - Preamble 1(a)
Termination of proceedings (all charges)		
Withdrawing all charges in the Local Court or the Children's Court in any case where death has been occasioned (including accessorial liability and concealing such an offence).	Direction required from the Director or a Deputy Director.	Legal Delegations - Preamble 1(a)
The District Court and the Supreme Court		
Determining that no bill of indictment be found		
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, (including the purported "merging" of charges, or the substitution of charges).	Direction required from the Director or a Deputy Director (Director may not delegate function, except to a Deputy Director).	s 5(3) CP Act 1986 Legal Delegations - Preamble 1(c) Prosecution Guideline 3.4 s 33(2)(a) DPP Act 1986
Directing that no further proceedings be taken		
Directing that no further proceedings be taken against a person who has been committed for trial or sentence.	Direction required from the Director or a Deputy Director (Director may not delegate function, except to a Deputy Director).	s 5(3) CP Act 1986 Legal Delegations - Preamble 1(c) s 33(2)(b) DPP Act 1986

Ex officio counts		
Finding a bill of indictment in respect of an indictable offence, in circumstances where the person concerned has not been committed for trial ("ex officio counts"), except to add a statutory or common law alternative to the indictment, as an alternative to an offence that has been committed for trial or sentence.	Direction required from the Director or a Deputy Director (Director may not delegate function, except to a Deputy Director).	Legal Delegations - Preamble 1(d) Prosecution Guideline 3.4 s 33(2)(c) DPP Act 1986
Finding a bill under a different provision (including sub-section)		
Finding a bill of indictment in respect of an offence under a different provision (including sub-section) to that committed for trial or sentence, except to add a statutory or common law alternative to the indictment, as an alternative to an offence that has been committed for trial or sentence.	Approval of the Director or a Deputy Director required.	Legal Delegations - Preamble 1(d) Prosecution Guideline 3.4 s 33(2)(c) DPP Act 1986
Finding a bill under the same provision but with different Law Part Code		
Finding a bill of indictment in respect of an offence under the same provision to that committed for trial or sentence, but where the Law Part Code attaching to the offence is incorrect, where the difference would render the offence on the indictment a different offence to that which was committed for trial (for example, where the same provision creates more than one offence).	Approval of the Director or a Deputy Director required.	Legal Delegations - Preamble 1(d) Prosecution Guideline 3.4 s 33(2)(c) DPP Act 1986.
Applying to vacate a trial		
Applying to vacate a trial or agreeing to a defence application to vacate.	Instructions to make an application to vacate, or agree to a defence application to vacate, should be obtained from the Director or a Deputy Director unless the court does not allow time to obtain instructions.	The Director is the client. s 20(2) DPP Act 1986.
Applications to discharge a jury		
Applying to discharge a jury or agreeing or consenting to an application to discharge a jury.	Instructions to make an application to discharge a jury or to consent to the discharge of the jury should be obtained from the Director or a Deputy Director unless the court does not allow time to obtain	The Director is the client and has not authorised the making of such an

	instructions or evidence has not yet been called and a new jury can be empanelled within a short time.	application without instructions first being sought. s 20(2) DPP Act 1986.
Applications to recuse a judge for apprehended bias		
Crown application for a judge to recuse themselves on grounds of apprehended bias.	Instructions to make the application are to be obtained from the Director or a Deputy Director.	The Director is the client and <u>has not</u> authorised the making of such an application without instructions first being sought. s 20(2) DPP Act 1986 DPPdia post
Advice to the court as to whether further proceedings will be taken pursuant to *s 53(2)* of the *Mental Health an d Cognitive Impairment Forensic Provision Act 2020*		
Advice to the court, pursuant *s 53(2)* of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*, as to whether further proceedings will be taken by the Director in respect of the offence(s).	Direction required from the Director or a Deputy Director. The power to direct no further proceedings may not be delegated except to a Deputy Director (s 33(2)(b) DPP Act). Anterior to any advice to the court under s 53(2) *MHCI (FP) Act* is the decision whether to NFP.	s 5(3) CP Act 1986 Legal Delegations - Preamble 1(c) s 33(2)(b) DPP Act 1986
Agreeing, pursuant to *s 31* of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*, that the evidence establishes a defence of mental health impairment or cognitive impairment		
Agreeing, pursuant to *s 31* of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*, that the proposed evidence in the proceedings establishes a defence of mental health impairment or cognitive impairment.	Approval of the Director or a Deputy Director should be obtained.	Prosecution Guideline 8.5
Retrials		
Proceeding to retrial where two juries have been unable to agree upon a verdict.	Direction required from the Director or a Deputy Director (a retrial will be directed only in exceptional circumstances).	Prosecution Guideline 1.8

Offering no evidence in an appeal		
Withdrawing all charges by offering no evidence to an appeal to the District Court under Part 3 of the Crimes (Appeal and Review) Act 2001 in any case where death has been occasioned (including accessorial liability and concealing such an offence).	Direction required from the Director or a Deputy Director.	Legal Delegations - Preamble1(a)
Withdrawing charges transferred by way of certificate under *s 166* of the *Criminal Procedure Act 1986*		
Withdrawal of back up offence transferred by way of certificate under *s 166* of the *Criminal Procedure Act 1986* in any case where death has been occasioned (including accessorial liability and concealing such an offence).	Direction required from the Director or a Deputy Director.	Legal Delegations - Preamble 1(a)
The Supreme Court		
Applications to present an indictment in the Supreme Court		
Applying to the Chief Justice, in accordance with *s 128* of the *Criminal Procedure Act 1986*, to present an indictment in the Supreme Court.	Approval of the Director or a Deputy Director required.	The right of the Director to make the application has not been delegated to Crown Prosecutors.
The Court of Criminal Appeal		
Appeals		
Appealing under *s 5D, 5F and 5G* of the *Criminal Appeal Act 1912* against a sentence. Appealing under s107 and 108 of the *Crimes (Appeal and Review) Act*. Amending a ground of appeal in respect of an appeal under the above sections. Conceding a conviction or sentence appeal.	Direction required from the Director or a Deputy Director.	Prosecution Guideline 10.4 s 33(2)(d) DPP Act 1986 Right of appeal is reposed in the Director and it has not been delegated to Crown Prosecutors. The concession of a conviction appeal has the effect of a direction of no further proceedings which cannot be delegated to a Crown Prosecutor.

Waiver of the Director's legal privilege		
Waiving the Director's legal privilege.	Only the Director or a Deputy Director may approve any waiver of privilege.	Prosecution Guidelines 13.4 and 15.3
Evidentiary matters		
Taking of induced statements and applications for immunity		
Taking of an induced statement, where the anticipated evidence relates to a matter being prosecuted by the ODPP. Only the Director or a Deputy Director may make a recommendation to the Attorney General to grant a witness immunity, being either an indemnity or undertaking.	Approval of the Director or a Deputy Director required. Submission to the Director addressing factors set out in the guideline	Prosecution Guideline 11.5 Prosecution Guideline 11.4
Calling a prison informer		
The decision to call a prison informer as a witness.	Approval of the Director or a Deputy Director required.	Prosecution Guideline 11.3
Evidence obtained by hypnosis or EMDR		
Use of evidence obtained by either hypnosis or EMDR.	Approval of the Director or a Deputy Director required.	Prosecution Guideline 14.4
Communicating with the media		
Responding to media enquiries other than those of an uncontroversial nature		
Responding to media enquiries other than those of an uncontroversial nature concerning matters in the public domain.	Approval of the Director or a Deputy Director required.	Prosecution Guideline 16.3

Bail		
Making a detention application in a superior jurisdiction		
Making a detention application in a superior jurisdiction to that in which the matter is presently proceeding (including a review of a bail decision).	Approval of the Director or a Deputy Director required.	Bail Policy Part 4.1
The decision to not oppose the grant of bail where the accused is an informer (or prospective informer)		
The decision to not oppose the grant of bail where the accused is an informer (or prospective informer) and the police officer-in-charge supports the grant of bail to allow the applicant to provide assistance.	Approval of the Director or a Deputy Director required.	Bail Policy Part 4.4
Applications For Costs		
Consenting to a defence application for costs.	Approval required from the Director or a Deputy Director.	Costs paper s 20(2) DPP Act 1986.

Annexure 1 - Prosecutions for which DPP approval is required

Prosecutions for which DPP approval is required

Proceedings for certain NSW offences may only be instituted with the prior approval of the Director of Public Prosecutions or her Deputies. The following is a list of such offences.

Offence and Section	Approval Provision
s 25C(1) Crimes Act – Supply of drugs causing death	s 25C(4) – Proceedings for an offence under this section may only be instituted by or with the approval of the Director of Public Prosecutions.
s 66EA(1) Crimes Act – Persistent sexual abuse of a child	s 66EA(14) – Proceedings for an offence against this section may only be instituted by or with the approval of the Director of Public Prosecutions.
s 66EC(2) Crimes Act – Grooming a person for unlawful sexual activity with a child under the person's authority	s 66EC(3) – Proceedings for an offence under this section may only be instituted by or with the approval of the Director of Public Prosecutions.
s 82 Crimes Act – Termination of pregnancy performed by unqualified person	s 82(4) – Proceedings for an offence under this section may only be instituted, by or with the approval of, the Director of Public Prosecutions.
s 91G Crimes Act – Children not to be used for production of child abuse material	s 91G(6) – Proceedings for an offence under this section against a child or young person may only be instituted by or with the approval of the Director of Public Prosecutions.
s 91H Crimes Act – Production, dissemination or possession of child abuse material	s 91H(3) – Proceedings for an offence under this section against a child or young person may only be instituted by or with the approval of the Director of Public Prosecutions
s 91P Crimes Act – Record intimate image without consent	s 91P(2) – A prosecution of a person under the age of 16 years for an offence against this section is not to be commenced without the approval of the Director of Public Prosecutions
s 91Q Crimes Act – Distribute intimate image without consent	s 91Q(2) – A prosecution of a person under the age of 16 years for an offence against this section is not to be commenced without the approval of the Director of Public Prosecutions

Offence and Section	Approval Provision
s 91R Crimes Act – Distribute intimate image without consent	s 91R(6) – A prosecution of a person under the age of 16 years for an offence against this section is not to be commenced without the approval of the Director of Public Prosecutions
ss 193D(1) and (2) Crimes Act – Dealing with property that subsequently becomes an instrument of crime.	s 193D(3) – Proceedings for an offence under this section (ie ss 193D(1) and 193D(2)) must not be commenced without the consent of the Director of Public Prosecutions.
s 316 Crimes Act – Concealing serious indictable offence (for offences committed prior to 31/8/2018, the DPP's approval was required pursuant to an order published in Government Gazette No. 86 on 31/8/2012)	s 316(4) – A prosecution for an offence against subsection (1) is not to be commenced against a person without the approval of the Director of Public Prosecutions if the knowledge or belief that an offence has been committed was formed or the information referred to in the subsection was obtained by the person in the course of practising or following a profession, calling or vocation prescribed by the regulations for the purposes of this subsection. Subsection (5) provides that the regulations may prescribe a profession, calling or vocation as referred to in subsection (4). See cl 4 of the *Crimes Regulation* 2020.
s 316A Crimes Act – Concealing child abuse offence	s 316A(6) – A prosecution for an offence under subsection (1) is not to be commenced against person without the approval of the Director of Public Prosecutions in respect of information obtain by an adult in the course of practising or following a profession, calling or vocation prescribed by the regulations for the purposes of this subsection. Subsection (7) provides that the regulations may prescribe a profession, calling or vocation as referred to in subsection (6). See cl 4 of the *Crimes Regulation* 2020
s 529 Crimes Act – Criminal defamation	s 529(7) – Proceedings in a court for an offence under this section cannot be instituted without the written consent of the Director of Public Prosecutions. Subsection (8) provides that in those proceedings, a consent purporting to have been signed by the Director of Public Prosecutions is, without proof of the signature, evidence of that consent.
s 105H Residential Tenancies Act 2010 – False and misleading information about documents required to be furnished in connection with a domestic violence termination notice relating to a particular offender pursuant to s 105C(2) of the Act	s 202(1A) – Proceedings for an offence under section 105H may only be instituted by or with the approval of the Director of Public Prosecutions.

Authorisations by the NSW Attorney General to the NSW DPP, pursuant to which the DPP consents to prosecutions

Section 11(1) of the *Director of Public Prosecutions Act* 1986 provides that the DPP may consent to prosecutions for offences in relation to which an order under s 11(2) is in force. Pursuant to s 11(2), a person who has, under a law of the State, the power to consent to prosecutions for offences of a particular kind, may by order published in the NSW Government Gazette, authorise the Director of Public Prosecutions (DPP) to consent to prosecutions for offences of that kind.

The NSW Attorney General has the power to consent to various prosecutions. The NSW Attorney General has, by orders published in the NSW Government Gazette No. 86 on 31 August 2012 at pages 3838-3839, authorised the DPP to consent to prosecutions for the offences in the following table. The authorities delegated to the Director by the Attorney General can only be exercised by the Director herself (ie. not the Deputies, unless they are in the position of Acting Director).

Offence and section	Particulars
s 183 Conveyancing Act 1919 – Fraudulent concealment of deeds or falsifying of pedigree by vendor	s 183(3) – No prosecution for any offence included in this section against any seller or mortgagor, or any solicitor or agent, shall be commenced without the sanction of His Majesty's Attorney-General or Solicitor-General and s 183(4) - No such sanction shall be given without previous notice of the application for leave to prosecute to the person intended to be prosecuted in such form as the Attorney-General or the Solicitor-General directs.
s 66F Crimes Act – Sexual intercourse – cognitive impairment	s 66F(8) – A prosecution for any of the following offences may not be commenced without the approval of the Attorney General: (a) an offence under subsection (2) and (3) (or under section 344A in connection with such an offence), (b) an offence referred to in subsection (6) in which the prosecution relies on the operation of that subsection
s 78A Crimes Act – Incest or s 78B Crimes Act – Attempted incest	s 78F(1) – No prosecution for an offence under sections 78A (incest) or 78B (attempted incest) shall be commenced without the sanction of the Attorney General.

Offence and section	Particulars
s 78H – Homosexual intercourse with male under 10 (repealed) s 78I – Attempt, or assault with intent, to have homosexual intercourse with male under 10 (repealed) s 78K – Homosexual intercourse with male between 10 and 18 (repealed) s 78L – Attempt, or assault with intent, to have homosexual intercourse with male between 10 and 18 (repealed) s 78N – Homosexual intercourse by teacher, etc (repealed) s 78O – Attempt, or assault with intent, to have homosexual intercourse with pupil, etc. (repealed) s 78Q – Alternative charge (repealed)	Schedule 11, cl 55(2) (previously s 78T) provides - No prosecution for an offence under section 78H, 78I, 78K, 78L, 78M, 78N, 78O or 78Q or for an offence of attempting, or of conspiracy or incitement, to commit an offence under any of those sections shall, if the accused was at the time of the alleged offence under the age of 18 years, be commenced without the sanction of the Attorney General.
s 249E Crimes Act – Corrupt benefits for trustees	s 249E(4) – Proceedings for an offence against this section shall not be commenced without the consent of the Attorney General
s 33 Oaths Act 1900 – False statements	s 33(1) provides that any person who, having made an affidavit under section 32, wilfully makes a false statement in the affidavit, knowing the statement to be false, is taken to be guilty of perjury, if the making of the statement, had it been on oath, would by law have been perjury. No prosecution for an offence under s 33(1) is to be commenced without the sanction of the Attorney General: s 33(2).
Real Property Act 1900 offences (s 141)	s 143(1) provides that all offences against the provisions of the Real Property Act may be prosecuted, and all penalties or sums of money imposed or declared to be due or owing by or under the provisions of the same may be sued for and recovered in the name of the Attorney General.

Offence and section	Particulars
Surveillance Devices Act 2007 and Surveillance Devices Regulation 2014 offences	s 56 – Proceedings for an offence against this Act or the regulations must not be instituted without the written consent of the Attorney General.
s 20D Anti-Discrimination Act 1977 – Serious racial vilification (repealed 13.8.2018)	s 20D(2) – A person shall not be prosecuted for serious racial vilification under this section unless the Attorney General has consented to the prosecution.
s 49ZTA Anti-Discrimination Act 1977 – Serious homosexual vilification (repealed 13.8.2018)	s 49ZTA(2) – A person shall not be prosecuted for an offence of serious homosexual vilification under this section unless the Attorney General has consented to the prosecution.
s 49ZXC Anti-Discrimination Act 1977 – Serious HIV/AIDS vilification (repealed 13.8.2018)	s 49ZXC(2) – A person shall not be prosecuted for an offence of serious HIV/AIDS vilification under this section unless the Attorney General has consented to the prosecution.

ODPP
New South Wales

Director's Chambers

19 December 2023

Ms Una Doyle
Chief Executive
Judicial Commission of New South Wales

By email: complaints@judcom.nsw.gov.au

Dear Ms Doyle,

Complaint against Judge S Grant

Pursuant to Part 6 of the *Judicial Officer's Act 1986* (NSW), I refer to the Judicial Commission the conduct of Judge Grant of the District Corut of NSW in the matters of *R v Wood* (2021/00111211) ('*Wood*'), *R v Fairfull* (2022/00097605) ('*Fairfull*') and *R v Gollan* (2022/00159960) ('*Gollan*').

In these three matters Grant DCJ attempted to manage his trial lists by attempting to orchestrate pleas of guilt. The complaints are particularised below, and I also rely on the attachments to this letter.

R v Wood (2021/00111211)

The matter of *Wood* related to an altercation in Leeton, NSW, on 25 February 2021. The accused Andrew Wood stabbed the complainant. He was charged with two offences under the *Crimes Act 1900* (NSW) ('*Crimes Act*'). The first count on the indictment was a charge of wound with intent to murder (s 27 Crimes Act); the second and alternative count was a charge of wound with intent to cause grievous bodily harm (s 33(1)(a) Crimes Act). The complainant's evidence relevant to intent was that at the time that the accused stabbed him, the accused said words to the effect of "I'm going to fucking kill you".

At the arraignment on 25 March, Judge Grant refused to list the matter for trial. His Honour explained to the Crown that he did not believe that it would be possible for the Crown to prove the accused's intent to murder and urged the Crown to accept a plea to the alternative count. His Honour adjourned the matter until 2 May 2022 so that the Crown could consider its position.

On 2 May 2022, Judge Grant once again refused to list the matter for trial. His Honour repeated his prior exhortations that the Crown accept a plea of guilty to count two in full satisfaction of the proceedings. The Crown declined to do so. His Honour then listed the matter in the Albury super call over on 21 June 2022.

During the super call over negotiations, the accused's plea offer was accepted by the Crown. On 2 August 2022 the matter was adjourned for sentence before Judge Grant on 10 October 2022.

His Honour's conduct in twice refusing to list the matter for trial because of his view as to the prospects of conviction was highly inappropriate. The Crown does not currently possess the

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transcripts for the arraignment on 25 March and the mention on 2 May 2022. These have been ordered and will be forwarded upon their receipt. His Honour's remarks on sentence (Attachment 1) reveal how his personal beliefs about the prospects of conviction on count one affected his Honour's treatment of the matter (p 2-3):

> *"I endeavoured to explain to the Crown the difficulties of proving attempted murder where the Crown had to prove beyond reasonable doubt an intention to kill, as opposed to an intention to cause grievous bodily harm. The matter was adjourned a couple of times for the Crown to consider its position. My identification to the Crown of proceeding with count 1 fell on deaf ears. The Crown would not accept the plea to count 2 in full satisfaction of the indictment. It wished to persist with attempted murder. The matter was placed in the super call-over list so that independent eyes from Sydney could objectively assess the prosecution of the offender".*

R v Fairfull (2022/00097605)

The matter of *Fairfull* concerned an incident on 9 March 2022 at Yanco Agricultural High School in Yanco, NSW. The incident involved the complainant, Toby Palmer, and three co-accused youth, BP, JT and AF. The complainant and the co-accused were year 10 boarding students who shared a dormitory room at the high school.

The Crown case was that on 9 March 2022, the complainant was subjected to a series of violent sexual incidents committed by the co-accused. The co-accused were charged with various offences under the *Crimes Act*, including aggravated sexual assault (s 61J(1)), sexual act for production of child abuse material – child under 16 (s 66DF) and disseminate child abuse material (s 91H(2)).

During the prosecution of the co-accused, BP, the Crown and BP agreed to a plea deal whereby BP would plead guilty to two offences arising under s 61J(1) and s 66DF of the *Crimes Act* in return for a series of other charges being withdrawn. On 14 September 2023, Judge Grant sentenced BP to a community correction order of two years for the s 61J(1) offence, and a community correction order of three years for the s 66DF offence. At the time that BP was sentenced, AF had not yet pleaded, and his trial was scheduled to begin on 11 December 2023.

On 10 October 2023, Judge Grant's Associate emailed the parties in *Fairfull* (Attachment 2). The Associate provided a link to his Honour's sentencing judgment of BP (Attachment 3), and stated, "*…in light of his Honour's sentence of BP, can you please advise whether the trial will be proceeding on 11 December 2023?*"

On 20 October 2023, his Honour's Acting Associate emailed the parties inquiring whether "*…the trial is still set to proceed given the judgment in BP*" (Attachment 4). Follow-up emails were sent by his Honour's Acting Associate on 25 and 31 October, as well as on 1 and 14 November.

While considering the matter in Director's Chambers, the emails sent by Judge Grant on 10 and 20 October were brought to my attention. I subsequently directed my staff to apply for Judge Grant's recusal from the sentencing of AF.

The recusal application was made on the basis that, on a sensible appraisal of the entirety of the emails sent to AF's legal representatives, a fair-minded lay observer might reasonably apprehend that Judge Grant might not bring an impartial and unprejudiced mind to sentencing AF.

R v Gollan (2022/00159960)

The matter of *Gollan* involved the prosecution of a young person, 17-year-old Alexander Gollan, for a string of serious sexual offences committed against a 13-year-old complainant, Amy Becker.

The offences occurred between April and mid-July 2021, predominantly at the complainant's house. There were initially 32 counts on the indictment ranging from sexual touching to sexual intercourse without consent.

On 15 December 2022, the Crown made a formal application before Magistrate McLoughlin in the Albury Children's Court to have the prosecution dealt with on indictment. On 14 March 2023, the matter was committed to the Albury District Court for arraignment on 14 April. On this date, the accused was arraigned before Judge Grant. The accused entered guilty pleas to 13 counts relating to sexual touching. On 12 May 2023, his Honour listed the matter for trial on 6 November 2023.

On 31 October 2023, defence counsel indicated that, in lieu of the aggravated sexual assault counts on the indictment (s 61(J) *Crimes Act*), the accused would plead guilty to alternative counts of sexual intercourse with a child between the age of 10 and 14 under s 66C(1). The distinction between these offences is the offender's knowledge of non-consent, which is not an element of the s 66C(1) offence, and was a key component of the accused person's criminality. Accordingly, the plea offer was rejected by the Crown.

On 6 November, the parties appeared before the Albury District Court for the commencement of the trial. Mr Metcalfe, counsel for the accused, indicated to Judge Grant that his client would be willing to plead guilty to the alternative counts under s 66C(1) (Attachment 5, p 1). The Crown responded that this plea did not satisfy the indictment. His Honour then questioned why the Crown had not agreed to the plea offer, and whether the offer had been considered by Director's Chambers. After the Crown explained that they had not consulted Director's Chambers, as they were not required to, his Honour stated (p 2):

> *"What, you just simply have a conference with the complainant and she says, "I don't accept it", and then that's the end of the matter without discussing the matter with the director's chambers about reasonable prospects of conviction, utility of the state, money spent in regard to having juries? It's over 15,000 plus a day in running a jury trial."*

After further exchanges, the Crown offered to consult with the Director's Chambers about the proceedings. A Direction was then made to confirm the Crown's prior position and proceed with the trial on the s 61(J) offences.

This Direction was communicated to Judge Grant after a short adjournment (p 4). His Honour continued to question the Crown about this decision (p 4-6), particularly in relation to the perceived non-utility in proceeding to trial. Regarding the four-year difference in statutory maximum sentences between the charged count and the alternative count, his Honour stated (p 6):

> *"So tell me, Mr Pincott, in your discussions with chambers, and you probably don't want to tell me this because it might impinge upon the Director's privilege, but was there any discussion about the statutory maximums in regards to the difference between these two offences, and seven days of utility being spent over an argument about four years?"*

His Honour's continued emphasis on the costs of proceeding to trial as a significant reason for resolving the prosecution on less serious charges was inappropriate. Whilst utilitarian considerations bear on the decision to prosecute, they are not determinative of where the public interest lies.

After further exchanges, the Crown requested an adjournment until the following day. Overnight, a further Direction was made regarding an alternative plea deal. The next morning, the parties instructed Judge Grant that they required the day to negotiate the plea deal. His Honour then returned to the issue of consent and questioned how the Crown intended to prove the accused's

knowledge of non-consent in light of a particular section of the Crown case statement (Attachment 6, p 9). His Honour then remarked (p 9):

> *"All right. Can I indicate this. That I have presided over 14 trials in [Albury] this year. One of those trials where a guilty verdict was entered by the jury in my view was unreasonable, and I have an expectation the Court of Criminal Appeal will find the same way and direct an acquittal in regards to that. So, let's now go down to 13 trials; out of 13 trials, Mr Crown, there have only been two convictions in [Albury], which means that the Crown batting rate at this moment is 15%, and that's the jury of people with common sense that you will no doubt be faced with if this matter does not resolve."*

After further exchanges, the matter was adjourned for the parties to negotiate.

Judge Grant's reference on 7 November 2023 to the conviction rates for sexual assault prosecutions in the Albury District Court was inappropriate. Prosecutions are conducted on the merits of each case, rather than by reference to the success of other matters. By emphasising that the prosecution should be resolved with regard to the unlikelihood of conviction in a particular court, his Honour downplayed the significance of the matter.

Complaint

The conduct of Judge Grant in *Wood, Fairfull* and *Gollan* reflects a pattern of behaviour whereby his Honour inappropriately intervenes in cases to pressure accused persons or the Crown to accept pleas as a matter of case management.

Whilst judges of the District Court must manage their trial lists efficiently, this does not, justify the inappropriate interventions such as those made by Judge Grant in the matters outlined above. His Honour's conduct represents a significant overreach from ordinary judicial practice.

I am available to discuss this complaint should you have any further questions.

Yours faithfully,

Sally Dowling SC
Director of Public Prosecutions

Attachments:

R v Wood

1. Transcript of sentencing proceedings *R v Wood* 10 October 2022

R v Fairfull

2. Email to the parties in *Fairfull* from Judge Grant's Associate, 10 October 2023
3. *R v BP* [2023] NSWDC 415
4. Email to the parties in *Fairfull* from Judge Grant's A/Associate, 20 & 25 October 2023
5. Email to the parties in *Fairfull* from Judge Grant's A/Associate, 1 November 2023
6. Email to the parties in *Fairfull* from Judge Grant's A/Associate, 14 November 2023

R v Gollan

7. Transcript of proceedings *R v Gollan* 6 November 2023
8. Transcript of proceedings *R v Gollan* 7 November 2023

Our File No. C/24/02
15 March 2024

Ms Sally Dowling SC
Director of Public Prosecutions
175 Liverpool Street
SYDNEY NSW 2000

By email only:

Dear Ms Dowling,

Your complaint against his Honour Judge Grant of the District Court of NSW

I refer to my letter of 10 January 2024 and write to provide an update on your complaint submitted to the Commission on 19 December 2023.

Under section 18(1) of the *Judicial Officers Act 1986* (the Act), the Judicial Commission of NSW (the Commission) is required to undertake a preliminary examination of a complaint. Section 18(2) of the Act notes that the Commission, in conducting the preliminary examination, may initiate such enquiries into the subject-matter of the complaint as it thinks appropriate.

Your complaint relates to the conduct of his Honour in three matters.

I note that you withdrew the part of the complaint relating to the matter of *R v Wood* by letter dated 25 January 2024.

The Commission has considered the remainder of the complaint, including the further material provided on 29 February 2024, and has resolved to dismiss the part of the complaint relating to the matter of *R v Fairfull* under section 20(1)(h) of the Act.

However, the Commission has requested that Judge Grant provide written submissions in response to the part of the complaint that relates to the matter of *R v Gollan.* The Commission will treat the complaint as it relates to the matter of *R v Gollan* on its own merits and not as part of 'a pattern of behaviour' as referred to in the complaint. His Honour's response will be taken into account by the Commission in determining what, if any, further action should be taken.

I will provide a further update at the appropriate time.

Yours sincerely,

U. Doyle
Chief Executive

Our File No. C/24/02
13 May 2024

Ms Sally Dowling SC
Director of Public Prosecutions
175 Liverpool Street
SYDNEY NSW 2000

By email only:

Dear Ms Dowling,

Your complaint against his Honour Judge Grant of the District Court of NSW

I refer to the complaint made by you dated 19 December 2023 and my previous correspondence of 15 March 2024 providing an update on your complaint against his Honour Judge Grant.

In considering this matter, the Commission examined your complaint materials and other relevant documentation. A written response to the complaint allegations was obtained from Judge Grant and has been considered by the Commission.

Having regard to the material before it, the Commission has determined that the part of your complaint relating to his Honour's conduct in the matter of *R v Gollan* has been established but does not justify the attention of the Conduct Division. The Commission has, however, resolved to refer the complaint to the Head of Jurisdiction under section 21(2) of the *Judicial Officers Act 1986* (the Act) with a recommendation to the Chief Judge that his Honour be counselled as to the proper limits of case management in criminal matters and that questions as to the reasonable prospects of a prosecution are for the DPP and not for a trial judge.

The complaint has therefore been referred to the Honourable Justice Huggett, Chief Judge of the District Court of NSW, as the relevant Head of Jurisdiction, for attention.

Yours sincerely,

U. Doyle
Chief Executive

ODPP
New South Wales

Director's Chambers

26 February 2024

Ms Una Doyle
Chief Executive
Judicial Commission of New South Wales

By email: complaints@judcom.nsw.gov.au

Dear Ms Doyle,

Complaint against Newlinds DCJ

1. Pursuant to s 15(1) and Part 6 of the *Judicial Officers Act 1986*, I make this complaint to the Judicial Commission about a matter that concerns the ability and behaviour of a judicial officer, namely the conduct of Judge Newlinds of the District Court of New South Wales in the matter of *R v Martinez* (File Number 2021/159787) including, but not limited to, the reasons for judgment in [2023] NSWDC 552.

2. In summary, the conduct of Newlinds DCJ demonstrates:

   (a) a failure to meet basic standards of competence;

   (b) repeated failures of judicial impartiality, detachment and demeanour when in Court and in the publication of reasons for judgment;

   (c) unreasonable criticism and vilification of a sexual assault complainant, which was very likely to cause unnecessary hurt; and

   (d) baseless criticism of me, and of the Office of the Director of Public Prosecutions (**ODPP**), in a manner very likely to reduce public confidence in the administration of criminal justice, in particular when commencing and maintaining sexual assault trials.

Materials

3. To assist in the consideration of the complaint, I attach copies of the documents and materials that are set out in the list of attachments at the end of this letter.

The decision in *R v Martinez* [2023] NSWDC 552

4. In *R v Martinez* [2023] NSWDC 552 (**Judgment**), delivered on 5 December 2023, Newlinds DCJ gave reasons for judgment for making an order granting an application for a certificate for costs pursuant to s 2 of the *Costs in Criminal Cases Act 1967* (NSW).

5. As is apparent from Judgment at [7], the applicant (given the pseudonym Mr Daniel Martinez), had been the accused person in a criminal trial conducted before Newlinds DCJ and a jury commencing on 23 November 2023. Mr Martinez was accused of four counts of

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sexual assault, that is, four offences against s 61I of the *Crimes Act 1900* (NSW), which provides that "*Any person who has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the sexual intercourse is liable to imprisonment for 14 years*". The trial concluded on 4 December 2023 upon the delivery by the jury of verdicts of not guilty to each charge. Mr Martinez immediately brought his application for a certificate for costs, which Newlinds DCJ heard and determined the next day.

6. The Judgment was promptly published on NSW Caselaw in December 2023 and it remains available to the profession and to the public on that web site.

7. Although the main focus of this complaint is the content and expression of the Judgment, I also refer below to some of the comments made by Newlinds DCJ recorded in (i) the transcript of the trial; and (ii) the transcript of the hearing of the application on 5 December 2023.

8. A number of the statements made by Newlinds DCJ in the Judgment, which are the subject of this complaint, received prominent dissemination in the national media, including in (i) an article headed "*Judge lashes DPP over rape cases*", *The Australian*, 15 December 2023; and (ii) an article headed "*DPP returns fire on 'rape case laziness'*", *The Australian*, 18 December 2023.

9. On 15 December 2023, in an attempt to address some of my concerns about the Judgment, the ODPP took the unusual step of issuing a media statement in relation to the Judgment.

10. 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*).

Dealing with the complaint

11. I refer to the "*Guidelines for complaints against Judicial Officers*" (14 November 2022) issued by the Commission pursuant to s 10(1) of the *Judicial Officers Act 1986*. I submit that this complaint is within the jurisdiction of the Commission and warrants reference to, and examination by, the Conduct Division.

Standards of judicial conduct

12. I refer to the "*Guide to Judicial Conduct*", Third Edition (Revised) published by The Australian Institute of Judicial Administration Incorporated in December 2023 (**CCJ Guide**). I acknowledge that the *Judicial Officers Act 1986* does not mandate the consideration by the Commission of the standards of judicial conduct set out in the CCJ Guide. Nevertheless, as the CCJ Guide indicates (p vi), it is a publication adopted by resolution on 31 October 2023 of the Council of Chief Justices of Australia and New Zealand, a Council which includes the Chief Justice of Australia and the Chief Justice of New South Wales. It may be regarded as an authoritative current statement of principles and guidelines for the conduct of judges of the District Court of New South Wales.

Grounds of the complaint

13. The conduct of Newlinds DCJ in *R v Martinez* involved an abject failure to meet an acceptable standard of judicial conduct in a number of respects, which I have set out in the summary above and address further below. The conduct is very likely to have eroded public confidence in the administration of justice and to have reduced public respect for the institution of the judiciary.

Ground One - Failure to meet basic standards of competence

14. Newlinds DCJ demonstrates a lack of awareness, or misunderstanding, of the law as it applies to the conduct of criminal trials and related applications. Four examples are addressed below.

15. In the Judgment at [25], having made it clear that he viewed the case as "*hopeless*" before hearing all of the evidence, Newlinds DCJ referred in strident terms to his belief that "*there is a substantial flaw in the system set up within the DPP of this State*" in respect of obtaining instructions before discontinuing criminal proceedings, and that an "*apparent policy of the DPP*" put advocates appearing on the DPP's instructions in a position of "*intolerable conflict*" with their professional obligations, which he considered requires advocates "*to form their own individual, subjective views, as to whether proceedings should be commenced and continued*" and not proceed "*regardless of instructions*" if they form the view that the case has no prospects of success.

16. The principal functions and responsibilities of the DPP are set out in s 7 of the *Director of Public Prosecutions Act 1986* (NSW) (DPP Act). 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 (s 33(2)(a)-(b) of the DPP Act).

17. Solicitor Advocates are employed officers under the DPP Act who generally run less complex criminal trials for and on behalf of the Director. A Solicitor Advocate cannot lawfully be delegated the function of discontinuing proceedings following a committal. Thus, it is not a matter of actual or apparent policy of the DPP that proceedings on indictment are conducted on the instructions of the Director, it is a requirement of the DPP Act.

18. Further, criminal trials are instituted and maintained in NSW by the Director and the ODPP in accordance with the Prosecution Guidelines. The Prosecution Guidelines are issued under s 13(1) of the DPP Act. Those guidelines address many aspects of the conduct of criminal trials, including that if 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, then the advocate is to consult with the victim and seek a direction to discontinue the proceedings (see Guidelines 1.7 and 5.6).

19. Accordingly, it is a grave error to think that an advocate appearing on behalf of the Director has a power or discretion, let alone an obligation, to discontinue proceedings on the basis of "*subjective opinion*" and without instructions.

20. I note that in the costs hearing Newlinds DCJ said "*I don't know anything about the director's guidelines*" (5/12/23 T 19.50) and *"[t]he 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."* (5/12/23/ T20.20)

21. The second lack of competence I highlight is the demonstration in the Judgment that Newlinds DCJ 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 Judgment erroneously records speculative findings or comments about the actual decision to prosecute, which was neither required nor permitted by the Act, or by the authorities he cited but then flagrantly exceeded. See Judgment at [3], [70]-[71]. This is also addressed in the fourth ground below.

22. The third example of lack of competence is the suggestion at the end of the paragraph in Judgment at [95] to the effect that a decision to prosecute in a sexual assault case ought to include "*at least being satisfied that the complainant has a correct understanding of the legal definition of sexual assault or sexual intercourse without consent*". That comment involves a startling 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 victim's understanding of the law.

23. The fourth example is conduct that occurred during the trial: see 28/11/23 T253 – 254. That example shows a lack of awareness and unwillingness to consider the application of well-used statutory provisions regulating the attendance of government experts by AVL in proceedings in NSW (see s 5BAA of the *Evidence (Audio and Audio Visual Links) 1998*).

24. 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. The ignorance of these matters, demonstrated by the reasons for Judgment, is a failure of competence.

Ground Two - Failures in judicial impartiality, detachment and demeanour

25. Intemperance and baseless criticism erode public confidence in the administration of justice and in the judiciary. See further CCJ Guide at [2.1], [4.1], [4.2], [4.3], [4.4], [4.5] and [4.12].

26. These repeated failures included:

    (a) a preparedness to state and publish extreme criticism of the conduct of criminal trials by me 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, which I address 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]).

Ground Three – Unreasonable criticism and vilification of a sexual assault complainant

27. Written comments in the Judgment, and oral comments of Newlinds DCJ in Court (which I understand were audible to the complainant), involved gratuitous and insulting criticism of the complainant. They were unbalanced and unjudicial. They were very likely to cause unnecessary hurt to the complainant, which is conduct contrary to the CCJ Guide at 4.12.

28. In particular:

(a) Judgment at [53], [95] and [97] in respect of a suggested misunderstanding of the law of sexual assault, in circumstances in which a complainant's understanding of the criminal law is irrelevant to any aspect of a criminal trial;

(b) Judgment at [83]-[86], which involves remarkable criticism. It 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;

(c) The use of loaded, stigmatising and gendered language that heighten the criticism, including in Judgment at [5] and [86] ("*gentlemen*"), [83] ("*Complainant's history of accusing*"), [85], [86] ("*tally of sexual assault allegations … to her credit*"); see also the repeated use of pejorative and stigmatising terms to describe the complainant's intoxication: *"she's obviously off her trolley"* (T348.34); "*raging alcoholic*" (T525.35).

29. The conduct of the trial and the Judgment are apt to deter complainants of sexual assault from coming forward. There are numerous barriers to the reporting of sexual offences, including community misconceptions and the fear of complainants that they will be blamed or judged (see KPMG and RMIT, *Exploring justice system experiences of complainants in sexual offence matters* (31 July 2023), 26; Julia Quilter and Luke McNamara, Experiences of Complainants of Adult Sexual Offences in the District Court of NSW: A Trial Transcript Analysis (2023) 259 *BOCSAR Crime and Justice Bulletin*, 3). The Judgment can only serve to exacerbate and justify those fears.

Ground Four – Baseless criticism of the Director of Public Prosecutions and the Office of the Director of Public Prosecutions

30. Newlinds DCJ repeatedly engaged in baseless criticism of me and the ODPP in a manner that is likely to reduce public confidence in the administration of criminal justice, in

particular, in respect of decisions about commencing and maintaining sexual assault trials. I refer in particular to the Judgment at [3], [84] and [95].

31. Newlinds DCJ came to determine the application immediately after a criminal trial in which he evidently formed a strident adverse view about the merits of the prosecution of Mr Martinez based on what he saw in Court. That did not relieve him of the obligation to deal with the application for a certificate for costs in a judicial manner.

32. In the consideration of the application, the judge's task involved the consideration set out in s 3(1) of the *Costs in Criminal Cases Act 1967*. Newlinds DCJ correctly cited authority to the effect that this involved a hypothetical question, based on all relevant facts before the judge hearing the application. The statutory inquiry did not require or permit an investigation into the actual decision to prosecute and there was no evidence before him about that decision. Yet, in that context, Newlinds DCJ was prepared to publish unjustified slurs against me and the ODPP, including:

    (a) the suggestion that no proper consideration was given to the decision to prosecute, no discretion was exercised, and a "*lazy and perhaps politically expedient course*" was taken to prosecute without considering the evidence (Judgment at [84]). This extreme and damaging criticism was made, I emphasise, in giving reasons for judgment in an application that did not call for an inquiry into, or judgment about, that decision;

    (b) the suggestion that he had a "*deep level of concern that 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 (Judgment at [95]). The judge had no basis to suggest such a process occurred in *R v Martinez*, let alone suggest the existence and application of a more generally applicable policy or expectation. This comment is particularly offensive given the judge's admitted ignorance of the Prosecution Guidelines (see [21]).

33. The malign speculation in 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.

Section 15(2) of the Judicial Officers Act 1986

34. I note that s 15(2) of the *Judicial Officers Act 1986* provides:

> (2) The Commission shall not deal with a complaint (otherwise than to summarily dismiss it under section 20) unless it appears 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.

35. In my submission, the conduct of Newlinds DCJ demonstrated by the materials provided with this complaint is such that the Commission should proceed to deal with the complaint based on either or both of the grounds in s 15(2).

Further information

36. Please let me know if the Commission requires or requests any further information or materials in relation to the complaint.

Yours faithfully

Sally Dowling SC
Director of Public Prosecutions

Encl:

1. Transcript of the trial of *R v Martinez*
2. Transcript of costs hearing in *R v Martinez*
3. *R v Martinez* [2023] NSWDC 552
4. Media Statement of ODPP dated 15 December 2023

Our File No. C/24/08
13 May 2024

Ms Sally Dowling SC
Director of Public Prosecutions
175 Liverpool Street
SYDNEY NSW 2000

By email only:

Dear Director,

Your complaint against his Honour Judge Newlinds of the District Court of NSW

I refer to the complaint made by you on 26 February 2024.

The Judicial Commission of NSW (the Commission) has considered the complaint and Judge Newlinds' responses to it dated 11 March 2024 and 19 March 2024.

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 has resolved to refer the complaint to a Conduct Division which will be constituted under Division 3 of the Act.

His Honour Judge Newlinds has been informed of the Commission's referral of the matter to a Conduct Division which will be constituted as soon as possible.

Yours sincerely,

U. Doyle
Chief Executive

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

REPORT OF CONDUCT DIVISION OF THE JUDICIAL COMMISSION OF NEW SOUTH WALES

COMPLAINT BY DIRECTOR OF PUBLIC PROSECUTIONS (NSW) AGAINST NEWLINDS SC DCJ

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.