

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

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

DATED: 5 NOVEMBER 2024

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- 1 This Conduct Division was constituted by resolution of the Judicial Commission of New South Wales (Judicial Commission) on 11 June 2024, pursuant to s 22(1) of the *Judicial Officers Act 1986* (NSW) (the Act), following the determination by the Judicial Commission that a complaint made on 8 April 2024 (the Complaint) by the Director of Public Prosecutions (NSW), Ms Sally Dowling SC (the Director), against his Honour Judge Whitford SC of the District Court (the Judicial Officer) should not be summarily dismissed.
- 2 The Complaint, made pursuant to s 15(1) of the Act, concerned remarks made by his Honour in reasons for judgment (*R v Smith (a pseudonym)* [2024] NSWDC 41) (*Smith*) published in determining an application for a costs certificate under the *Costs in Criminal Cases Act 1967* (NSW) (*Costs in Criminal Cases Act*). The Complaint relates to the remarks made from [59] of that judgment and, in particular, the remarks made at [68]-[79] and [81] (most of which are reproduced in due course).
- 3 The Director has complained that the impugned portions of the reasons in *Smith* demonstrate: (a) a failure to meet basic standards of competence; (b) failures of judicial impartiality; and (c) baseless criticism of the Director and the Office of the Director of Public Prosecutions (ODPP) without evidence, in denial of procedural fairness; and that this was in a manner very likely to reduce public confidence in the administration of criminal justice. The Judicial Officer accepts that there were errors of law and errors of judgment in his judgment in *Smith*, as will be explained in due course, but maintains that it has not been established that these have undermined public confidence in the administration of justice and argues that the Complaint has already been “dealt with” as a result of the process that has been followed in the

examination of the Complaint, such that notwithstanding that some parts of it may be substantiated it should now be dismissed.

- 4 We have addressed the complaints made in the Complaint under 4 grounds, corresponding to those set out under the headings (i)-(iv) of the Particulars of Complaint (reproduced in Schedule B).
- 5 For the reasons set out below, the Conduct Division has concluded that the Complaint has been partly substantiated and that it should not be dismissed; but nevertheless is of the view that this is not a matter which would justify Parliamentary consideration of the removal of the Judicial Officer from office as contemplated by s 28(1)(a) of the Act and explained below, having regard to the insight that his Honour has shown in relation to aspects of the Complaint that the Conduct Division has found to have been substantiated (including his acceptance that by the impugned judgment he made errors both of law and of judgment) and his sincerely articulated intention not to repeat the conduct which is the subject of the Complaint.
- 6 In view of the above determination, in the opinion of the Conduct Division the matter should be referred to the Judicial Officer's head of jurisdiction, the Chief Judge of the District Court, for such counselling and support as the Chief Judge considers appropriate in the circumstances as they apply at any time.

Procedural matters

- 7 Before setting out the remarks about which complaint is made and the Particulars of Complaint, it is convenient to set out the procedure that has been followed in this matter.
- 8 On receipt of the Complaint, the Judicial Commission conducted a preliminary examination of the Complaint (as required by s 18 of the Act). As part of that preliminary examination, by letter dated 10 April 2024, the Judicial Commission requested a response from the Judicial Officer to the allegations raised in the Complaint. That response (the First Response) was received on

30 April 2024. In his subsequent Response to Particulars (see below), the Judicial Officer says that his insight into how the judgment in *Smith* might reasonably be and has been received has developed since the First Response, explaining that in that response he concentrated on the genuine intentions which had motivated his remarks in *Smith* and attributing this to his perception that the Complaint concentrated on allegations of malice on his part in the writing and publication of the judgment. The Judicial Officer has also explained that he was in a heightened emotional state after he received and read the Complaint (he considering that, in its manner of expression, the Complaint contained material that was extraneous, gratuitously personal and intentionally inflammatory). With hindsight the Judicial Officer can now see that, at the time of the preparation of the First Response, his focus on those matters likely and regrettably obscured his appreciation of those aspects of the judgment in *Smith* which failed to meet an acceptable judicial standard.

- 9 After consideration by the Judicial Commission of the Complaint, and the Judicial Officer's First Response, the Judicial Commission determined that the Complaint should not be summarily dismissed under s 20 of the Act. The Judicial Commission resolved that the Complaint should be referred to the Conduct Division pursuant to s 21(1) of the Act, that resolution being in the following terms:

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 [Act], the Commission resolved to refer the complaint to a Conduct Division which will be constituted under Part 6 Division 3 of the Act.

- 10 The Conduct Division appointed by the Judicial Commission comprised (in accordance with s 22 of the Act): the President of the Court of Appeal, the

Hon Justice Julie Ward; a retired judge of appeal, the Hon Carolyn Simpson AO KC; and the Chair of Applied Mathematics at the University of Sydney, Payne-Scott Professor Nalini Joshi AO (a community representative of high standing in the community nominated by Parliament in accordance with Schedule 2A of the Act).

- 11 Pursuant to s 23 of the Act, the Conduct Division is required to conduct an examination of a complaint referred to it and, in conducting such an examination, the Conduct Division may initiate such investigations into the subject-matter of the complaint as it thinks appropriate. Pursuant to s 31(1) of the Act, the Conduct Division is not limited to the matters initially raised in the complaint and the Conduct Division may treat the original complaint as extending to other matters arising in the course of it being dealt with. Section 23(3) of the Act provides that the examination or investigations of the Conduct Division shall, as far as practicable, take place in private.
- 12 The Conduct Division has been assisted in its examination and consideration of the Complaint, and the Judicial Officer's responses and submissions in relation to the Complaint, by the Crown Solicitor's Office of NSW (the CSO) and Counsel Assisting (Ms K Edwards SC and Ms E Bathurst).
- 13 On 16 August 2024, the Judicial Officer was provided with materials to which the Conduct Division proposed to have regard in determining the Complaint (as listed in Schedule A but with the addition – explained below – of the report of a separately constituted Conduct Division into a related complaint) and with Particulars of Complaint.
- 14 On 22 August 2024, the Director sent two letters to the Assistant Crown Solicitor (as indicated above, the Crown Solicitor having been appointed as the solicitor assisting the Conduct Division). First, a letter: indicating that the request made in the Complaint for a direction pursuant to s 36(1) of the Act preventing publication of the matters contained in the Complaint was not pressed by the Director; annexing further media articles, correspondence and transcripts which the Director considered relevant to the Complaint; and

requesting that the Conduct Division take into account various additional matters not expressly raised in the original Complaint. Second, a letter requesting that the report dated 19 August 2024 of the separately constituted Conduct Division in relation to a complaint by the Director into the conduct of Newlinds SC DCJ (Newlinds Report) be included in the materials to which the Conduct Division would have regard in determining the Complaint.

- 15 The Judicial Officer provided his personally signed response to the Particulars of Complaint on 29 August 2024 (Response to Particulars). On the same date, the Judicial Officer's representatives wrote to the CSO confirming that the Judicial Officer had no objection to the Conduct Division having regard to the Newlinds Report, while noting that it was not evidence and that its relevance was limited given that the findings and recommendations in that report were based on the "entirely different facts and circumstances" of the conduct complained of in that matter.
- 16 The Conduct Division determined (and conveyed this by letters dated 5 September 2024 from the CSO to the Judicial Officer's legal representatives and to the Director, respectively): first, not to expand its examination of the Complaint to address the additional matters raised in the first letter dated 22 August 2024 from the Director (though noting that the Conduct Division would consider the Director's request that, if the Complaint were substantiated in whole or in part, the Conduct Division consider directing the Judicial Officer to do whatever was necessary to have the judgment in *Smith* removed from NSW Caselaw and any other platform upon which it is published) and, second, that the Newlinds Report would be considered by the Conduct Division for the purposes of determining the Complaint.
- 17 As to the former, we note that the Judicial Officer has voluntarily removed the *Smith* judgment from public access on NSW Caselaw, such that only restricted access has been available since 23 August 2024; and it was our view that nothing further was therefore required. As to the latter, we considered that it was appropriate to consider the Newlinds Report in circumstances where there is a degree of overlap between the Complaint and

the complaint made by the Director in respect of Newlinds SC DCJ, though recognising that not all aspects of the Newlinds Report are relevant to the Complaint. We made clear that our intention was to examine the Complaint and form our own opinion as to whether the Complaint is wholly or partly substantiated, or should be dismissed, as required under the Act, separate from the findings in the Newlinds Report (as we have done).

- 18 The Conduct Division considered that it was appropriate for the Complaint to be considered and dealt with on the papers (once the Judicial Officer had had an opportunity to consider the material and the submissions of Counsel Assisting the Conduct Division and to make submissions in response thereto). The Judicial Officer's legal representatives agreed, on the basis that, if it were to be considered that the Complaint was wholly or partly substantiated and the Conduct Division was considering referral for Parliamentary consideration of removal from office pursuant to s 28(1)(a) of the Act, then the Judicial Officer would be afforded the opportunity of a hearing.
- 19 On 5 September 2024, a timetable was set for the provision of written submissions by Counsel Assisting the Conduct Division and by the Judicial Officer, respectively. The time for provision of the Judicial Officer's response was extended at the request of the Judicial Officer to accommodate his personal arrangements. Submissions were provided to the Conduct Division by Counsel Assisting on 19 September 2024 and served on the Judicial Officer's representatives the following business day. Submissions were provided by the Judicial Officer's legal representatives on 10 October 2024.
- 20 After reviewing those submissions, the Conduct Division invited any brief supplementary submissions (with reference to the submissions that had been received as to Ground (ii) of the Complaint and on any other issue). The timeframe for those supplementary submissions was also extended at the Judicial Officer's request. Supplementary submissions were received by the Conduct Division from Counsel Assisting on 25 October 2024 and served on the Judicial Officer's legal representatives the following business day (28 October 2024). Supplementary submissions were received from the Judicial

Officer's representatives on 29 October 2024. Although complaint was made in the Judicial Officer's supplementary submissions that there was no timetable for the Judicial Officer to respond to "unanticipated submissions" in the 25 October 2024 supplementary submissions of Counsel Assisting, the Judicial Officer declined an opportunity afforded to him to provide further (and final) submissions in response thereto.

- 21 The Conduct Division has carefully considered the Complaint and all of the material and submissions referred to above and has reached the conclusions stated above for the following reasons.

Background to the Complaint

- 22 The background to the Complaint is set out in the Particulars of Complaint (see Schedule B) but may be summarised as follows.
- 23 The Judicial Officer presided over the trial by jury of the accused (Smith) commencing on 19 February 2024. The Director (in whose name the proceedings were brought) was represented by a Solicitor Advocate. After the adjournment of an earlier trial (on two counts of sexual assault), the accused was arraigned on a sole charge of sexual intercourse without consent, knowing there was no consent, contrary to s 61I of the *Crimes Act 1900* (NSW). The accused pleaded not guilty. The issues at trial were whether the prosecution had proved to the criminal standard that the complainant did not consent to the sexual intercourse and, if so, that Smith knew that she did not consent. The complainant was intoxicated and did not remember anything of the period when the offence allegedly occurred.
- 24 At the close of the Crown case, the defence applied, unsuccessfully, for a directed verdict of "not guilty" (22/2/24; T 196.27).
- 25 The accused gave evidence and was cross-examined.
- 26 The jury retired to consider its verdict at 1:10pm on 26 February 2024 and on the same day, very shortly thereafter at 2pm, returned a verdict of not guilty.

27 The accused subsequently applied, successfully, for a certificate for costs pursuant to s 2 of the *Costs in Criminal Cases Act*. By s 2, where, inter alia, an accused person has been acquitted at trial, the court “may” grant a certificate under that Act. By s 4, a certificate entitles the recipient to apply for a payment from Consolidated Revenue of the costs incurred in the trial. Section 3 specifies the circumstances under which a certificate may be granted. The Judicial Officer published reasons for the decision on that costs certificate application (*Smith*), those reasons being prepared overnight following the hearing of the costs certificate application. The Complaint solely concerns that part of the costs certificate judgment from [59] onwards, as noted above. The decision to grant the costs certificate was not the subject of an appeal. The Director contends (though the Judicial Officer submits otherwise) that (although the judgment in *Smith* contains appellable errors of law and the Judicial Officer 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 the Complaint. We agree that, in circumstances where there was no challenge to the grant of the costs certificate, an appeal was not a satisfactory means of redress or of dealing with the subject matter of the Complaint.

Smith

28 Turning then to those parts of the judgment in *Smith* which have led to the Complaint, we note as follows.

29 At [57], the Judicial Officer observed that, despite the requirements of s 3(1) of the *Costs in Criminal Cases Act* being made out, the grant of a costs certificate was not automatic and there remained a “residual discretion as to whether to grant a certificate, or not”. In respect of that residual discretion, the Judicial Officer said (at [64]) that:

Just as it might be appropriate, and as I understand it permissible, in individual cases to consider the accused’s conduct of the proceedings as a consideration relevant to the exercise of the residual discretion, the same ought sensibly be true of the conduct of the prosecution in the instant case.

- 30 At [66], the Judicial Officer referred to a number of observations he had made during the hearing to the Solicitor Advocate as to what the Judicial Officer perceived to be an “apparent want of merit” in the prosecution case; and set out an extract from the transcript from the hearing (20/2/24; T 63) in which the Solicitor Advocate had acknowledged that “it may not be the strongest of matters” and had concluded by saying that he could not “comment on policy”. In that extract from the transcript, the Judicial Officer had referred to the case bearing a degree of similarity to “a case which attracted some notoriety in the media and an adverse costs order before Christmas”. That was a reference to the decision of Newlinds SC DCJ in *R v Martinez* [2023] NSWDC 552 (*Martinez*) (this being the judgment the subject of the separate complaint by the ODPP against Newlinds SC DCJ, which culminated in the Newlinds Report).
- 31 At [67], the Judicial Officer went on to say that “[o]n any reasonable view, the prosecution case in the present matter was even weaker than the one with which his Honour was concerned”.
- 32 What next appears in the reasons (from [68]-[79]) is the nub of the Complaint and warrants being set out in full:
68. It is at least the recent experience of this Court that time and time again proceedings are brought without apparent regard to whether there might be reasonable prospects of securing a conviction. It is made plain in many of those cases, that they are brought, and maintained, on the instructions of “the Director’s chambers”, whatever the entity so described might embrace by way of decision-making, without apparent regard to any views which might be held by the person likely best placed to assess the strengths and weaknesses and merits otherwise of the prosecution, being the Solicitor Advocate or Crown Prosecutor, salaried or otherwise, briefed in the matter.
69. I make these observations for the purpose of endorsing some of the remarks of Newlinds SC DCJ in *Martinez* as to the difficulties to which this trend gives rise in the efficient conduct of the business of the Court and the problems generally to which it gives rise in the administration of criminal justice in this State.
- 33 We interpose here to note that although the particular remarks of Newlinds SC DCJ that the Judicial Officer was there expressly endorsing were not

identified, it is clear from the content of the Judicial Officer's further observations that the reference included at least part of what was said in *Martinez* at [95], namely:

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 ...

34 The Judicial Officer did not, however, expressly endorse the further statement of Newlinds SC DCJ (at [95] of *Martinez*) to the effect that an interrogation of the complainant's own understanding of the legal definition of sexual assault or sexual intercourse without consent was required. As Counsel Assisting have here noted, and the Judicial Officer's submissions emphasise, the Judicial Officer's comments as to prosecutorial decision-making centred around the need for compliance with Guidelines published by the ODPP pursuant to s 13 of the *Director of Public Prosecutions Act 1986* (NSW) (*DPP Act*) (as opposed to operating pursuant to some "opaque, even secret" policies – see [74] of *Smith*). The Guidelines deal with both the decision to institute proceedings, and discontinuance of proceedings that have been instituted.

35 We note that Newlinds SC DCJ had earlier said (at [25] of *Martinez*) 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 barristers 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.

36 These observations, at least in part, exposed ignorance (by Newlinds SC DCJ) of relevant statutory provisions. The *DPP Act* confers power on the Director to institute and conduct, on behalf of the Crown, prosecutions for

indictable offices in the Supreme and District Courts, including s 8(1)(a) committal proceedings for indictable offences. By s 33(2)(b) the power to discontinue proceedings against a person who has been committed for trial is expressly confined to the Director or a Deputy Director.

37 To the extent that Newlinds SC DCJ's remarks criticised the Solicitor Advocate for continuing the proceedings, they were misplaced (see Newlinds Report). Equally, to the extent that the Judicial Officer adopted those remarks in *Smith*, that adoption was misplaced. Once Smith was committed for trial, the Solicitor Advocate was precluded by statute from making any decision to discontinue the proceedings.

38 Newlinds SC DCJ went on (at [97] in *Martinez*) to express the opinion to the effect that, if no effort had been made (by those who had made the decision to commence the proceedings) to work out that the complainant had an "idiosyncratic and wrongheaded application of the law to the facts that she understood them to be", then the prosecutor had "failed to perform the important role of filtering hopeless cases out of the system".

39 In *Smith*, the Judicial Officer, having made clear that his purpose was to endorse some of the remarks of Newlinds SC DCJ in *Martinez*, made the following comments:

70. His Honour's observations warrant some express support, in my view, in circumstances where in the absence of clear recognition of a problem by judges, there is a substantial risk that it will go unremedied. Leaving aside any question of expression, lest it be thought that his Honour's observations somehow represented idiosyncratic and unwarranted criticism of the conduct of matters before this Court, it seems to me important that the issues be exposed wherever they are encountered in individual cases.

71. There were two significant problems highlighted by his Honour.

72. The first concerns the intolerable conflict with which representatives appearing in trials are burdened, between their instructions on the one hand and their obligations to the Court and by extension to the administration of criminal justice generally on the other. Those representatives are, as his Honour remarked, professionally obliged 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.

73. The second relates to the fact that for all practical purposes prosecutorial discretion is, in the majority of cases, the sole “check and balance”, as his Honour described it, in ensuring that scarce public resources are not needlessly devoted to futile prosecutions. Far too frequently, not just in this case, or in the case of *Martinez*, but also in numerous others, including some that have been the subject of reported public and private comment elsewhere, one cannot help but conclude that any reliance upon the Director’s own published guidelines has been abandoned, or at least abandoned in some categories of case, in favour of simply letting a jury (or a judge sitting alone) decide the merits of a case, without any professional examination of either the reasonable prospects of securing a conviction or the public interest in pursuing the prosecution.
74. The Court’s accumulating experience suggests there was nothing frivolous, nor indeed unique, about the deep level of concern expressed by Newlinds SC DCJ that there has developed within the Office of the Director of Public Prosecutions of this State some sort of unwritten policy or expectation to the effect that certain categories of case are now prosecuted without, or perhaps in spite of, a rational, professional, interrogation of the merits of the case and the prospect of securing a conviction. I share that concern. The concluding remark in the passage from the transcript in this case which I have earlier recited (at paragraph [66] above), offers some implicit support for that conclusion. If that conclusion is correct, it is a matter of profound concern for the administration of criminal justice in NSW. There is something disturbingly Orwellian, even surreal, about a significant public institution publishing guidelines, expressed to transparently reflect the general principles according to which it is said to operate in its core function, only then to operate in that core function by reference to opaque, even secret, policies which appear to be dissociated from, and to undermine, the published guidelines.
75. The expense of a criminal trial, not to mention the time which members of the community are called upon to devote to it as jurors, cannot be overstated. A criminal trial demands the expenditure of an enormous amount of predominantly public funds. Furthermore, each meritless proceeding that is conducted delays the resolution of other matters with a more worthy claim on that public expense and the devotion of the time of the Court and members of the community and the legal profession.
76. It also should not be overlooked that the only experience many community members have of the criminal justice system is through serving as a juror. If they are called upon to spend days, sometimes even weeks, resolving a matter that is patently without merit, they leave with an unfortunate, to say the least, view of the criminal justice system. There is a real risk that the commencement and maintenance of cases that have no reasonable prospect of succeeding risks drawing the criminal justice system into disrepute.

77. There is also a risk of significant and inappropriate stress and disruption being caused to an accused, sometimes over a long period and even extending to a deprivation of liberty as occurred in *Martinez*, from the initiation and maintenance of prosecutions which have no merit.
78. Equally, perhaps in many cases more, significant, is the fact that the anxiety, stress, humiliation and distress that will frequently be associated with a complainant's involvement in the criminal justice system can be profound. In many cases, that involvement necessarily will be sustained for long periods as a matter proceeds through the courts. Quite properly, in recent years much has been done to ameliorate the difficulties confronting complainants. The reality, however, is that there are limits to what can be done, if the conduct of a fair trial for persons accused of serious crimes is a consideration, as it must be. I do not think it is an overstatement to suggest that it is bordering on cruel to subject a complainant to the experience of a criminal trial, if a reasoned and objective professional assessment of the prospects of securing a conviction concludes that the prospects are less than reasonable.
79. For all these reasons, it seems to me that problems in the administration of criminal justice in the State, where they exist, need to be exposed. If judges remain silent in individual cases where a prosecution without reasonable prospects has been brought and maintained, then there is likely no prospect of a remedy for a problem that appears now to be endemic.

40 At [81], the Judicial Officer stated, as a "fact", "the prosecution was instituted, and maintained, either without any or any proper professional advertence to whether there existed reasonable prospects of securing a conviction, or in spite of such advertence" as a matter fortifying his conclusion that it was appropriate to issue a costs certificate.

Statutory provisions

- 41 By s 26(1) of the Act, the Conduct Division 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, or
 - (b) the complaint has not been substantiated.
- 42 The "grounds on which the Commission may summarily dismiss complaints" are stated in s 20(1) of the Act and, relevantly, include that the Judicial

Commission is of the opinion that, whether or not the complaint appears to be substantiated:

- (a) the complaint is one that it is required not to deal with,
...
- (e) in relation to the matter complained about, there is or was available a satisfactory means of redress or of dealing with the complaint or the subject-matter of the complaint,
- (f) without limiting paragraph (e), the complaint relates to the exercise of a judicial or other function that is or was subject to adequate appeal or review rights,
...
- (h) having regard to all the circumstances of the case, further consideration of the complaint would be or is unnecessary or unjustifiable.

43 The power to dismiss a complaint (whether summarily or not) includes a power to dismiss a part of a complaint (s 31(3)).

44 If it dismisses a complaint, the Conduct Division must give a report to the Judicial Commission setting out its conclusions (s 26(2)) and the Judicial Commission must give a copy of the report to the judicial officer concerned (s 26(3)). The Judicial Commission may 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 26(4)).

45 Pursuant to s 28(1) of the Act, if the Conduct Division decides that a complaint is wholly or partly substantiated:

- (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.

46 By s 53 of the *Constitution Act 1902* (NSW) (*Constitution Act*), the holder of judicial office may be removed from the office by the Governor, on an address

from both Houses of Parliament in the same session, on the grounds of “proved misbehaviour or incapacity”. Neither term is defined in the *Constitution Act*. In *The Honourable Justice Vince Bruce v The Honourable Terence Cole* (1998) 45 NSWLR 163 (*Bruce v Cole*) at 166E, the Court observed that “[t]he independence of the judiciary is, to a very substantial degree, dependent upon the maintenance of a system in which the removal of a judicial officer from office is an absolutely extraordinary occurrence”.

- 47 In the Report of Inquiry by a Conduct Division of the Judicial Commission of NSW in relation to Magistrate Jennifer Betts (the Betts Report) dated 21 April 2011, the Conduct Division stated that s 53 of the *Constitution Act* refers to “incapacity to discharge the duties of judicial office in a manner that accords with recognised standards of judicial propriety. Those standards ... include affording a fair hearing to all litigants, avoiding offensive remarks and bullying, and maintaining, in the court room, the decorum that enhances respect for the judicial decision-making process, and accordingly, the resultant decisions, and in general, the administration of law” (at [158]).
- 48 As we have not formed the opinion that this is a matter that could justify Parliamentary consideration of the removal of the Judicial Office from office, it is not necessary further to consider s 28(1)(a).
- 49 Unless the complaint is dismissed (summarily or otherwise), the alternative opinion that the Conduct Division may form under s 28(1)(b) of the Act in terms encompasses the referral of the matter back to the head of jurisdiction (“should therefore be referred back”) (cf the suggestion by the Judicial Officer in the present case that, if the Complaint were to be wholly or partly substantiated but the opinion in s 28(1)(a) is not formed, then the matter need not be referred back to his head of jurisdiction).
- 50 If the Conduct Division forms the opinion in s 28(1)(b), the Conduct Division must send a report to the relevant head of jurisdiction setting out the Division’s conclusions. Such a report may include recommendations as to what steps might be taken to deal with the complaint (s 28(3)). A copy of the

report must be given to the Judicial Commission (s 28(4)), and the Judicial Commission must give a copy to the judicial officer concerned (s 28(5)). The Judicial Commission may 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(6)).

Overview of Judicial Officer's position

- 51 As already noted, the Complaint raises issues as to judicial competence; judicial impartiality; and procedural fairness, which issues it is contended give rise to the likelihood or risk that public confidence in the ODPP and the administration of justice has been or will be undermined or reduced. We deal with each of those issues in due course but, first, set out an overview of the Judicial Officer's various responses to the Complaint.
- 52 In his First Response (which in hindsight the Judicial Officer recognises was prepared in a "heightened emotional state" which obscured his appreciation of the respects in which the judgment in *Smith* failed to meet an acceptable judicial standard), the Judicial Officer contended that the Complaint should be summarily dismissed by the Judicial Commission on three bases under s 20 of the Act.
- 53 First, that the Complaint was one that the Judicial Commission was not required to deal with under s 20(1)(a) of the Act because the Complaint, if substantiated, could not reasonably be thought capable of warranting Parliamentary consideration of the removal of the Judicial Officer from judicial office and nothing published in the judgment was capable of affecting the performance of his judicial or official duties and there was no question of his capacity.
- 54 Second, that the Complaint related to the exercise of a judicial or other function that is or was the subject of adequate appeal or review rights under s 20(1)(e), (f) of the Act (i.e., to appeal the judgment on the grounds of mistake of facts, irrelevant considerations, legal errors or denial of procedural fairness).

55 Third, that, having regard to all the circumstances, further consideration would be unnecessary or unjustifiable (see s 20(1)(h) of the Act) in circumstances where the complainant had elected not to appeal; the Complaint appeared to have been brought without regard to submissions made during the hearing which materially impacted the complainant's allegations; and where the making of a complaint of this kind had the capacity to undermine the independence and proper functioning of the NSW judiciary.

56 The Judicial Commission having determined that it was not appropriate summarily to dismiss the Complaint, in his subsequent Response to Particulars, the Judicial Officer made clear that he did not intend to attempt to defend error in his judgment and that he unreservedly accepted that elements of his judgment in *Smith* failed to meet an acceptable judicial standard (which he regretted and for which he apologised). The Judicial Officer further stated that he expected, and accepted, that the Conduct Division would likely make findings against him in respect of some at least of the Grounds stated in the Particulars of Complaint.

57 Significantly, in the Response to Particulars, the Judicial Officer stated that:

I see now that the Judgment gives rise to legitimate concerns about the wrongful consideration of an inferred basis for the actual decision to prosecute, and the perceived use of a Judgment as a vehicle for criticism of the processes of the Office of the Director of Public Prosecutions (ODPP), without the underpinning requisite to a fair process. Further, I accept that the language I used in part of the Judgment (while reflecting the strength of my concern) was inappropriate to the circumstances, and unjudicial. In those regards, I accept that I failed to meet the standards properly expected of a judicial officer and which I expect of myself.

58 The Judicial Officer expressed his genuine regret and remorse for those failures. We accept those statements.

59 More recently, in the written submissions dated 10 October 2024 made on his behalf by senior and junior counsel representing the Judicial Officer, the Judicial Officer has embraced the submissions of Counsel Assisting on a large number of issues; and the Judicial Officer accepts, with the benefit of reflection, that his intention (which he explains was to raise a genuine concern

about an issue within the administration of justice and his concerns for different participants in the criminal justice system) miscarried.

60 On one aspect, however, the initial written submissions for the Judicial Officer are at pains to clarify his position. In response to a submission by Counsel Assisting to the effect that it was apparent from the concessions made by the Judicial Officer in his Response to Particulars that his contentions for summary dismissal of the Complaint were no longer maintained, the Judicial Officer's position was clarified as follows. While still accepting that adverse findings may be made against him by the Conduct Division, the written submissions make clear that the Judicial Officer makes no concession as to the ultimate disposition of the matter by the Conduct Division in light of those findings. Rather, it is submitted for the Judicial Officer that further consideration of the Complaint is not necessary to discharge the protective work of the Judicial Commission (thereby warranting dismissal of the Complaint under s 26(1)(a), in combination with grounds in sub-ss 20(1) and (2), of the Act).

61 It is further submitted for the Judicial Officer that, even if not dismissed, the Complaint has already been adequately "dealt with" by the process that has taken place, noting that the Judicial Officer in his Response to Particulars has acknowledged the errors he made, has demonstrated that he has developed insight as a result of the matter, has extended a genuine apology, and has assured the Conduct Division that he supports the work of the ODPP; and that the Judicial Officer has voluntarily taken steps to restrict public access to the impugned judgment. It is submitted that the mere process of the Judicial Commission/Conduct Division investigation has been so salutary for the Judicial Officer that the Conduct Division can be sure that the Judicial Officer does not pose any risk to the public. We consider this submission in due course but here make clear that we have no doubt that this investigation will have had a salutary effect on the Judicial Officer, as evidenced by his Response to Particulars; but that this does not lead us to conclude that the Complaint should now be dismissed.

Complaint

Ground (i): Lack of competence

- 62 In the Complaint, the Director complains that the judgment in *Smith* demonstrates that the Judicial Officer failed to meet basic standards of competence. In the context of the Complaint, we do not take this to be an assertion of general incompetence to discharge the duties and obligations of a judicial officer (such as may meet the test of “incapacity” for the purposes of s 53 of the *Constitution Act*); rather, it is confined to the competence with which he carried out the function of determining Smith’s application for a costs certificate.
- 63 Moreover, the Director makes clear (as adverted to above) that the content of the judgment at [1]-[58] is not the subject of complaint (see [14] of the Complaint). The Director accepts that at [20]-[52] the Judicial Officer accurately summarises the relevant facts and correctly identified the issue as related to the element of consent; and notes that the Judicial Officer found that the requirements of s 3(1) of the *Costs in Criminal Cases Act* were made out (at [56]).
- 64 The Director also notes that the Judicial Officer correctly (and expressly) accepted that the judicial task in an application for a certificate for costs raises a hypothetical question based on the relevant facts before the Court at the hearing of the application (the Director referring to [14], [15], [19] and [54] of *Smith*).
- 65 The complaint here made is that the Judicial Officer 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* but, instead, explored, speculated as to and drew conclusions about, the assumed basis of the actual decision to prosecute (see the Complaint at [16], [18], [20(b)]). The Director further complains that, to the extent that the Judicial Officer relied on the “residual discretion” in s 2 of the *Costs in Criminal Cases Act*, this was to

construct a “fictitious legal framework as a vehicle for extreme criticism of the ODPP, when in truth that criticism was entirely collateral to the issues required to be determined” for the resolution of the application before him.

- 66 Counsel Assisting identify the essence of the Director’s complaint (on Ground (i)) as being that, notwithstanding his proper identification of the nature of the exercise required to be undertaken on such an application, the Judicial Officer inappropriately utilised the concept of a “residual discretion” to endorse the statements of Newlinds SC DCJ in *Martinez*, to criticise the conduct of the actual prosecution and to mount serious criticisms of the Director and the ODPP. The Director contends this illustrates a lack of basic competence on the Judicial Officer’s behalf.
- 67 Counsel Assisting submit that examination of the actual decision to prosecute in the particular case sits uncomfortably with the well-established question of what a hypothetical prosecutor in possession of all relevant facts (including facts that only emerged during the trial itself) would have done (that being the threshold standard under s 3(1) of the *Costs in Criminal Cases Act*). Counsel Assisting submit that such an approach would permit the conflation of the hypothetical prosecutor in possession of all relevant facts (including facts that only emerged during the trial itself) with the question of the actual decision to prosecute in the particular case, which is often made in the absence of knowledge of those facts; a conflation which Counsel Assisting submit the statutory scheme in the *Costs in Criminal Cases Act* seems structured to avoid.
- 68 It may be accepted that the existence and scope of any residual discretion under s 2 of the *Costs in Criminal Cases Act* is uncertain. Some decisions at an inferior court level appear to have considered the actual decision to prosecute as relevant to any “residual discretion” under s 2 (referring, by way of example, to *R v Cowled*; *R v Wilson* [2023] NSWDC 162 at [83]-[84]; *R v CPR* [2009] NSWDC 219; 9 DCLR (NSW) 362 at [34]-[35]; *R v DS* [2022] NSWDC 441 at [41]-[47]; *R v Duffy (No 2)* [2022] NSWDC 388 at [30]-[32]). It is not for the Conduct Division to rule on the correct approach to s 2; it is

sufficient to say that we accept the submissions of Counsel Assisting that these matters tend against the conclusion that the Judicial Officer's deployment of the "residual discretion" *per se* to make observations about the actual decision to prosecute exhibits "a failure to meet basic standards of competence" on the Judicial Officer's part.

69 However, having regard to the content of the observations made by the Judicial Officer (when expressly endorsing, at [72]-[73] of *Smith*, aspects of the observations in *Martinez*) and the further observations made by the Judicial Officer (see from [74] of *Smith*), combined with a denial of procedural fairness to the Director (Ground (iii) of the Complaint), Counsel Assisting submit that there has been a significant error of judgment on the part of the Judicial Officer in the manner in which the Judicial Officer proceeded.

70 In that regard, Counsel Assisting submit that it was imprudent (and we agree that it was imprudent, to say the least) for the Judicial Officer (to the extent that it appears that he did) to endorse the remarks of Newlinds SC DCJ in *Martinez* at [25] (set out above), in circumstances where the Judicial Officer had over 10 years' experience, sitting predominantly in the District Court's criminal jurisdiction, and has acknowledged in his Response to Particulars that he has never been under any misapprehension as to the terms of the *DPP Act* concerning the inability of advocates appearing on the Director's instructions to withdraw matters of their own initiative. We say "to the extent that it appears" that the Judicial Officer endorsed the comments of Newlinds SC DCJ at [25] because, as noted above, the Judicial Officer does not expressly identify which part of the observations in *Martinez* he is there endorsing. However, as we have observed, the reference to the matters at [72]-[73] in *Smith* makes tolerably clear that his Honour was intending to endorse the observations by Newlinds SC DCJ at [25] as set out above.

71 Counsel Assisting submit, and again we agree, that it was rash for the Judicial Officer (in a judgment written overnight, as the Judicial Officer makes clear that it was) to endorse statements of Newlinds SC DCJ which were

inconsistent with, or at least created the perception of being inconsistent with, the terms of the *DPP Act*.

72 We consider, as Counsel Assisting have submitted, that the Judicial Officer's endorsement of the remarks of Newlinds SC DCJ in *Martinez* would be understood as adding weight to the criticisms of the Director expressed by Newlinds SC DCJ; and that the Judicial Officer's reference to "leaving aside any question of expression" (at [70]) would convey to a reader that the Judicial Officer was in substance (if not in form) endorsing the observations of Newlinds SC DCJ.

73 Counsel Assisting further submit (and the Judicial Officer now acknowledges this) that the case before the Judicial Officer was not an appropriate vehicle for the Judicial Officer to have articulated the concerns that he there raised (as to perceived tension between the duties of the prosecutor and duties owed to the Director) and that in any event those concerns ought not to have been articulated in the manner that they were.

74 In particular, Counsel Assisting submit (and we agree) that there is nothing in the transcript or the submissions in the proceedings before the Judicial Officer, beyond a concession by the Solicitor Advocate that it "may not be the strongest of matters", which suggested that the Solicitor Advocate was called upon to advance a case that he believed had no merit, or that his views had been disregarded, or that he had been obliged to run the case despite his own misgivings after following the process outlined in the ODPP Guidelines; and hence it was inappropriate to endorse Newlinds SC DCJ's observations in *Martinez* where those observations had no application to the case before him. It is submitted, and we agree (and the Judicial Officer here accepts), that this approach amounted to taking into account an irrelevant consideration in the assessment of whether the costs certificate should issue and hence error in that sense.

75 Counsel Assisting submit (and we agree) that this error of judgment was exacerbated by the comments made by the Judicial Officer (at [73] of *Smith*),

following his Honour's endorsement of Newlinds SC DCJ's comments in *Martinez*; in particular, the Judicial Officer's reference to "numerous other" (unidentified) cases and the observation that commences "one cannot help but conclude ..." (which we consider can only be read as a statement of the Judicial Officer's own conclusion to that effect).

76 Counsel Assisting point out the following: that the question as to how the actual decision to prosecute came to be made was not before the Judicial Officer (let alone the question of how the Director came to prosecute the "numerous other" unidentified cases); that the Judicial Officer had no evidence as to the actual decision to prosecute the case before him (let alone in the "numerous other" unidentified cases to which his Honour referred); and that the prosecution was not given any real opportunity to address or lead evidence as to the actual decision to prosecute the case, nor was the Director given an opportunity to be heard on the very serious allegation that the ODPP Guidelines were abandoned in these cases. Counsel Assisting submit, and we agree, that this amounted to a denial of procedural fairness (see Ground (iii)) and that it was compounded by the strength of the language employed by the Judicial Officer (noting that the Judicial Officer has acknowledged in his Response to Particulars that this was "too strident").

77 Insofar as the Judicial Officer stated that the Solicitor Advocate's submissions (extracted at [66] of *Smith*) provided "implicit support" for the conclusion (at [74] of *Smith*) that there is "some sort of unwritten policy or expectation to the effect that certain categories of case are now prosecuted without, or perhaps in spite of, a rational, professional interrogation of the merits of the case and the prospect of securing a conviction", Counsel Assisting submit (and we agree) that a review of the extracts of the written and oral submissions from the hearing of the costs certificate application (to which the Judicial Officer drew attention in his First Response) do not provide "implicit support" for the ODPP operating pursuant to "some sort of unwritten policy" nor for the suggestion that cases are routinely prosecuted at the ODPP without, or in spite of, a rational, professional interrogation of the merits of the case. It is noted that the Solicitor Advocate's reference to not being able to "comment on

policy” was in response to the Judicial Officer’s comment in respect of expenditure of resources. Further, Counsel Assisting submit that if there was uncertainty as to the submissions made by the Solicitor Advocate (namely as to whether they provided support for the statements the Judicial Officer made at [74] of *Smith*), there was an error in the Judicial Officer not clarifying the import of those submissions before making the remarks at [74].

- 78 Insofar as the Judicial Officer has (both in the First Response and the Response to Particulars) emphasised that the conclusion as to the existence of “other policy considerations” was couched in a qualified way, Counsel Assisting submit (and we accept) that this does not adequately address the statement at the commencement of [74] in *Smith* to the effect that the “deep level of concern” shared by the Judicial Officer is supported or borne out by the Court’s “accumulating experience”; nor the assertion that the Solicitor Advocate’s response provided implicit support for that conclusion. In any event, if the Judicial Officer was simply making observations about a possibility of prosecutorial decision-making being approached in this fashion, then in our view this highlights the inappropriateness of making such strident observations at all, particularly without affording procedural fairness to the Director.
- 79 The Judicial Officer expressly accepts that some aspects of the judgment in *Smith*, especially in making some of the observations at [68] to [74], were imprudent and contain errors of law and judgment. Relevantly, the Judicial Officer accepts the following errors.
- 80 First, embarking on general observations and commentary about the apparent exercise of prosecutorial discretion otherwise than in accordance with the ODPP Guidelines in circumstances where (although he says the comments on one level were responsive to submissions made on the application) they were not strictly necessary for the determination of the costs application which was before him and were made without exposing fully his concerns so as to afford the ODPP a proper opportunity to respond. The Judicial Officer accepts that these errors (going beyond that which was strictly necessary for

the determination of the matter at hand – i.e., taking into account irrelevant considerations – and a failure to accord procedural fairness) are legal errors.

81 Second, expressing his concerns and observations in language too strident in the circumstances of those legal errors, which the Judicial Officer accepts risked diminishing public confidence in the ODPP's processes of considering the institution and continuation of prosecutions. The Judicial Officer accepts that this is an error of judgment.

82 Those errors having been established, as we find they have been, the relevant question for the Conduct Division is as to whether those errors of law and errors of judgment are such as to demonstrate a failure to meet basic standards of competence on the Judicial Officer's part. As mentioned above, we do not read the Director's Complaint as asserting general incapacity to discharge his function as a judge of the District Court.

83 Counsel Assisting submit that, while competence includes appreciation of what constitutes proper judicial conduct, the absence of such an appreciation in one instance (here, the making of the impugned observations in *Smith*) does not signify a general lack of basic competence.

84 Counsel Assisting emphasise (as also does the Judicial Officer) that this is the first complaint to the Judicial Commission made about the Judicial Officer since he was appointed over 10 years ago. Further, Counsel Assisting submit (and we agree) that in his Response to Particulars the Judicial Officer has demonstrated an appreciation that certain aspects of his reasons in *Smith* did not exhibit proper judicial conduct.

Determination as to Ground (i)

85 We consider that the errors of law and judgment identified in the submissions of Counsel Assisting (and appropriately conceded by the Judicial Officer) in relation to Ground (i) have been made out. The Judicial Officer erred in endorsing the observations of Newlinds SC DCJ that are inconsistent with the terms of the *DPP Act* and erred in proceeding to take into account, in

determining the costs certificate application, the concerns raised as to the exercise of prosecutorial discretion (see at [81] of *Smith*). We do not agree that the comments about the exercise of prosecutorial discretion were responsive to the submissions made by the Solicitor Advocate in the trial about not being able to comment on policy (20/2/24; T 63.45; and see reference to policy in the debate in the costs application at 27/2/24; T 5-6). On our review of the transcript, we accept the submission of Counsel Assisting that the remarks in the judgment were not responsive to the Solicitor Advocate's submission (that he could not comment on policy) and that the remarks in the judgment were contrary to the Solicitor Advocate's submission as to the lack of relevance of the actual exercise of the prosecutorial discretion.

86 Nor can we accept that the tone of the judgment was “careful” and “impartial to any individual participant in the criminal justice system, and expressing concerns about the impact of the administration of criminal justice more broadly”, as the Judicial Officer submits. The language in which the impugned observations were expressed is (as the Judicial Officer himself acknowledges) strident (for example, the statement that “[t]here is something disturbingly Orwellian, even surreal ...”). Indeed, if that language was carefully chosen, then it only emphasises to our minds the inappropriateness of the Judicial Officer's decision expressly to endorse the observations in *Martinez* in those terms. As to the submission by the Judicial Officer that his judgment was “impartial to any individual participant in the criminal justice system”, it is clear that the focus of the criticism as to prosecutorial decision-making and accusation of abandonment of or departure from published ODPP Guidelines can only have been directed to those within the ODPP responsible for such decision-making (including, at least implicitly, the Director herself). We accept that the concerns in *Smith* as to the administration of criminal justice were broadly expressed. Therein lies much of the problem – the Judicial Officer made sweeping allegations as to “a problem that appears now to be endemic” ([79] of *Smith*) having expressly stated that he shared the concern that there had developed within the ODPP “some sort of unwritten policy or expectation ...” as to the prosecution of matters “without, or perhaps

in spite of, a rational professional interrogation of the merits of the case and the prospect of conviction” ([74] of *Smith*).

87 Nevertheless, we do not consider that those errors manifest a failure by the Judicial Officer to meet basic standards of competence. It would be a rare judicial officer who did not, on occasion, make errors of law and even errors of judgment. Occasional errors of that kind do not bespeak a failure (in general terms) to meet “basic standards of competence”. We accept the Judicial Officer’s explanation that his intention (to draw attention to issues of concern to him in the administration of justice) miscarried; and that his adoption of certain observations of Newlinds SC DCJ was without sufficient critical thought at the time, was not strictly necessary for the determination of the costs application and was without exposing fully his concerns so as to afford the ODPP a proper opportunity to be heard. These errors appear to be an aberration in an otherwise unblemished judicial career.

88 Thus, we have concluded that (although there were errors of law and of judgment in the impugned decision) the complaint as to failure to meet basic standards of competence is not substantiated.

Ground (ii): Failure of judicial impartiality

89 The Director alleges that the Judicial Officer deliberately used the judgment in *Smith* as a tool for public criticism of the Director and the ODDP ([17] of the Particulars of Complaint) and publicly attempted to influence prosecutorial decision-making ([18] of the Particulars of Complaint). The Director further complains that, at [68]-[81] of *Smith*, the Judicial Officer makes “extraordinary and unfounded statements” about her and the ODPP “that amount to allegations of professional misconduct and misconduct in public office” (Particulars of Complaint at [20]).

90 Counsel Assisting note that a key aspect of these allegations is that the impugned paragraphs of the judgment in *Smith* exhibit a lack of judicial impartiality, or at least an appearance of judicial impartiality.

91 The Judicial Officer, in his written submissions responding to those of Counsel Assisting, emphasises that the Complaint alleges that he “deliberately” used the judgment as a tool for public criticism and that he “publicly attempted” to influence prosecutorial decision-making. The Judicial Officer says that what Ground (ii) therefore charges is a failure to be impartial by deliberately using the judgment in the manner alleged, and publicly attempting to influence prosecutorial decision-making; and that Ground (ii) ought not be found to be substantiated by a finding that the judgment gave an “appearance” of lack of judicial impartiality. We address this submission below.

92 Counsel Assisting submit that, having regard to the language deployed in the judgment in *Smith*, it would be open to find that that language gives rise to an appearance of lack of judicial impartiality. We agree. The endorsement by the Judicial Officer of concerns as to the exercise of prosecutorial discretion and the identification of a “trend” for proceedings to be brought without apparent regard to whether there might be reasonable prospects of securing a conviction are expressed in very strong terms. Even more trenchant views are expressed in the suggestion (said to be drawn from the Court’s “accumulating experience”) that there has developed some sort of unwritten policy or expectation of the kind set out at [74] of *Smith* and that, if there is such a policy or expectation, then there is something “disturbingly Orwellian, even surreal” about it ([74]).

93 The suggestion that the ODPP operates in accordance with “opaque, even secret, policies” dissociated from and undermining its published Guidelines is not only in very strong terms, in our opinion it cannot seriously be disputed that it must carry with it the risk of undermining public confidence in the administration of justice, particularly when made with the imprimatur of a judicial observation in a published judgment.

94 As Counsel Assisting have noted, the Guide to Judicial Conduct (3rd edition, revised, December 2023) (Guide), to which all judicial officers’ attention is drawn, addresses the risks involved in judicial officers participating in public debate (see [5.7.1]) and strongly cautions against involvement in political

controversy (unless the controversy itself directly affects the operation of the courts, the independence of the judiciary or aspects of the administration of justice). While the Judicial Officer here emphasises that his intention was to raise issues of concern as to the administration of criminal justice, it should be noted that the Guide goes on to explain that even then:

There is a risk that the judge may express views, or be led in the course of discussion to express views, that will give rise to issues of bias or prejudice in cases that later come before the judge even in areas apparently unconnected with the original debate. A distinction might be drawn between opinions and comments on matters of law or legal principle, and the expression of opinions or attitudes about issues or persons or causes that might come before the judge.

- 95 Counsel Assisting have referred in this context to a number of cases where judicial officers have engaged in public comment in a trenchant way or have taken part publicly in a controversial or political discussion, and this has been said to give rise to, at least, the apprehension of impartiality or bias (see *Gaudie v Local Court of NSW* [2013] NSWSC 1425; *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 and *Hoekstra v HM Advocate (No 2)* (2000) JC 391 (*Hoekstra*)).
- 96 Relevantly, in *Hoekstra*, the Court observed at [23] that, while judges are entitled to criticise developments in the law and raise concerns about the administration of justice, what they “cannot do with impunity is to publish either criticism or praise of such a nature or in such a language as to give rise to a legitimate apprehension that, when called upon in the course of their judicial duties to apply that particular branch of the law, they will not be able to do so impartially”.
- 97 Counsel Assisting in their initial written submissions submitted that, while it was open to find that Ground (ii) was substantiated on the basis that the language deployed in the judgment in *Smith* created an appearance of lack of impartiality, it would not be open to go further and find that the Judicial Officer deliberately or maliciously used the judgment as a tool for public criticism of the Director and the ODPP ([17] of the Particulars of Complaint) and as an

attempt to influence prosecutorial decision-making ([18] of the Particulars of Complaint). The Judicial Officer embraced those submissions.

98 We should note that the Complaint did not in terms assert that the conduct of which complaint was made was done maliciously. The concept of malice arose because the Judicial Officer in the First Response suggested that the allegations in the Complaint could be distilled to a number of core propositions, those including that he wrote the judgment with malicious intent and that he published the judgment with malicious intent. We do not accept that the Complaint encompasses an allegation of malicious intent, although we recognise that the statement in the Complaint of the Judicial Officer's "clear purpose" being to "support and inflame an unjudicial public campaign" against the Director and the ODPP and the statement to the effect that the Judicial Officer deliberately repeated and endorsed the "scurrilous" criticism made by Newlinds SC DCJ might be read as accusing the Judicial Officer of a malicious intention.

99 That said, it was after consideration of the above submission by Counsel Assisting noted at [97] above that the Conduct Division invited supplementary submissions. We did so because (with no disrespect intended) it appeared to us that Counsel Assisting's submission conflated the deliberate nature of the conduct and its motivation.

100 In supplementary submissions, Counsel Assisting clarified that what was sought to be articulated in their initial submissions was that it would not be open to the Conduct Division to find that the Judicial Officer was malicious in motivation or used the judgment in *Smith* as a vehicle to criticise the ODPP Guidelines *per se* (noting that the Judicial Officer sought to emphasise the importance of adherence to the ODPP Guidelines). They maintain that submission.

101 We consider that the concept of "malice" was an unfortunate intrusion into the consideration of the Complaint. In her Complaint, the Director did not expressly allege malice, although she did assert that the Judicial Officer

deliberately used the occasion of the judgment to express his views about the conduct of her office and made reference to “[t]he malign speculation” in the judgment. In any event, we make no finding of malice or malicious intention on the part of the Judicial Officer.

- 102 Counsel Assisting submit that it is open to make the more general finding that the Judicial Officer deliberately used the impugned part of the judgment in *Smith* as a tool for public criticism of the Director or the ODPP in how those ODPP Guidelines were being applied more generally. They make that submission for the following reasons: that the impugned observations were made deliberately (referring to the stated purpose of the observations being to endorse some of the remarks of Newlinds SC DCJ in *Martinez* – see [69] of *Smith*); and that the Judicial Officer accepts that the impugned observations were not necessary for the purposes of determining the costs application (from which it is submitted that it may be reasonably inferred that the purpose of making those observations in a publicly available judgment was deliberately to use that part of the judgment as a tool to criticise the alleged “trend” (see [69] of *Smith*) and, therefore, effectively to criticise the Director’s prosecutorial decision-making).
- 103 The Judicial Officer, in his supplementary submissions, addresses the potential finding “that the Judicial Officer deliberately used the judgment as a tool for public criticism of the Director or the ODPP and as an attempt to influence prosecutorial decision making”, pointing out (correctly) that it merges [17] and [18] of Ground (ii) in the Particulars of Complaint (see Schedule B). We interpose to note that this assumes that there would be one composite finding rather than the “and” signifying that there may be two findings in relation to this Ground.
- 104 In the supplementary submissions dated 29 October 2024, the Judicial Officer contends that the Conduct Division does not have evidence before it to reach the required level of satisfaction to make, and cannot lawfully make, the findings under particulars [17] and [18] of Ground (ii) of the Complaint.

- 105 The Judicial Officer accepts that Particular 18 (the public attempt to influence prosecutorial decision-making) contains an element of intention but submits that the potential (merged or composite) finding is “arguably more serious” in that it charges the Judicial Officer with deliberately using the judgment as a “tool” both to criticise and to influence. Further, it is submitted that the use of the word “tool” is significant, in that it implies that any such criticism or influence was improper.
- 106 We interpose here to put at rest the concern here raised by the Judicial Officer. We do not contemplate making a composite finding as such. We have treated [17] of the Particulars of Complaint (deliberate use of the judgment as a tool for public criticism) as a separate particular to [18] of the Particulars of Complaint (public attempt to influence prosecutorial decision-making). That said, the complaint as to reference to use of the judgment as a “tool” is misplaced; not only because that is precisely what is the subject of [17] of the Particulars of Complaint but also because the Judicial Officer himself has referred to use of the judgment as a “vehicle” to expose his concerns and we see no relevant difference in the import of “tool” and “vehicle” in this context. A more neutral term might indeed be to refer to the use of the judgment as a “means” of expressing the Judicial Officer’s concerns and criticism of the Director and/or ODPP.
- 107 That said, the Judicial Officer argues that findings as to the matters complained of in [17] and [18] could only be made on the basis that the Conduct Division did not accept his responses to the Complaint as to the concerns he held and what he was trying to achieve by addressing those concerns in the judgment in *Smith*. As we explain in due course, we do not accept that submission. It is not inconsistent with the Judicial Officer having a genuine concern about issues in the administration of criminal justice to find that the Judicial Officer either deliberately used the judgment in *Smith* as a tool for public criticism of the Director and/or ODPP; or that he publicly attempted to influence prosecutorial decision-making (or, indeed, to make both such findings).

- 108 Insofar as the particulars here being addressed ([17] and [18]) raise the question of the Judicial Officer's intent, the Judicial Officer submits that there is no evidence before the Conduct Division that would allow us to reach actual persuasion that he deliberately conducted himself in the manner alleged (noting the "Briginshaw" test (*Briginshaw v Briginshaw* (1938) 60 CLR 336; [1938] HCA 34 per Dixon J)).
- 109 It is submitted that where there are two possible characterisations of the Judicial Officer's conduct (one "well-intentioned, even if flawed", the other "calculated and deliberate"), exactness of proof is required to reach a finding as to the latter. The Judicial Officer here emphasises that he was "attempting to highlight what appeared to him to be a trend in cases brought by the ODPP", including in the present case, to act otherwise than in accordance with its own published Guidelines; and that in doing so he explained "through" the judgment in *Smith* the serious problems for the administration of criminal justice in NSW if the reasonable prospects of securing a conviction are ignored, or not properly assessed. As indicated above, we do not accept that well-intentioned conduct and deliberate conduct are mutually exclusive concepts (and the introduction of "calculated" goes beyond the relevant particular of complaint).
- 110 The Judicial Officer accepts that it may be open to find that, "through" the judgment in *Smith*, he attempted to encourage the ODPP to adhere to its own published Guidelines in bringing and maintaining prosecutions having regard to the prospects of securing a conviction but argues that that is not conduct that would engage the protective function of the Judicial Commission; and he submits that it is not open to find that his stated concerns about the importance of adherence to the ODPP Guidelines were driven by improper intentions.
- 111 The Judicial Officer submits that there is no basis to find that he attempted to influence prosecutorial decision making more broadly (i.e., more broadly than to use the judgment to encourage the ODPP to adhere to its own Guidelines), "including in any particular case, including the instant case, or any particular

types of criminal cases”. We do not accept this submission. By the time of the judgment in *Smith*, self-evidently the decision to prosecute was well and truly past. Any attempt through the judgment in *Smith* to encourage the ODPP to adhere to its own Guidelines can only have related to future prosecutorial decision-making.

112 Further as to [17] of the Particulars of Complaint, the Judicial Officer maintains his position that the language of the judgment in *Smith* is not about the Director nor any other individual. We have already pointed out that the criticisms made of prosecutorial decision-making can only sensibly be understood as including the Director as a decision-maker within the ODPP. Nevertheless, the Judicial Officer submits that in the absence of such language, it is not open to find that he deliberately used the judgment as a “tool” to criticise the Director or any other individual. The Judicial Officer submits that the language of the judgment demonstrates that he was careful to avoid making any personal criticisms, and confined his remarks to an apparent process and the consequences for the administration of justice in the adoption of a process which involved the institution of proceedings ignoring, or in spite of, advertence to the Guideline requirement of a reasonable prospect of securing a conviction.

113 As to the complaint at [18] of the Particulars of Complaint asserting a public attempt to influence prosecutorial decision-making, the Judicial Officer submits that there is no evidence that would lead to actual persuasion that he had the “alleged ulterior motivation for writing and publishing the Judgment online”, i.e., that he deliberately identified that this was the judgment to level improper criticism at the Director and/or the ODPP, and that he then disseminated it with the intention and in a manner that would make that improper criticism “public”.

114 The Judicial Officer embraces the submission of Counsel Assisting that there was nothing improper about making the judgment in *Smith* available for publication on NSW Caselaw. We agree. The Judicial Officer submits that members of the legal profession would receive and understand the judgment

in a way that is different to most members of the broader public (arguing that they would understand the difference between the Judicial Officer's qualified observations in the judgment as opposed to findings). That, of course, says nothing to what a lay reader (or the media) might make of those observations. The Judicial Officer reiterates the statement made in his First Response to the effect that it had occurred to him "that if published in a judgment in a matter in which they [the expressed concerns] arose it might promote appropriate discussion and examination of the issue; in the interests of the administration of justice in NSW, not in its derogation".

Determination as to Ground (ii)

- 115 As indicated above, we have approached [17] and [18] of Ground (ii) of the Particulars of Complaint separately.
- 116 As to [17], there can be no doubt that the Judicial Officer expressed in the judgment in *Smith* his concerns as to an issue arising in the administration of justice (namely, what he perceived as a trend in prosecutorial decision-making) in very trenchant terms (and that he did so without evidence as to the actual decision-making in this case and in circumstances where he now accepts that the issue did not arise for the purposes of the application there being determined).
- 117 Accepting that judges, like other members of the public and the legal profession, are entitled to raise concerns about serious matters relating to the administration of justice, in our opinion it is entirely inappropriate for the Judicial Officer to have expressed his concerns in the manner (and forum) in which he did. So, for example, the suggestion of an opaque or secret policy within the ODPP to act otherwise than in accordance with its published guidelines is extraordinary and raises a real concern as to the administration of criminal justice. It had no evidentiary foundation and created the appearance of lack of judicial impartiality.
- 118 In our view, it cannot seriously be suggested that the observations were not deliberately made – since the Judicial Officer himself made clear (see at [69]

of *Smith*) that he was intentionally making those observations in order to endorse those in *Martinez* (saying that he did so “lest it be thought that [those observations] somehow represented idiosyncratic and unwarranted criticism”). It is not necessary to go further than the Judicial Officer’s own words in his judgment in *Smith* to conclude that the observations were deliberately made and were deliberately made to endorse what the Judicial Officer understood to be the “criticism” expressed in *Martinez*.

- 119 We do not accept that it is necessary to find that the Judicial Officer was not well-intentioned in order to make a finding that the complaint at [17] is substantiated. We accept that the Judicial Officer has genuine concerns which led him to make the impugned observations. That does not mean they were not deliberately made. They self-evidently were. And they were most emphatically observations that were critical of the decision-makers within the ODPP insofar as the accusation was as to the trend in decision-making identified at [69] of *Smith* and the conclusion was expressed, as one that one could not help but reach, at [73] as to the abandonment of reliance on the ODPP’s own Guidelines. The “public” nature of the criticism lies in the fact that the criticism is contained in a judgment which (accepting that there was nothing improper or out of the ordinary in this regard) was published and publicly accessible (for a time).
- 120 As to the deliberate use of the judgment as a “tool” for public criticism, bearing in mind that the observations were not necessary for the purpose of determining the costs application itself, as the Judicial Officer accepts, it can only be concluded that the Judicial Officer deliberately used the judgment as the means (or tool), or in his own words “vehicle”, to express his concerns (and his criticism) of the manner in which prosecutorial decisions were perceived by him to have been made within the ODPP. Were that not the case there would have been no point to the making of those observations at all. The Judicial Officer’s own response acknowledges that he was making these observations “through” the judgment in the expectation or belief that this might promote “appropriate discussion and examination” of the issue he had identified. The fact that the observations are said to have been “well-

intentioned” does not gainsay that they were made using the judgment as a tool or vehicle for the making of those observations.

121 As to the distinction drawn between criticism of the Director personally and criticism of the ODPP more generally, as previously noted the Director has responsibility within the ODPP in relation to prosecutorial decision-making. Criticism of the perceived abandonment of reliance on ODPP Guidelines and speculation as to the existence of opaque, even secret, policies as to prosecutorial decision-making, can only reasonably be understood as criticism of not just some nameless decision-maker(s) within the ODPP but as criticism of the Director’s overview or management of the ODPP. While not explicit, we consider that the criticism made in the judgment of prosecutorial decision-making must be understood as criticism that included the Director.

122 Thus, we find this aspect of the Complaint ([17] of the Particulars of Complaint) to be substantiated.

123 Similarly, we have concluded that the observations were made as a public attempt to influence prosecutorial decision-making. We note that in his Response to Particulars the Judicial Officer states that:

Second, there was never in my mind any intention of interfering in the exercise of prosecutorial discretion. I am and have always been acutely aware of the existence and scope of the prosecutorial discretion. I had no interest or intent in interfering with that discretion in its exercise in any individual case, as distinct from identifying what appeared to me to be significant problems for the administration of justice when or if the exercise of the discretion miscarries, as I believed, and still believe, it did in the instant case.

124 That is impossible to reconcile with the first sentence in [70] of *Smith*, where the Judicial Officer said “in the absence of clear recognition of a problem by judges, there is a substantial risk that it will go unremedied”, and the last sentence of [79], where the Judicial Officer said that “there is likely no prospect of a remedy for a problem that appears now to be endemic”. It is difficult to see any reason to include in the judgment the impugned observations as to the “problem” that the Judicial Officer perceived to be

“endemic” in relation to prosecutorial decision-making other than to influence prosecutorial decision-making, since it is that very issue to which those observations are addressed. While the Judicial Officer does not (in his observations at [74]-[79] of *Smith*) speculate specifically as to the prosecutorial decision in the actual case that was before him (referring more generically to the concern if the ODPP Guidelines were not followed “in favour of simply letting a jury (or a judge sitting alone) decide the merits of a case, without any professional examination of either the reasonable prospects of securing a conviction or the public interest in pursuing the prosecution”), the Judicial Officer does refer (at [79] in *Smith*) to a need to expose “a problem that appears now to be endemic”.

125 Indeed, as noted above, in his supplementary submission, the Judicial Officer (while saying that there is no basis to find that he attempted to influence prosecutorial decision-making more broadly) explicitly acknowledges that it is open to find that “through” the judgment in *Smith*, he attempted to encourage the ODPP to adhere to its own published Guidelines. The suggestion that conduct of this kind (well-intentioned as we accept it may have been) does not engage the protective function of the Conduct Division misses the gravamen of the conduct as we see it. It is not appropriate for judicial officers to engage in strident terms (in a judgment as to an issue where this was not necessary for the purposes of the decision at hand) in criticism of perceived trends in prosecutorial decision-making or speculation (in what can only be seen as highly inflammatory terms – “disturbingly Orwellian, even surreal”) as to the existence and operation of opaque or secret policies within the ODPP. It is difficult to see anything more likely to undermine public confidence in the administration of justice in this State (and it was both wholly without evidentiary foundation and without affording procedural fairness to the Director).

126 The Judicial Officer goes on to criticise the actual decision-making in the present case in referring at [81] (as a matter of “*fact*”) to the “fact that the prosecution was instituted and maintained, either without any or any proper professional advertence to whether there existed reasonable prospects of

securing a conviction, or in spite of such advertence” (something that fortified his conclusion that it was appropriate to issue a costs certificate).

127 Thus, Particular [18] of the Particulars of Complaint is also substantiated.

128 We note that, in his Response to Particulars the Judicial Officer has made clear that it was never his intention deliberately to insult the Director or the ODPP or to influence prosecutorial discretion, saying that:

First, it was never my intention for the Judgment to embarrass, to insult, to question the integrity of or to cause reputational harm to any person, or more broadly to undermine confidence in the ODPP, the Courts or the justice system in any way. The staff of the ODPP ought not have any concern about my support for the work that they do or the way that they do it. I respect the work of all participants in the criminal justice system. The work is mentally and emotionally taxing, relentless and involves subject matter often concerning deeply disturbing human conduct. Where the liberty of people and the mental state of complainants is involved, the work is especially arduous. The staff of the ODPP are to be commended for the difficult work that they do.

129 We see no reason not to accept that statement and we consider that it is important to record those acknowledgments in this report.

130 We note that, in his Response to Particulars, the Judicial Officer has recorded that in his First Response he was upset and unsettled by the reference to matters relating to his private life (at [27(b)] and [27(c)] of the Complaint) and to the allegation that the judgment in *Smith* “may have been informed or inspired by some collaboration or conspiracy with” journalists (referred to at [28] of the Complaint). Lest there be any doubt, we consider that the reference to those matters in the Complaint was unfortunate and we make no finding as to (nor have we placed any weight on) those assertions by the Director (which in essence amount to speculation as to the source of the reference to “reported public and private comment” in [73] of the judgment in *Smith*).

131 The Judicial Officer explained in his First Response that his reference to “private” when referring in *Smith* to “reported public and private comment” was to the comments made by Acting Judge Conlon, in a private capacity,

reported in an article in the *Weekend Australian* in 2023. The Judicial Officer accepts that the fault in the ambiguity of this reference is his but has explained that “it did not occur to me at the time of writing that it might be read as though I was referring to some private, personal communications known only to me”. We accept that explanation and acknowledgement of ambiguity. We further accept the submission of Counsel Assisting that the only relevance that might be attached to these paragraphs of the Complaint is that, as recorded in the Judicial Officer’s Response to Particulars, it explains the differences in tone between the First Response and the Response to Particulars. We consider that the references in the Complaint to the Judicial Officer’s private life, in particular, were provocative and unnecessary.

132 In conclusion as to Ground (ii), we find: first, that the complaint that the Judicial Officer deliberately used the judgment as a tool for public criticism of the Director and/or the ODPP is substantiated; and, second, that the Judicial Officer publicly attempted to influence prosecutorial decision-making is also substantiated.

133 While we consider that Ground (ii) is partly substantiated, we do not consider that this warrants referral for Parliamentary consideration of removal of the Judicial Officer from office, particularly in light of the acknowledgment of error by the Judicial Officer and his sincere expression of remorse and regret.

Ground (iii): Failure to afford the Crown procedural fairness

134 The Director complains that the Judicial Officer failed to afford the ODPP procedural fairness by failing to give notice of, and an opportunity for, the ODPP to be heard on the Judicial Officer’s comments on prosecutorial decision-making (at [68]-[81] in *Smith*). In particular, the Director complains that the allegation in *Smith* at [73] (of there being numerous other cases where the Director’s own published guidelines have been abandoned) was never put to the Solicitor Advocate, nor were those numerous other cases ever identified by the Judicial Officer.

- 135 Counsel Assisting have emphasised (and we agree) that the importance of affording procedural fairness is acute in circumstances where the statements in *Smith* at [73] were highly critical of those responsible for prosecutorial decision-making within the ODPP (which we accept would include the Director) and likely to have tarnished the reputation of the ODPP (and of the Director). Counsel Assisting have pointed to the observation of Mason CJ, Dawson, Toohey and Gaudron JJ in *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 (*Ainsworth*) at 578, that it has long been accepted that reputation is an interest attracting the protection of the rules of natural justice; and that it mattered not that in the case before it, that instead of an express finding, there was an adverse recommendation. Counsel Assisting note that in *Ainsworth*, the tabling of the Commission's report, although having no legal effect of consequence, had the practical effect of damaging the appellants' reputations which entitled them to declaratory relief.
- 136 Counsel Assisting submit that, similarly in the present case, the observation by the Judicial Officer that "one cannot help but conclude" that the Director's published Guidelines had been abandoned in view of unwritten policy (see [73]-[74] of *Smith*), without giving the Crown notice of, and an opportunity to be heard in respect of, these criticisms was a denial of procedural fairness. We agree (and, as we note below, the Judicial Officer does not cavil with this).
- 137 Counsel Assisting submit (and we agree) that the comments made by the Conduct Division in respect of Newlinds SC DCJ's comments at [95] of *Martinez* in the Newlinds Report at [184] are here apposite, namely that this was "profoundly unfair and was done in violation of the 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".
- 138 In his Response to Particulars, the Judicial Officer has expressly acknowledged that he failed to afford the Crown procedural fairness (as particularised in [19] of the Particulars of Complaint); that there was no

evidence about any pattern of apparently unsustainable cases coming before the Court, nor did he outline details of his own experience of cases in which he had issued costs certificates; and that it was inappropriate to have included reference to his general conclusions even in a qualified way and to have referred to the perceived existence of a practice or policy generally in relation to the institution of proceedings. In the written submissions in response to those of Counsel Assisting, the Judicial Officer accepts that Ground (iii) relating to procedural fairness can be found to be substantiated “to some extent”.

Determination as to Ground (iii)

- 139 This ground of the Complaint can be disposed of relatively briefly in light of the acknowledgments made by the Judicial Officer. In our opinion, the ground is clearly substantiated. The failure of the Judicial Officer, prior to publishing the judgment in *Smith*, to identify and give the ODPP an opportunity to be heard on the serious allegation that in numerous other (unidentified) cases the Director’s Guidelines had apparently been abandoned, amounted to a fundamental denial of procedural fairness. We accept the submission by Counsel Assisting that those comments illustrate that the Judicial Officer took the unjudicial course of deciding the case by reference to material that was not in evidence and was not disclosed to the ODPP.
- 140 Ground (iii) is therefore substantiated. Moreover, we do not accept that the denial of procedural fairness in this context necessarily gave rise to a right of appeal (in circumstances where the matter the subject of complaint was expressed simply as fortifying the conclusion as to the grant of a costs certificate; and there was no issue taken with that grant); and hence we do not accept that there was an adequate avenue of relief so as to warrant dismissal of the matter pursuant to s 20(1)(e) and (f) of the Act.
- 141 Again, however, in light of the Judicial Officer’s acknowledgment of his error in this regard, we do not consider that the substantiation of Ground (iii) of the

Complaint warrants referral for Parliamentary consideration of removal from office.

Ground (iv): Criticism of the Director and ODPP very likely undermined and/or risked undermining public confidence in the administration of criminal justice in NSW

142 Finally, the Director complains that the Judicial Officer's criticisms of the Director and the ODPP in *Smith* at [68]-[81] fell short of the appropriate standards of a judicial officer in the circumstances because they were very likely to have undermined and/or risked undermining public confidence in the administration of criminal justice in NSW. The Director complains that the speculation as to prosecutorial decision-making (referring to *Smith* at [68]-[69], [72]-[74] and [81]) and the Judicial Officer's intemperate language in those paragraphs are very likely to have reduced public respect for both the institutions of the ODPP and the District Court of NSW (Complaint at [36]-[37]).

143 The Director also complains that the Judicial Officer's decision to publish promptly the judgment in *Smith* on NSW Caselaw, in circumstances where the Judicial Officer was endorsing previous judicial comments in *Martinez* which he knew to have "attracted some notoriety in the media" (see 20/02/24; T 63; extracted in *Smith* at [66]), was intended to endorse publicly, reinforce, and escalate the criticisms of the Director and the ODPP in the media which had occurred as a result of the *Martinez* decision.

144 Counsel Assisting submit that it is open to find that the impugned statements in *Smith* could have had and, given the publicity following the judgment, are likely to have had the effect of reducing public confidence in the administration of criminal justice. We agree, particularly in respect of the Judicial Officer's extraordinary (and it might be said irresponsible) suggestion (without evidentiary foundation) that prosecutorial decisions may be made with reference to "opaque, even secret" policies and without, or perhaps in spite of, "a rational, professional, interrogation of the merits of the case and the prospect of securing a conviction".

- 145 While pointing out that some of the publicity in the materials before the Conduct Division relates solely to the *Martinez* decision, Counsel Assisting note that the Judicial Officer's express endorsement of Newlinds SC DCJ's observations in *Martinez* generated further media comment, which Counsel Assisting submit was likely to have the effect of reducing public confidence in the administration of criminal justice in the manner described. We agree.
- 146 Counsel Assisting acknowledge that not all criticism of the Director is likely to reduce public confidence in the administration of criminal justice; nor is it suggested that judges should necessarily be held responsible for the manner in which the media chooses to report their comments. Counsel Assisting further argue that judicial officers, at least in the ordinary case, should not be expected to make their judgments 'with an eye' to how they might be reported (or even distorted) in the media since this would be inimical to the fundamental independence of the judiciary. It is noted that the Judicial Officer has stated that he was not aware of much of the media reporting attached to the Complaint, and that he finds much of that comment to be inflammatory and misinformed.
- 147 However, Counsel Assisting point out that in the present case the Judicial Officer made his comments stating his awareness of (some) existing commentary in the media and that he was making his comments with the express intention of supporting some of Newlinds SC DCJ's observations in *Martinez*.
- 148 Counsel Assisting submit that, in this regard, the observations of the Conduct Division in the Newlinds Report at [187]-[189] are apt also in the present case:

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.

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.

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.

149 In his Response to Particulars, the Judicial Officer acknowledged that:

I should never have expressed the general views and conclusions which I did in the Judgment about the ODPP's processes and policies, all the more so for want of adequate exposure during argument of the matters informing the conclusions which are reflected in the Judgment. I accept too that the Judgment contains language which, while not intended so to do, risks diminishing public confidence in the ODPP's processes of considering the institution and continuation of prosecutions. I see now, but did not have in contemplation at the time (as I should have), how that may have contributed to critical commentary in the media... I profoundly regret now that I did not.

150 In the written submissions prepared on his behalf, it is submitted that the Judicial Officer did not (contrary to what was found to be the case in the Newlinds Report) embark on "high-handed commentary on the conduct and general practices of a statutory office holder" and that the terms and tone of the judgment in *Smith* demonstrate that the Judicial Officer "attempted to deal with the issue in a more careful way, impartial to any individual participant in the criminal justice system, and expressing concerns about the impact for the administration of criminal justice more broadly". We disagree. In our opinion, the trenchant language used by the Judicial Officer tells against such a conclusion.

151 The Judicial Officer in his submissions in response to the Counsel Assisting submissions notes that in his Response to Particulars he accepted that the judgment in *Smith* contains language which (he submits unintentionally) risks diminishing public confidence in the ODPP's processes of considering the institution and continuation of prosecutions but he argues that this language must be read in the context of the whole of the judgment, which included concerns about aspects of the administration of justice of which it is said that the instant case was emblematic. In that context, the Judicial Officer notes that, consistently with modern public attitudes and a trauma-informed

approach to the experience of sexual assault complainants, his concerns included, among other things, the potential impact of meritless prosecutions on complainants (referring to [77]-[78] of *Smith* set out earlier).

152 The Judicial Officer submits that, insofar as Ground (iv) may be substantiated, any findings ought to be moderated taking into account the following matters.

153 First, that on the basis of the material before the Conduct Division, there is insufficient material to find that the Judicial Officer's conduct *in fact* undermined public confidence in the administration of criminal justice in NSW such that it is submitted that the first limb of Ground (iv) (about actual undermining of public confidence) cannot be substantiated and it is submitted that this first limb of Ground (iv) must be dismissed under s 26(1)(b).

154 Second, that the impugned observations were not about the Director, nor any other individual. (We have commented on this already – see at [121] above.)

155 Third, that the Judicial Officer did not endorse all of what was said in *Martinez* and, to the extent that the Judicial Officer did endorse statements in *Martinez*, this should be read in the context of the whole of the judgment in *Smith*, including that the Judicial Officer did not make any criticisms about the Director nor about any other individual (such that it is submitted that Ground (iv), particular (i), cannot be substantiated by a proxy argument relying on *Martinez*).

156 Fourth, that the actual or likely impact of the judgment must be considered in a broader, chronological context, including that there were Media Releases made by the Director or the ODPP on 22 June 2023 (before *Martinez* was delivered), on 15 December 2023 (in relation to *Martinez*), and on 1 March 2024 (in relation to *Smith*).

157 It is submitted that there could not safely be a finding that the remarks concerning the exercise of prosecutorial decision-making and the “intemperance” with which they were expressed were “very likely to have

reduced public respect for both the institutions of the ODPP and the District Court of NSW”, including because (by reference to various of the Media Releases and reports in the press about the judgment in *Smith* which are included in the material before the Conduct Division) there was a public reply to the judgment and media reporting about it. In particular, the Judicial Officer submits that, where it was publicly reported that an internal ODPP “whistle-blower” was suggesting that judges (not only himself) were correct in their claims, any reduction in public confidence in the ODPP cannot be fairly attributed to the Judicial Officer, and is actually supportive of judges of the District Court (contrary to Ground (iv), particular [20](iii)). We do not accept this contention.

158 Further, the Judicial Officer submits that, to the extent that Ground (iv) may be found to be substantiated, it would also be open for that finding to be moderated by the making of additional findings that: by the time the judgment in *Smith* was delivered, there was an ongoing public discourse about the administration of criminal justice in NSW and, in particular, ODPP processes in instituting and continuing prosecutions, where the merits of cases are a consideration, and the ODPP had communicated to the public by Media Releases that the paramount consideration was whether a prosecution was in the public interest; that the Judicial Officer was not aware of much of the media reporting attached to the Complaint and considers much of that comment to be inflammatory and misinformed; and the Judicial Officer attempted to communicate his genuine concerns about the particular issue through the judgment, but accepts that he made an error of judgment in the way that he did it. (There was no evidence of “ongoing public discourse about the administration of criminal justice in NSW” other than that precipitated by the judgment in *Martinez* to which fuel was added by the judgment in *Smith*.)

159 The Judicial Officer submits that the case of *Smith* was a serious matter where the risk of an unjust conviction was palpable; and that it was legitimate to call into question the institution of the prosecution in *Smith* and, if confined only to that case, the expressed concerns were warranted. The Judicial Officer submits that the fact that he “used the vehicle of his costs Judgment to

raise his legitimate concerns” ought not be the subject of an adverse finding. (As adverted to earlier, this submission appears to acknowledge that the judgment in *Smith* was indeed used as the means by which or through which (i.e., as the tool) to express the Judicial Officer’s concerns, which squarely contradicts the submission made in his supplementary submissions that it cannot be safely concluded that he used the judgment as a “tool” for public criticism of the ODPP.)

160 Further, it is submitted that the Judicial Officer’s contribution to the public discourse was not a major aspect of the media coverage when compared to the media reporting of *Martinez*, and did not correspond with damaging criticisms made by journalists in their media reports.

Determination as to Ground (iv)

161 We consider that the impugned observations in the judgment in *Smith* did indeed risk undermining public confidence in the administration of criminal justice in New South Wales and are likely to have reduced public respect for the institution of the ODPP. The use of such trenchant language (in a publicly accessible judgment) in which the observations were made (the reference to the position being “disturbingly Orwellian, even surreal”) and the nature of those observations (speculation as to the ODPP operating pursuant to opaque, even secret policies) only needs to be stated to establish that point. In that sense, the media reporting and debate (accurate or otherwise) is almost beside the point. The very making of the observations, with the imprimatur of judicial office, inevitably carried the risk of undermining public confidence. The Judicial Officer accepts that the language he used carried that risk (though he says it was unintentional).

162 It is not necessary to find that public confidence was in fact undermined by the making of the impugned observations nor is it relevant in this context that there may have been support by the media or others (such as the whistleblower to which the Judicial Officer has referred) for the observations. The fact is that the making of those observations in the language in which

they were made, and in circumstances where the observations were not necessary for the determination of the costs application, was not consistent with appropriate judicial conduct. In any event, the media reports included in the materials before the Commission themselves provide evidence as to the undermining of public confidence in the administration of justice as a result of the observations. We do not accept the Judicial Officer's submission that there is no evidence that public confidence has been undermined.

163 That said, the Director's complaint that the Judicial Officer's decision to publish the *Smith* judgment on NSW Caselaw was deliberately intended to endorse publicly, reinforce and escalate the criticisms of the Director and the ODPP in the media which had occurred as a result of *Martinez* (see particular [20](iv) of this Ground (iv)) has not in our view been substantiated. We accept the submission of Counsel Assisting that there are many good reasons for judicial officers to publish their decisions on NSW Caselaw (not least, we would say, is the principle of open justice) and that there is no basis to conclude that the Judicial Officer's decision to publish the judgment in this case was motivated as the Director contends. Judicial officers are encouraged to publish their judgments on NSW Caselaw and most do so shortly after judgment has been delivered. We also note that, in our view quite appropriately, the Judicial Officer has voluntarily taken steps to restrict public access to the *Smith* judgment.

164 We do not accept that the Judicial Officer's conduct is in some way ameliorated by the fact that the impugned observations were not addressed individually to the Director (since the observations were addressed to the exercise of prosecutorial discretion within the ODPP of which she is the Director). Nor do we consider that the broader chronological context assists the Judicial Officer (since it is clear that he was aware that the observations in *Martinez* had gained some notoriety in the media and must have been aware that endorsement of those observations in his own judgment would attract media attention – it can only be assumed that the Judicial Officer in that sense was intending to have some say in the debate as to the observations that he was expressly endorsing).

165 It may be accepted that the Judicial Officer was expressing genuinely held concerns as to matters in the administration of criminal justice in this State. However, the manner and terms in which he did so was not conducive to the maintenance of public confidence in the administration of justice, nor was it appropriate judicial conduct.

166 Thus, Ground (iv) is in part substantiated.

Opinion to be formed under s 28(1)

167 In circumstances where the Complaint has been partly substantiated, the question is as to what (if any) opinion should be formed as provided for under s 28 of the Act.

168 Counsel Assisting submit (and we agree) that, while the seriousness of some of the Judicial Officer's statements in *Smith* ought not be understated, in all the circumstances we would not conclude that the subject matter of the Complaint could justify Parliamentary consideration of the removal of the judicial officer complained about from office. It is submitted that, by his Response to Particulars, in particular, the Judicial Officer has shown insight into his behaviour, accepting that the language he used in part of the judgment was inappropriate to the circumstances and unjudicial, such that in this instance he failed to meet the standards properly expected of a judicial officer.

169 It is noted that there is no allegation of inappropriate behaviour or lack of competence in the lead up to the judgment in *Smith* (or as to the conduct of those proceedings); that this is the first complaint to the Judicial Commission made about the Judicial Officer since he was appointed over 10 years ago; and that the Judicial Officer has operated predominantly in the Court's criminal jurisdiction.

170 Counsel Assisting submit (and again we agree) that "proved misbehaviour" or "incapacity" warranting a referral for Parliamentary consideration of removal has not been established on the materials before the Conduct Division.

Rather, Counsel Assisting submit that the matter should be referred back to the Chief Judge of the District Court pursuant to s 28(1)(b) of the Act.

171 It is noted that the Conduct Division is required to send a report to the Chief Judge of the District Court setting out its conclusions (s 28(2)) and that such a report may include recommendations as to what steps might be taken to deal with the Complaint (s 28(3)).

172 Counsel Assisting have made submissions about whether the Conduct Division ought to recommend that the Chief Judge remove the Judicial Officer from sitting in the Court's criminal jurisdiction (at least to the extent that includes proceedings brought by the ODPP, as opposed to all criminal matters) for the foreseeable future. Counsel Assisting have identified matters both in support and against such a recommendation. In support, it is submitted that there may remain an ongoing apprehension of the Judicial Officer's impartiality arising from the criticism in the judgment in *Smith* of the Director or those with decision-making authority in the ODPP in the exercise of prosecutorial discretion. Counsel Assisting understand that no recusal applications have been made in any criminal matters in which the Judicial Officer has been involved since the Complaint, noting that it was reported in the media on 6 May 2024 that he disclosed the existence of the Complaint in a sitting in Newcastle. However, Counsel Assisting note that it cannot be said that there is no possibility that in future cases prosecuted by the Director, an application for the Judicial Officer to recuse himself may be made on the grounds of apprehended bias. Such an application will necessarily be determined by the Judicial Officer himself after hearing any argument advanced.

173 Against such a recommendation, Counsel Assisting note that the Complaint does not disclose any ongoing lack of competence or understanding of the criminal law on behalf of the Judicial Officer; nor any other suggestion of misconduct. It is noted that, in the course of the *Smith* proceeding prior to the judgment, the Judicial Officer discharged his duties competently, including declining the defence application for a directed verdict.

- 174 Counsel Assisting again point out that the Judicial Officer has sat predominantly in the Court's criminal jurisdiction since he was appointed as a judge of the District Court on 24 June 2013 (without complaint to the Judicial Commission) though has been sitting predominantly in the civil jurisdiction since the Complaint. Counsel Assisting note that if an application for the Judicial Officer to recuse himself was brought by the Director, the assessment of whether there might be an apprehension of bias would need to be assessed against the background of the Judicial Officer's acknowledgement and apology to the ODPP (if that were to be made public), all his conduct in *Smith*, and his subsequent steps to restrict access to the judgment. They note that it is very difficult to anticipate the circumstances and outcome of such an application as each has to be assessed on a case by case basis.
- 175 On balance, Counsel Assisting have submitted that the Conduct Division should not recommend that the Judicial Officer not sit on ODPP cases in the Court's criminal jurisdiction. They submit that the decision as to any future steps is best left to the Chief Judge who will have the benefit of the Conduct Division's report if the matter is referred back to her Honour.
- 176 The Judicial Officer, as noted earlier, has submitted that the Complaint should be dismissed, notwithstanding that parts of the grounds may be substantiated; or that it should be dismissed in part. We reject the submission that the Complaint should be dismissed.
- 177 In written submissions for the Judicial Officer, it is contended that it is no longer open to conclude that his conduct warrants interventions into his judicial role in order to protect the public (it being noted that the legislative and Constitutional framework under which the Conduct Division operates allows no opportunity for punitive or disciplinary action against the Judicial Officer; and that the proceedings are entirely protective). While we accept the protective (non-punitive) nature of the proceedings, we consider that maintenance of public confidence in the administration of justice requires that we address the substance of the Complaint (even though it is not open to the Conduct Division or Judicial Commission to publish the report). That is

because the records of the Judicial Commission will record that the Complaint has been partially substantiated and (in the now accepted to be unlikely event that the Judicial Officer will repeat such conduct) those records might become relevant for any future complaint of this kind. We do not consider it a proper exercise of our function simply to dismiss the Complaint on the basis that the Judicial Officer has now accepted that he made errors of judgment and has expressed his intention never to repeat those errors. It is necessary in our opinion to emphasise the importance of adherence by judicial officers to the standards expected of them. Substantiating the Complaint in part is not for any punitive purpose; it is for the protection and maintenance of the rule of law.

178 The Judicial Officer submits that although “it is now clear that whilst there are some aspects of the Complaint which will likely be upheld”, many aspects of the Complaint have not been substantiated and, to that extent, it is submitted that these must be dismissed under s 26(1)(b) of the Act. The Judicial Officer complains that “the most egregious aspects of the Complaint were framed in an alarming manner, reasonably characterised as provocative and unnecessary”. We accept that parts of the Complaint were emotively framed and that references to the Judicial Officer’s personal life were unfortunate and unwarranted.

179 The Judicial Officer submits that the Conduct Division is now in a very different position to the Judicial Commission when it first received the Complaint; and he contends that, unlike the Judicial Commission, the Conduct Division may now reasonably dismiss the balance of the Complaint under s 26(1)(a) of the Act by reason of s 20(1)(h), namely, that, having regard to the whole of the circumstances of the case as it now stands, further consideration of the Complaint is unnecessary. This is said to be because the whole of the circumstances of the case (including the Judicial Officer’s responses and Counsel Assisting’s submissions), now establish that the protective purpose of the Act is not engaged. Again, we reject the contention that further consideration of the Complaint has been rendered unnecessary by the process that has been adopted to examine and consider the Complaint or

that the effect of that process on the Judicial Officer's appreciation of his errors of law or judgment should lead to its dismissal entirely.

- 180 The Judicial Officer submits that, properly analysed, the submissions of Counsel Assisting do not advance any basis for a conclusion that the performance by him of his judicial duties was or is affected by anything other than potential errors of law and errors of judgment, in this single case. The Judicial Officer submits that, apart from those grounds that are not substantiated, the balance of the Complaint is reduced to potential legal error (which he submits could have been the subject of appeal), and an error of judgment in a manner of expression in one instance in an otherwise long and unblemished record of service. As already noted we do not accept that the errors that have been demonstrated could satisfactorily have been redressed by an appeal in circumstances where the Crown does not challenge the grant of the costs certificate.
- 181 The Judicial Officer also submits that those errors, individually and collectively, do not bespeak judicial misconduct or incompetence, or incapacity for judicial office, of the type which is the object of the legislative purpose of the protective jurisdiction conferred by the Act and which would be required to be identified in order to fit the Judicial Commission and the Conduct Division's role properly and squarely within the Constitutional boundaries which protect the independence of a Chapter III judicial officer. While we agree that the Complaint as to incompetence was not substantiated, we do not accept that there is no protective purpose to be served by upholding those parts of the Complaint that have been substantiated. Apart from the likely further salutary effect on the Judicial Officer of the upholding of parts of the Complaint, we also consider that referral to the head of jurisdiction should provide additional support for the Judicial Officer's ongoing judicial role.
- 182 The Judicial Officer submits that there is no risk that he will ever repeat the errors that he made in the case of *Smith*. We accept that this is his intention

but we do not accept that this leads to the conclusion that the Complaint should be wholly dismissed.

- 183 As to whether the Conduct Division could dismiss the balance of the Complaint under s 26(1)(a) on the basis in s 20(1)(h) of the Act, Counsel Assisting accept that it is open to consider taking such a course, particularly in light of the Response to Particulars and the Judicial Officer's motivations. However, Counsel Assisting also submit (and we agree) that it is open to conclude that the combined force of all the circumstances militates towards a determination not to dismiss the Complaint (and to refer the Complaint back to the head of jurisdiction) under s 28(1)(b) of the Act. Counsel Assisting emphasise in this regard the following matters: the stage of the Conduct Division's examination of the Complaint; the public nature of the judgment in *Smith* (including its comments about *Martinez*); the ensuing media comment; the acceptance by the Judicial Officer that the judgment in *Smith* (though unintentionally) risked diminishing public confidence in the ODP's processes of consideration of the institution and continuation of prosecutions; and the Judicial Officer's acceptance that elements of the judgment, including its strident language, failed to meet an acceptable judicial standard.
- 184 The further submission is made by the Judicial Officer that, even if the Complaint is not wholly dismissed, action under s 28(1) of the Act is not mandatory. The Judicial Officer says that the Conduct Division is not statutorily required to form either of the opinions in s 28(1). The Judicial Officer submits that, in the alternative, there could be a finding that parts of the Complaint are substantiated and a conclusion that the matter does not justify Parliamentary consideration of the removal of the Judicial Officer; but no further opinion is formed of the kind in s 28(1)(b).
- 185 Alternatively, the Judicial Officer submits that there is no need to refer the matter back to the Chief Judge of the District Court; that there would be no utility in this course; and that this is a case where no further action is required under s 28 of the Act as the matter has already been sufficiently "dealt with" as a result of the proceedings before the Judicial Commission and the

Conduct Division. We reject that contention. The Judicial Officer goes on to submit that if the matter is referred back to the Chief Judge no recommendations are required to impact any decisions that the Chief Judge may make, including any decisions as to the extent to which the Judicial Officer may preside over criminal cases. We accept this last submission as explained in due course.

186 As to the submission that it is not mandatory to form one of the two opinions provided for by s 28(1), if the Complaint be substantiated, Counsel Assisting submit that this is not correct and that the approach proposed by the Judicial Officer is not permitted on the proper construction of the Act. Counsel Assisting argue that if the Conduct Division decides that the Complaint is wholly or partly substantiated, s 28(1) applies, under which there are only two options: the formation of the opinion under s 28(1)(a) or the formation of the opinion under s 28(1)(b); and that if the second of those opinions is formed there is no discretion as to whether or not to refer the complaint back to the head of jurisdiction (emphasis being placed on the word “therefore” in s 28(1)(b)). It is submitted that this describes the mandatory statutory consequence of the Conduct Division forming the opinion under that subsection. Counsel Assisting argue that this is supported by the text of s 28(2) which provides that if the Conduct Division forms an opinion referred to in s 28(1)(b) the Conduct Division “must” send a report to the relevant head of jurisdiction setting out the Division’s conclusions.

187 In any event, Counsel Assisting submit that even if there were a discretion as to whether or not to refer the Complaint back to the head of jurisdiction, it is open to conclude that it is appropriate to take that course in the present case. Counsel Assisting argue that the role of the head of jurisdiction in the context of such a matter is important (it being a role that includes providing such counselling, advice and support to the Judicial Officer as the Chief Judge considers appropriate in the circumstances and managing the Court taking into account the relevant circumstances at the time). We agree and in those circumstances it is not necessary to express a concluded view as to whether the proposed approach by the Judicial Officer is permissible under the Act.

- 188 As to the submissions made by Counsel Assisting as to the risk of future apprehended bias applications in ODPP prosecutions, the Judicial Officer submits that this risk is extremely remote and that it ought not be persuasive in the determination of this matter (reference being made to the test for such an application as applied in *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 15, namely the fair-minded lay observer *Ebner* test – see *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; [2000] HCA 63). The Judicial Officer submits that there are a number of factors which make it entirely unlikely that the Judicial Officer would need to recuse himself in any future proceedings in which the ODPP is a party. We do not need to record those submissions in light of the conclusion we have reached on this issue.
- 189 Finally, the Judicial Officer submits that the report of the Conduct Division should either be subject to a direction pursuant to s 36 of the Act restricting its publication so far as it records matters contained in documents lodged with the Conduct Division or, in the alternative (which he submits is preferable), the Conduct Division should make a notification to the Judicial Commission not to provide a copy of any report to the Director. The basis for this is the Judicial Officer's concern for confidentiality to be maintained in circumstances where there was swift media attention after provision of the Newlinds Report to the Judicial Commission and then to the Director.
- 190 The Judicial Officer emphasises (and we accept) that the role of the Conduct Division is protective, not punitive. It is submitted that publication of any report in the present matter risks the public shaming of the Judicial Officer that may carry an unintended punitive aspect, which he submits would be unfair, out of proportion to what he did, and foreign to the protective purpose of the Act. Emphasis is placed on the fact that the Judicial Officer has accepted that by the judgment in *Smith* he made errors (of law and judgment); has accepted responsibility for failing in the respects earlier identified to meet an acceptable judicial standard; and has apologised and expressed thoughtful contrition for any unintended consequences of those errors.

191 Counsel Assisting submit, to the contrary, that there should be no restrictions on the Commission providing the report to the Director for the following reasons: that the impugned observations were made in a judgment published on NSW Caselaw (although the text of the judgment is no longer accessible by the public); that the Judicial Officer made those impugned observations with the stated purpose of endorsing the observations of Newlinds SC DCJ in *Martinez* which had already been the subject of media reports at the time the judgment in *Smith* was published; that in the course of the Conduct Division's examination of the Complaint to date, no interested party has applied for a direction under s 36 of the Act preventing or restricting the publication of evidence given before the Division or of matters contained in documents lodged with the Division; and (significantly in our view), to the extent that the Judicial Officer has now acknowledged error and expressed his regret and apology for that conduct in his Response to Particulars, that would not be known to the Director unless she was provided with a copy of any report.

Determination as to Opinion under s 28(1)

192 As already noted, we have concluded that the conduct found to have partly substantiated the Complaint does not warrant the referral of the matter for Parliamentary consideration of removal of the Judicial Officer from office, that being a course that has been recognised to be "an absolutely extraordinary occurrence" (see *Bruce v Cole* to which reference has earlier been made). We see the Judicial Officer's conduct as an aberration in an otherwise unblemished judicial career.

193 We have, however, formed the opinion that the matter should be referred back to the relevant head of jurisdiction (s 28(1)(b)). We do not accept the submission that such a referral would be of no utility; nor do we consider that such a referral can properly be described as punitive. We consider that the role of the head of jurisdiction in such a case is important – to counsel and support the Judicial Officer, including providing advice and support as to how any concerns he has as to issues arising in the administration of justice might properly be raised in accordance with appropriate judicial conduct.

- 194 We do not accept that it would be appropriate to dismiss the Complaint in its entirety in circumstances where significant parts of it have been substantiated. That would not, in our opinion, properly reflect our consideration and determination of the Complaint. Our report makes clear those aspects of the Complaint which have been substantiated and those which have not. The only part of the Complaint that should formally be dismissed is Ground (i), on the basis that failure to meet the basic standards of competence was not substantiated.
- 195 We do not consider that a notification should be given precluding the Judicial Commission from providing a copy of the report to the Complainant (see s 28(6) of the Act). Rather, we consider it entirely appropriate that the Judicial Commission (if it be so minded – and it is a matter for the Judicial Commission to decide) provide a copy of this report to the Director. The Complaint makes clear the personal toll that the making of the impugned observations has had on the Director and its detrimental impact on the ODPP. To the extent that the Judicial Officer has now acknowledged error and has expressed his regret and apology for that conduct, the Director will only be apprised of this by provision of a copy of the report (since there has been no suggestion of an apology having been made directly to her by the Judicial Officer).
- 196 As to the suggested restriction on publication under s 36 of the Act, we do not consider that to be appropriate (nor would it be practical). The impugned observations were made in a public judgment (although now removed from public access), were deliberately made to endorse the similar observations and criticism by Newlinds SC DCJ, and were the subject of media reports. In those circumstances, and given the very real risk of public confidence in the administration of justice being undermined by those impugned observations (and the media reports that evidence that confidence has already been undermined by those observations) it is not appropriate that the Conduct Division's report be subject to restrictions other than those mandated by the Act itself (as to which see s 37 of the Act).

197 We do not accept that publication of the report to the Judicial Commission without a notification of the kind contemplated by s 28(6) and without any restriction under s 36 of the Act as the Judicial Officer has requested, amounts to a punitive exercise. As noted, it is our view that it is appropriate in all the circumstances that the Director be provided with a copy of the report, acknowledging the validity of much of her Complaint against the Judicial Officer and recording his acknowledgment of error, regret and apology for such conduct, and intention never to repeat such conduct. In our view those matters may also go some way to minimising the likelihood of future recusal applications in ODPP prosecutions.

Conclusion

198 For the reasons set out above, we have concluded that the Complaint is partly substantiated but that the complaint which is the subject of Ground (i) should be dismissed.

199 In summary, we have found that the following Grounds of the Particulars of Complaint have been substantiated:

Ground (ii): That the Judicial Officer deliberately used the judgment in *Smith* as a tool for public criticism of the Director and the ODPP.

Ground (ii): That the Judicial Officer publicly attempted to influence prosecutorial decision-making.

Ground (iii): That the Judicial Officer failed to afford the ODPP procedural fairness by failing to give notice of, and an opportunity for the ODPP represented by the Solicitor Advocate to be heard on, the Judicial Officer's comments on prosecutorial decision-making in the *Smith* judgment at [68]-[81].

Ground (iv): That the Judicial Officer's criticisms of prosecutorial decision-making within the ODPP (and at least implicitly of the Director)

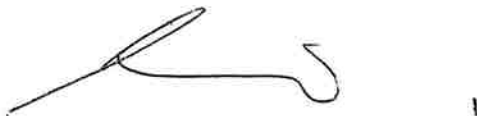
in the *Smith* judgment at [68]-[81] fell short of the appropriate standards of a judicial officer in the circumstances because they were very likely to have undermined and/or risked undermining public confidence in the administration of criminal justice in NSW.

200 We have formed the opinion that the matter does not justify Parliamentary consideration of the removal of the Judicial Officer from office and that pursuant to s 28(1)(b) of the Act the matter should therefore be referred back to the relevant head of jurisdiction, namely the Chief Judge of the District Court, for such counselling and support as the Chief Judge considers appropriate in the circumstances as they apply at any time. We otherwise make no recommendations as to the steps that the Chief Judge may see fit to take in relation to the report.

Dated: 5 November 2024



The Hon Julie Ward



The Hon Carolyn Simpson AO KC



Prof Nalini Joshi AO

SCHEDULE A

Materials before the Conduct Division

- (1) an extract from the meeting of the Judicial Commission on 11 June 2024;
- (2) the Complaint;
- (3) the Judicial Officer's First Response to the Complaint;
- (4) the Judicial Officer's judgment in *R v Smith* [2024] NSWDC 41 (*Smith*) and the judgment of Newlinds SC DCJ in *R v Martinez* [2023] NSWDC 552 (*Martinez*);
- (5) transcript of the trial of *R v Smith* (2021/291163), and of the costs application in *R v Smith* (2021/291163);
- (6) written submissions of the applicant and of the Crown on the costs application in *R v Smith* (2021/291163);
- (7) various media reports which were provided with the original Complaint;
- (8) a media statement from the ODPP in response to *Martinez*;
- (9) a media statement from the ODPP in response to *Smith*;
- (10) the correspondence that had ensued by the time of the referral to the Judicial Commission between the Judicial Commission and the Judicial Officer and/or his legal representatives and between the Judicial Commission and the Director in relation to the Complaint;
- (11) a letter dated 6 May 2024 from the Director to the Judicial Commission attaching a further media article;
- (12) the relevant legislation as at 8 April 2024, being the Act, the Judicial Officers Regulation 2022 (NSW), the *Constitution Act*, the *Costs in Criminal Cases Act*,

the *Director of Public Prosecutions Act 1986* (NSW) and the *Royal Commissions Act 1923* (NSW);

- (13) caselaw referred to in the Complaint, *Smith* and the First Response;
- (14) The Guide to Judicial Conduct (Third Edition);
- (15) the ODPP Prosecution Guidelines (March 2021);
- (16) the Newlinds Report;
- (17) the Particulars of Complaint;
- (18) the Judicial Officer's Response to Particulars;
- (19) written submissions (and supplementary submissions) of the Judicial Officer and of Counsel Assisting in respect of the Complaint.

SCHEDULE B

Particulars of Complaint

- 1 By resolution made on 11 June 2024, the Judicial Commission resolved pursuant to S 21(1) of the *Judicial Officers Act 1986* (the Act) to refer to a Conduct Division constituted under Part 6 Div 3 of the Act a complaint submitted on 8 April 2024 by Ms Sally Dowling SC (Complaint), the Director of Public Prosecutions (Director), against his Honour Judge Whitford SC (the Judicial Officer).

- 2 The Complaint was made under s 15(1) of the Act and concerns both the ability and behaviour of the Judicial Officer. Pursuant to s 23 of the Act, the Conduct Division is conducting an examination of the Complaint and investigating whether the Complaint is wholly or partly substantiated and, if so whether:
 - (a) the matters the subject of the particulars of complaint could justify parliamentary consideration of removal of the Judicial Officer from office; or
 - (b) the matters do not justify such consideration and should therefore be referred back to the relevant head of jurisdiction, being the Chief Judge of the District Court of NSW.

Complaint

- 3 The Complaint is that the conduct of the Judicial Officer in the matter of *R v Smith* (a pseudonym) (File Number 2021/291163), in particular the reasons for judgment in relation to an application for a costs certificate under the *Costs in Criminal Cases Act 1967* (NSW) (*Costs in Criminal Cases Act*) in that matter (*R v Smith* [2024] NSWDC 41 (Judgment)), demonstrates:
 - (a) a failure to meet basic standards of competence;
 - (b) failures of judicial impartiality in the publication of reasons for judgment;

- (c) baseless criticism of the Director and the Office of the Director of Public Prosecutions (ODPP) without evidence, in denial of procedural fairness and in a manner very likely to reduce public confidence in the administration of criminal justice.

R v Smith (2024] NSWDC 41

- 4 The accused was committed for trial in the District Court of NSW on 30 June 2022. He was arraigned in Court on 29 July 2022 and entered pleas of not guilty to two counts of sexual assault.
- 5 The trial was initially listed to commence in July 2023, but it was adjourned to 19 February 2024.
- 6 On 19 February 2024 a fresh indictment was presented and the accused was arraigned on a sole charge of sexual intercourse without consent, knowing there was no consent, contrary to s 611 of the *Crimes Act 1900* (NSW).
- 7 The accused pleaded not guilty.
- 8 The trial commenced on 19 February 2024 before the Judicial Officer and a jury. The issue at trial was as to consent and knowledge as to any lack of consent. The complainant was intoxicated and did not remember anything of the period when the offence allegedly occurred.
- 9 At the close of the Crown case the defence applied unsuccessfully for a directed verdict of "not guilty" (22/2/24; T 1196.27).
- 10 The jury retired to consider its verdict on 26 February 2024 and on the same day, very shortly thereafter, returned a verdict of not guilty.
- 11 The accused subsequently applied for a certificate for costs pursuant to s 2 of the Costs in Criminal Cases Act.

12 The Judicial Officer granted the costs certificate pursuant to s 2 of the Costs in Criminal Cases Act. The Judicial Officer's reasons for granting the costs certificate are contained in the Judgment. The Judgment was not the subject of an appeal.

13 The Director's complaint concerns statements made in the reasons for judgment on that application. The content of the Judgment at [1]-[58] is not the subject of the Complaint.

Particulars of Complaint

(i) Lack of competence

14 The Judicial Officer was either unwilling or unable to confine his consideration and determination of the costs certificate application to the legal test and evidence relevant to the application ([15] of the Complaint).

Particulars

(i) The Judicial Officer set out the legal test applicable on the application (Judgment at [9]-[19]) noting that the applicant for a costs certificate bears the onus of proving that the institution of the proceedings by a hypothetical prosecutor possessed of all of the relevant facts would not have been reasonable, and must persuade the Court, on the balance of probabilities, to exercise its discretion to grant a certificate pursuant to s 2 of the Costs in Criminal Cases Act.

(ii) The Director complains that the Judicial Officer did not confine his Honour's consideration to the relevant facts before the Court at the hearing of the application ([15] of Complaint) but instead explored (and speculated as to) the assumed basis of the actual decision to prosecute (Complaint at [16] and [20(b)]).

15 The Judicial Officer's reasons (Judgment at [63]-[64]) attempt to construct a fictitious legal framework as a vehicle for extreme criticism of the ODPP, when

that criticism was collateral to the issues required to be determined on the application for the costs certificate (Complaint at [16]-[18]).

Particulars

- (i) The Judicial Officer (at Judgment [63]) contrasted the test under s 3(1)(a) of the Costs in Criminal Cases Act (which "might be wholly objective and confined to evidentiary issues in the case (with the possible exception of the qualification expressed by Smart AJA [in *R v Groom* [2000] NSWCCA 538 at [19]]") with the discretion conferred by s 2 of the Costs in Criminal Cases Act, considering that the latter appeared not to be so confined; and considered:
- (A) that the conduct of the prosecution in the instant case (at Judgment [64]); and
 - (B) that the conduct of the prosecution in "numerous other" cases (at Judgment [73]),

were considerations relevant to the exercise of the residual discretion conferred by s 2 of the Costs in Criminal Cases Act.

- (ii) The Director contends that exploration of the assumed basis of the decision to prosecute in the instance case was not a proper factor relevant to the exercise of the residual discretion (Complaint [16]).

16 The Judicial Officer demonstrated ignorance of the statutory framework within which prosecutions and related applications in the criminal jurisdiction are conducted (Complaint at [26]).

Particulars

- (i) The particulars to [15] are repeated.
- (ii) The Judicial Officer (Judgment at [72]) endorsed observations made by Newlinds SC DCJ in *R v Martinez* [2023] NSWDC 552 at [25] as to an

the purpose of endorsing some of the remarks made by Newlinds SC DCJ in *R v Martinez*.

(ii) The Judicial Officer made the following observations:

- (A) it was “at least the recent experience of the Court that time and time again proceedings are brought without apparent regard to whether there might be reasonable prospects of securing a conviction” and, in many of those cases, “on the instructions of ‘the Director’s chambers’ and “without apparent regard to any views” held by the Solicitor Advocate or Crown Prosecutor briefed in the matter (Judgment at [68]);
- (B) that the experience of the Court referred to in the Judgment at [68] is a trend ([69]);
- (C) far too frequently (not just in the instant case or the case of *R v Martinez* but also in “numerous others, including some that have been the subject of reported public and private comment elsewhere”) “one cannot help but conclude that any reliance on the Director’s own published guidelines has been abandoned, or at least abandoned in some categories of case, in favour of” letting the tribunal of fact decide the merits of a case “without any professional examination of either the reasonable prospects of securing a conviction or the public interest in pursuing the prosecution”: (Judgment at [73]);
- (D) his Honour shared the concern of Newlinds SC DCJ in *R v Martinez* at [95] that there has developed within the ODPP “some sort of unwritten policy or expectation to the effect that certain categories of case are now prosecuted without, or perhaps in spite of, a rational, professional interrogation of the merits of the case and the prospect of securing a conviction” (Judgment at [74]);

alleged "intolerable conflict" between an individual prosecutor's instructions and his or her obligations to the Court and the administration of criminal justice generally.

(iii) The Director contends that this criticism is based on a fundamental misunderstanding of the position of prosecutors in NSW and of the position of a barrister in either civil or criminal proceedings (Complaint at [21]). In particular, the Director contends that:

(A) The function of discontinuing criminal proceedings in NSW may be exercised by the Director or by a Deputy Director but the *Director of Public Prosecutions Act 1986* (NSW) (DPP Act) does not permit the delegation of that function to any other person, including a Solicitor Advocate (Complaint at [22]).

(B) Criminal trials are instituted and maintained in NSW by the Director and his or her delegates in accordance with the NSW ODPP Guidelines (Guidelines) issued under s 13(1) of the DPP Act. The Guidelines provide that if a Solicitor 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 Solicitor Advocate is to consult with the victim and seek a direction to discontinue the proceedings (Complaint at [23]-[24]).

(ii) Failure of judicial impartiality

17 The Judicial Officer deliberately used the Judgment as a tool for public criticism of the Director and the ODPP (Complaint at [19]-[20]).

Particulars

(i) The Judicial Officer in the Judgment at [69]-[70] made clear that the observations made by him in the Judgment at [68] and [71]-[79] were for

(E) the remark by the Solicitor Advocate that the advocate could not “comment on policy” (extracted in the Judgment at [66]) offered some implicit support for the conclusion that there was some sort of unwritten policy about which his Honour had expressed concern. If there was such an unwritten policy, there was something “disturbingly Orwellian, even surreal, about a significant public institution publishing guidelines, expressed to transparently reflect the general principles according to which it is said to operate in its core function, only then to operate in that core function by reference to opaque, even secret, policies which appear to be dissociated from, and to undermine, the published guidelines” (Judgment at [74]).

18 The Judicial Officer publicly attempted to influence prosecutorial decision-making.

Particulars

- (i) The particulars to [17] above are repeated.
- (ii) The Judicial Officer stated (at Judgment at [70]) that express support for Newlinds SC DCJ's observations was warranted “in circumstances where in the absence of clear recognition of a problem by judges, there is a substantial risk that it will go unremedied”.
- (iii) The Judicial Officer stated (Judgment at [79]) that “[i]f judges remain silent in individual cases where a prosecution without reasonable prospects has been brought and maintained, then there is likely no prospect of a remedy for a problem that appears now to be endemic” (Judgment at [79]).
- (iv) The Director contends that speculation as to the basis of the actual decision to prosecute involves intrusion into prosecutorial independence ([16] of the Complaint).

(iii) Failure to afford the Crown procedural fairness

19 The Judicial Officer failed to afford the Crown procedural fairness by failing to give notice of and an opportunity for the Crown (the Solicitor Advocate) to be heard on:

- (a) the approach his Honour took in the Judgment at [63]-[64] to the “residual discretion” in s 2 of the Costs in Criminal Cases Act (Complaint at [17]); and
- (b) the Judicial Officer’s comments on prosecutorial decision-making in the Judgment at [68]-[81] (Complaint at [17] and [27(a) and (b)]).

Particulars

- (i) The Director complains that there was no identification by the Judicial Officer prior to the Judgment, nor is there any identification in the Judgment at [73] or elsewhere of the “numerous other” cases, “including some that have been the subject of reported public and private comment elsewhere” to which reference is there made.
- (ii) The Director complains that the allegation in the Judgment at [73] of “numerous other” cases “including some that have been the subject of reported public and private comment elsewhere” where the Guidelines have been abandoned with no professional examination of the basis for the prosecution was not put to the Crown for comment or rebuttal and not supported by any evidence (Complaint at [27(a) and (b)]).

(iv) Criticism of the Director and ODPP very likely undermined and/or risked undermining public confidence in the administration of criminal justice in NSW

20 The Judicial Officer’s criticisms of the Director and the ODPP in the Judgment at [68]-[81] fell short of the appropriate standards of a judicial officer in the circumstances because they were very likely to have undermined and/or risked undermining public confidence in the administration of criminal justice in NSW.

Particulars

- (i) The Judicial Officer's repetition and endorsement of the criticisms made in *R v Martinez* in the Judgment at [68]-[69] (as particularised in [17] above):
- (A) amounted to allegations of lack of professionalism, or professional misconduct and misconduct in public office on the part of the Director and the ODPP (Complaint at [19] and [20]);
 - (B) was not to decide the instant case but to support and inflame "an unjudicial public campaign" against the Director and ODPP (Complaint at [20(c)]).
- (ii) The Director complains that the reference to "private comment" in the Judgment at [73] is likely to invite speculation in a reasonable reader about the source of the information, which is said to itself be damaging to the administration of justice (Complaint at [27(c)]).
- (iii) The Director complains that:
- (C) the speculation as to prosecutorial decision making (referring to the Judgment at [68]-[69], [72]-[74] and [81]); and/or
 - (D) the Judicial Officer's intemperance expressed in those paragraphs of the Judgment,
- are very likely to have reduced public respect for both the institutions of the ODPP and the District Court of NSW (Complaint at [36]-[37]).
- (iv) The Director complains that the Judicial Officer's decision to publish promptly the Judgment on NSW Caselaw and on the District Court of NSW website, in circumstances where the Judicial Officer was endorsing previous judicial comments in *R v Martinez* which he knew to have "attracted some notoriety in the media" (see 20/2/24 T63; extracted in the Judgment at [66]), was intended to endorse publicly, reinforce and

escalate the criticisms of the Director and the ODPP in the media which had occurred as a result of the *R v Martinez* decision.