

**Report of an Inquiry by a Conduct Division
of the Judicial Commission of NSW
in relation to
Magistrate Jennifer Betts**

21 April 2011

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

**The Honourable Justice Simpson
The Honourable D H Lloyd QC
Mr K Moroney AO**

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- 1 On 8 July 2009, pursuant to s 15 of the *Judicial Officers Act* 1986 ("the Act"), Mr Gary I Castle, solicitor, complained to the Judicial Commission of NSW ("the Commission") about a matter that concerned the ability or behaviour of Ms Jennifer Betts, a judicial officer within the meaning of the Act ("the Castle complaint").
- 2 On 29 October 2009, Mr Peter Maresch similarly complained to the Commission about a matter that concerned the ability or behaviour of the same judicial officer ("the Maresch complaint").
- 3 Part 6 of the Act sets out the procedures to be followed when such a complaint is made. By s 18 the Commission is to conduct a preliminary examination of the complaint, and may initiate such inquiries as it thinks appropriate. Thereafter, the options available to the Commission are limited, in effect, to three. The Commission may, if of the opinion that one or more of the conditions set out in s 20(1) is met, summarily dismiss the complaint.
- 4 If it does not take that course, it may, pursuant to s 21(1), refer the complaint to the Conduct Division, constituted under s 22.
- 5 The third alternative is provided by s 21(2). Where a complaint is not summarily dismissed under s 20, but the Commission thinks that, although

the complaint appears to be wholly or partly substantiated, it does not justify the attention of the Conduct Division, it may instead refer the complaint to the relevant head of jurisdiction.

- 6 On 14 December 2009, the Commission determined that neither complaint should be summarily dismissed, and that each be referred, pursuant to s 21(1), to the Conduct Division.

The relevant statutory provisions

- 7 Division 3 (of which s 22 is the opening section) and Division 4 of Pt 6 of the Act contain provisions regulating the exercise of the functions of the Conduct Division.

- 8 The following provisions of the Act are relevant:

- s 13, which provides:

“13 The Conduct Division

- (1) There shall be a Conduct Division of the Commission.
- (2) The Conduct Division shall have and may exercise the functions conferred or imposed on it by or under this or any other Act.
- (3) The functions of the Conduct Division may be exercised by 3 persons in accordance with Part 6, and not otherwise.
- (4) Schedule 3 has effect with respect to the procedure of the Conduct Division.”;

- s 14, which provides:

“14 Functions of the Conduct Division

The functions of the Conduct Division are to examine and deal with complaints referred to it under Part 6 and formal requests referred to it under Part 6A.”;

- s 15, which provides:

“15 Complaints

(1) Any person may complain to the Commission about a matter that concerns or may concern the ability or behaviour of a judicial officer.

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

(a) the matter, if substantiated, could justify parliamentary consideration of the removal of the judicial officer from office, or

(b) although the matter, if substantiated, might not justify parliamentary consideration of the removal of the judicial officer from office, the matter warrants further examination on the ground that the matter may affect or may have affected the performance of judicial or official duties by the officer.

(3) The Commission shall not deal with a complaint (otherwise than to summarily dismiss it under section 20) about:

(a) a matter arising before the appointment of the judicial officer to the judicial office then held, or

(b) a matter arising before the commencement of this Act, unless it appears to the Commission that the matter, if substantiated, could justify parliamentary consideration of the removal of the officer from office.

(4) A complaint may be made in relation to a judicial officer's competence in performing judicial or official duties, so long as the Commission is satisfied as to the matters mentioned in subsection (2) (a) or (b).

(5) A complaint may be made in relation to a matter, and be dealt with, even though the matter is already or has been the subject of investigation or other action by the Commission or Conduct Division or by any other body or person.

(6) Without limiting the foregoing, a complaint may be made in relation to a matter, and be dealt with, even though the matter constitutes or may constitute a criminal offence (whether or not dealt with, or being dealt with, by a court).

(7) The Commission or Conduct Division may adjourn consideration of any matter if it is being dealt with by a court or for any other appropriate reason.”;

- s 20, which sets out the bases on which the Commission is required summarily to dismiss a complaint (These concern, in essence, triviality, frivolity, ambiguity, or that further examination is unwarranted.);

- s 21, which provides:

“21 Reference of complaint to Conduct Division or head of jurisdiction

- (1) A complaint made to the Commission in accordance with this Act shall, if it is not summarily dismissed, be referred to the Conduct Division.
- (2) The Commission may however refer a complaint to the relevant head of jurisdiction if the Commission thinks that, although the complaint appears to be wholly or partly substantiated, it does not justify the attention of the Conduct Division.
- (3) A reference under subsection (2) may include recommendations as to what steps might be taken to deal with the complaint.”;

- s 22(1) and s 22(6) which provides:

“22 Constitution of Conduct Division

- (1) The Commission shall appoint a panel of 3 persons to be members of the Conduct Division for the purpose of exercising the functions of the Division in relation to a complaint referred to the Division.”
- (6) One panel may deal with 2 or more complaints, if the Commission considers it appropriate in the circumstances.”;

- s 23, which provides:

“23 Examination of complaint by Conduct Division

- (1) The Conduct Division shall conduct an examination of a complaint referred to it.
- (2) In conducting the examination, the Conduct Division may initiate such investigations into the subject-matter of the complaint as it thinks appropriate.
- (3) The examination or investigations shall, as far as practicable, take place in private.”;

- sub-s 24(1) and sub-s 24(2), which provide:

“24 Hearings by Conduct Division

- (1) The Conduct Division may hold hearings in connection with the complaint.
- (2) A hearing may be held in public or in private, as the Conduct Division may determine.”;

- s 25(1), which provides:

“25 Powers of Conduct Division concerning evidence

(1) For the purposes of a hearing in connection with a complaint:

(a) the Conduct Division and the Chairperson have the functions, protections and immunities conferred by the *Royal Commissions Act 1923* on commissioners and the chairman of a commission appointed under that Act, and

(b) that Act, with any necessary adaptations, applies to any witness summoned by or appearing before the Division in the same way as it applies to a witness summoned by or appearing before a commissioner under that Act.”;

- s 26, which provides:

“26 Dismissal of complaint by Conduct Division

The Conduct Division shall dismiss a complaint to the extent that the Division is of the opinion that:

(a) the complaint should be dismissed on any of the grounds on which the Commission may summarily dismiss complaints, [see s 20] or

(b) the complaint has not been substantiated.”;

- s 28, which provides:

“28 Substantiation of complaint

(1) 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.

(2) If it forms an opinion referred to in subsection (1) (b), the Conduct Division must send a report to the relevant head of jurisdiction setting out the Division’s conclusions.

(3) A report under subsection (2) may include recommendations as to what steps might be taken to deal with the complaint.”;

- s 29, which provides:

“29 Reports to Governor

(1) If the Conduct Division decides that a complaint is wholly or partly substantiated and forms an opinion that the matter could

justify parliamentary consideration of the removal of the judicial officer from office, it must present to the Governor a report setting out the Division's findings of fact and that opinion.

(2) (Repealed)

(2A) A copy of the report must be furnished forthwith to the Minister.

(3) The Minister shall lay the report or cause it to be laid before both Houses of Parliament as soon as practicable after the report is presented to the Governor.

(4) The Minister may present the report to the Clerks of both Houses of Parliament when Parliament is not sitting, and thereupon the report shall for all purposes be deemed to have been laid before both Houses of Parliament, but the Minister shall nevertheless lay the report or cause it to be laid before both Houses of Parliament as soon as practicable after Parliament resumes.

(5) A report presented to the Clerk of a House of Parliament may be printed by authority of the Clerk of the House and shall for all purposes be deemed to be a document published by order or under the authority of the House.

(6) A copy of any report presented to the Governor shall also be furnished forthwith to the Commission and, after it has been laid before each House of Parliament, to the complainant.

(7) (Repealed)

(8) A copy of any report referred to in this section shall also be furnished to the judicial officer concerned.”;

- s 31, which provides:

“31 Extension or partial dismissal of complaint

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

(2) If, in dealing with a complaint about a judicial officer, matters which might constitute grounds for a complaint about another judicial officer come to the attention of the Commission or Conduct Division, it may treat the original complaint as extending to the new matters.

(3) A power to dismiss a complaint (whether summarily or not) includes a power to dismiss a part of a complaint.”;

- s 36, which provides:

“36 Release of information

(1) The Conduct Division may give directions preventing or restricting the publication of evidence given before the Division or of matters contained in documents lodged with the Division.

(2) A person who makes a publication in contravention of a direction under this section is guilty of an offence punishable, upon

conviction, by a fine not exceeding 100 penalty units or imprisonment for a period not exceeding one year, or both.”;

- s 41, which provides:

“41 Removal of judicial officers

(1) A judicial officer may not be removed from office in the absence of a report of the Conduct Division to the Governor under this Act that sets out the Division’s opinion that the matters referred to in the report could justify parliamentary consideration of the removal of the judicial officer on the ground of proved misbehaviour or incapacity.

(2) The provisions of this section are additional to those of section 53 of the *Constitution Act 1902*.”

- 9 Also relevant is s 53 of the *Constitution Act 1902*, which provides:

“53 Removal from judicial office

(1) No holder of a judicial office can be removed from the office, except as provided by this Part.

(2) The holder of a judicial office can be removed from the office by the Governor, on an address from both Houses of Parliament in the same session, seeking removal on the ground of proved misbehaviour or incapacity.

(3) Legislation may lay down additional procedures and requirements to be complied with before a judicial officer may be removed from office.

(4) This section extends to term appointments to a judicial office, but does not apply to the holder of the office at the expiry of such a term.

(5) This section extends to acting appointments to a judicial office, whether made with or without a specific term.”

Section 53 was entrenched in the *Constitution Act* by referendum in 1995.

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- 10 The power conferred upon the Parliament to remove a judicial officer on the relevant grounds is in no way punitive, and the proceedings in the Conduct Division are not to be regarded as disciplinary. The jurisdiction is entirely protective. It is designed to protect both the public (from judicial officers who are guilty of misbehaviour rendering them unfit for office, or suffering from incapacity to discharge the duties of office), and of the judiciary (from unwarranted intrusions into judicial independence).

- 11 On 8 February 2010 the Commission appointed a panel of three persons to be members of the Conduct Division for the purposes of exercising the functions of the Conduct Division in relation to each of the two complaints.
- 12 On 8 March 2010, in circumstances and for reasons which it is not necessary to explore, the Commission reconstituted the Conduct Division, appointing a panel of 3 persons, as follows:

The Honourable Justice Carolyn Simpson
The Honourable David Lloyd QC
Mr Ken Moroney AO

- 13 The Crown Solicitor has been appointed to assist the Conduct Division in performing its functions. Mr Jeremy Gormly SC, and Ms Gail Furness (subsequently SC) were appointed as counsel assisting the Conduct Division. Mr Phillip Boulten SC was retained to represent the judicial officer, instructed by Messrs McLachlan Thorpe Partners, Lawyers.
- 14 From time to time the Conduct Division was provided with information and material concerning each complaint. Pursuant to s 23, on the basis of that material, it commenced an examination of each complaint. On 13 May 2010 pursuant to s 24, it decided to hold a hearing in connection with the complaints. On 25 January 2011, pursuant to s 24(2), it determined that the hearing would be held in private. Pursuant to s 36, it gave directions preventing or restricting the publication of evidence given before the Conduct Division or of matters contained in documents lodged with the Conduct Division. Those restrictions remain current unless and until, pursuant to s 29(3), this report is laid before the Houses of Parliament.
- 15 The judicial officer was notified that, pursuant to s 31, the Conduct Division had determined to treat the original complaints as extending to other matters which had earlier arisen. Initially, objection was taken on her behalf to that course, but the objection was withdrawn. In addition to the

Castle and Maresch complaints, the Conduct Division considered complaints that had earlier been made by Mr Jack O'Regan and Ms Julie Passas ("the O'Regan/Passas complaint") and by Mr Richard Farago ("the Farago complaint"). Each of these had previously been considered by the Commission. Pursuant to s 20(1)(h), the O'Regan/Passas complaint had been dismissed; pursuant to s 21(2), the Farago complaint had been referred to the Chief Magistrate. Each of the four complaints concerned the manner in which the judicial officer conducted certain proceedings in the Local Court.

- 16 The O'Regan/Passas complaint and the Maresch complaint were formulated by individuals not legally qualified, and were in somewhat diffuse terms. In order to afford the judicial officer procedural fairness, the Crown Solicitor and counsel assisting the Conduct Division particularised each of the four complaints, specifying with some precision what was alleged to be the proper characterisation of each instance of conduct under consideration.
- 17 On 25 January 2011, the hearing commenced, with the Conduct Division receiving evidence provided to it by counsel assisting, and evidence provided on behalf of the judicial officer. In accordance with arrangements previously made, the Conduct Division then adjourned the hearing to the week commencing 21 March 2011. That was done to enable the judicial officer to undertake a course of medical treatment previously foreshadowed, and thereafter to provide evidence concerning her capacity to discharge the functions of a judicial officer.
- 18 The evidence provided to the Conduct Division consisted of a bulky folder of agreed documents, a statement sworn by the judicial officer (together with significant additional documents), sworn statements made by two serving magistrates (Mr Dennis Burdett and Mr Anthony Marsden) and one retired magistrate (Mr Peter Norton), and reports of Dr Jonathan Phillips and Dr Peter Klug. In addition, the judicial officer, Dr Phillips, Dr Klug and Mr Marsden gave oral evidence. Further documents were tendered during

the hearing, and were marked as exhibits. The folder of material included both transcripts and sound recordings of each of the proceedings in question.

- 19 Pursuant to s 23(2) of the Act, and after the first day of hearing, and thus having heard the sound recordings of each of the four hearings, the Conduct Division initiated a further investigation. This was largely to obtain some indication of the extent to which these four instances were representative of the judicial officer's conduct, or were aberrational. The investigation consisted of a random sampling of sound recordings of hearings over which the judicial officer has presided. The Conduct Division has not itself listened to any of the sound recordings. Instead, counsel assisting, and senior counsel who represented the judicial officer, listened to that random selection of sound recordings. An Agreed Statement of Supplementary Facts was put before the Conduct Division, which is relevantly in the following terms:

"Some tapes of full days' proceedings were reviewed from March, May and to July 2008 at Ryde Local Court and tapes of full days' proceedings were reviewed from 10 February 2010, 10 March 2010 and 5 May 2010 at Parramatta Local Court. No substantial departures from acceptable judicial conduct were revealed by the review. The Magistrate worked diligently in order to deal with the matters before her and, in a number of matters heard in the three days in 2010, she demonstrated sensitivity and understanding of a high order." (Ex C)

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- 20 It will be necessary shortly to turn to the detail of the complaints and the evidence. Before doing so, however, it is convenient to note the potential outcomes of the Inquiry. The first task of the Conduct Division is to determine whether or not the complaints are (or, in this case, any of them is) wholly or partly substantiated. If any is not substantiated, the Conduct Division is obliged to dismiss that complaint or part thereof (s 26(b)). The Conduct Division is also obliged to dismiss a complaint if it is of the opinion

that it should be dismissed on any of the grounds, specified in s 20, on which the Commission may summarily dismiss a complaint.

- 21 Sections 28 and 29 are of importance. Paraphrased, they provide that, (i) where the Conduct Division finds that a complaint is wholly or partly substantiated, but forms the opinion that (notwithstanding that the complaint is substantiated) the matter does not justify Parliamentary consideration of the removal of the judicial officer from office, and should therefore be referred back to the relevant head of jurisdiction, it must send a report to that person, setting out its conclusions, which may include recommendations as to what steps might be taken to deal with the complaint; (ii) where, however, having found the complaint substantiated, it forms the further opinion that the matter could justify Parliamentary consideration of the removal of the judicial officer from office, it must present to the Governor a report setting out its findings of fact and that opinion, and provide a copy of that report to the Minister (the Attorney General), the Commission and the judicial officer.
- 22 The Act does not specify in what circumstances a complaint may be found to be substantiated.
- 23 The references in s 28 and s 29 to "Parliamentary consideration of removal of the judicial officer ... from office" are references to the very limited circumstances in, and the equally limited bases upon, which a judicial officer may be removed from office. These derive from s 53 of the *Constitution Act*, set out above.
- 24 As provided by s 41(2) of the Act, the provisions concerning removal of a judicial officer contained in s 41(1) are additional to the Constitutional provision. That means that s 53 cannot be invoked unless and until a Conduct Division of the Commission has made a finding, under s 28 of the Act, that the matter could justify parliamentary consideration of the removal of the judicial officer from office.

25 In accordance with s 28 and s 29 of the Act, if the Conduct Division were to find any one or more of the present complaints wholly or partly substantiated, it would then be necessary for it to consider further whether or not the circumstances are such as to warrant consideration by Parliament of an address to the Governor, seeking removal of the judicial officer from office, on the basis of either or both of proved misbehaviour or incapacity. Thus, the Act distinguishes between substantiation of a complaint, and a finding that the circumstances are such as to warrant Parliamentary consideration of the exercise of the powers conferred by s 53. The Act gives no direction as to what amounts to substantiation of a complaint.

26 Put more simply, the effect of s 29 of the Act in combination with s 53 of the *Constitution Act* is that the question the Conduct Division must determine is whether, on the basis of the facts found, the circumstances are capable of establishing misbehaviour or incapacity (or both) warranting or justifying removal from office. In considering that question it is well for the Conduct Division to bear in mind that:

“The 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.”:

The Honourable Justice Vince Bruce v The Honourable Terence Cole
(1998) 45 NSWLR 163 at 166E.

The relevant facts

27 The judicial officer is a magistrate of the Local Court. For the balance of this report she will be referred to as “the magistrate”. She was appointed to that position in October 1994, and has held office continuously since that date. She has served in a variety of locations performing all of the functions of a Local Court magistrate.

Personal circumstances

- 28 The magistrate's response to the complaints depended heavily upon her personal circumstances over a number of years. It is therefore necessary to deal, in some detail, with those circumstances.
- 29 The magistrate was born on 9 July 1955. She is now 55 years of age. She has a 17 year old son, born in 1993. After a history of working in various capacities in the law, including 2½ years in Hong Kong (1992-1994), she was appointed to the magistracy on 24 October 1994. She has served in that role since, in various locations. On her appointment she was allocated to the Burwood Local Court.
- 30 At the end of 1995, she became aware that she was in need of assistance in coping with single motherhood and a challenging career. She suffered significant anxiety. She sought medical advice and was prescribed an anti-depressant, and also consulted a psychologist. This was not the first time she had done so. She had consulted both a psychologist and a psychiatrist in Hong Kong and was prescribed short-term medication (see report of Dr Phillips, para 92). She continued to take medication as prescribed from 1995 until the end of 2008, when, without medical advice or supervision, she began "weaning herself off" it. By January 2009 she had ceased taking any medication.
- 31 In 2002, while presiding at the Bankstown Local Court, she was subject to a death threat, which was treated as credible. In June 2009 an uncle was killed in a motor vehicle accident in particularly distressing circumstances. The magistrate suffered numerous symptoms following this event.
- 32 In February 2007 the magistrate was allocated to the Ryde Local Court. The court sat three days each week. It was a busy court. Security was minimal, and some incidents occurred. The workload at the court was heavy.

- 33 On occasions the magistrate has encountered verbal aggression from litigants. It appears that she has also encountered some difficulties in relating to professional colleagues.
- 34 In evidence was a history, provided by the current Chief Magistrate, recording occasions on, and circumstances in, which successive Chief Magistrates had felt it necessary to counsel the magistrate. Several of these involve what was repeatedly described as “unapproved” absence from judicial education functions which were said to be “mandatory”. On each of these occasions, the magistrate was debited with recreation leave, or was retrospectively granted leave without pay. On another occasion, the Chief Magistrate had cause to speak to the magistrate about a complaint by another magistrate about her behaviour, specifically bad language used in common areas and in front of staff.
- 35 At the request of the Conduct Division, and by agreement between the legal representatives, the magistrate was comprehensively examined by a psychiatrist, Dr Jonathan Phillips. In a report dated 25 October 2010, Dr Phillips recommended that the magistrate undertake a course of treatment with a consultant psychiatrist expert in managing workplace problems. The magistrate accepted that advice and embarked on a course of treatment with Dr Peter Klug, who has also provided a comprehensive report.
- 36 It was in order to enable that treatment to be given that the hearing was adjourned in January, until March. It is convenient here to detail some of the results of the psychiatric examinations.
- 37 Following his consultations with the magistrate which took place over two days in August and September 2010, Dr Phillips reported to the Crown Solicitor. At that time, he considered that the magistrate was “moderately depressed” and “moderately anxious”, and initially withdrawn.

- 38 Dr Phillips saw his task as being to determine why the magistrate had acted in an “unprofessional” manner on the four occasions in question; he considered it vital to determine whether she was suffering from a diagnosable psychiatric disorder, whether she had done so in the past, and whether she had a personality trait dysfunction or a frank personality disorder, and whether there were other factors that might explain the manner in which she related to others.
- 39 Dr Phillips concluded that he did not have sufficient information to determine whether the magistrate suffered any recognisable psychiatric disorder while in Hong Kong, but concluded that, if she did, it was of relatively low intensity, brief, and in circumstances of stress.
- 40 He considered that the history showed that the magistrate began to experience psychiatric symptoms and stress in 1995, and that these were of a depressive nature.
- 41 Dr Phillips considered (para 103) that there was little doubt that the magistrate suffered increasing depression spectrum symptoms during 2009, possibly as a consequence of failing to take anti-depressant medication. The fact that she had responded positively to a particular drug suggested strongly that there were biological underpinnings to her depressive disorder. He considered it unlikely that she developed any significant abnormality of personality function and stated “with certainty” that she does not have any currently diagnosable personality disorder.
- 42 He did consider that the issue of “professional burnout” called for attention. He thought that the demands of the busy Local Court system, from which the magistrate had never had a major break, had had a significant impact on her psychological health.
- 43 He considered (at para 112) that there was strong clinical evidence of an adjustment disorder with depressive mood, chronic type. He considered (para 117) that there was a causal connection between her psychological

condition and her conduct. In those circumstances Dr Phillips made the recommendation for psychiatric treatment to which reference has already been made.

- 44 Dr Klug reported on 18 March 2011. He had access to Dr Phillips' first report. The history taken by Dr Klug was substantially in accordance with that taken by Dr Phillips. Dr Klug's view was that the magistrate:

“... has probably suffered from a recurrent adjustment disorder with mixed features of anxiety and depression which has followed a course of exacerbations and remissions.” (p 5)

He said that an adjustment disorder, although a major mood disturbance, is nevertheless a significant psychiatric entity characterised by excessive distress and/or dysfunction in response to specific stressors. In later restating his opinion, he added the word “chronic” to the diagnosis.

- 45 Dr Klug's opinion, as the Conduct Division perceives (and as he did also) is completely consistent with the findings of Dr Phillips.

The complaints

- 46 There is little, if any, dispute about the primary facts. After the decision of the Conduct Division under s 31 to treat the complaints as extending to other matters, four separate instances of conduct by the magistrate were considered. Each involves the conduct of the magistrate in the hearing of matters that had come before her. Each was sound recorded, and the recordings were available to the Conduct Division. It is convenient to deal with them in chronological order.

(i) *the O'Regan/Passas complaint (August 2003)*

Background

- 47 On 7 March 2003 an Apprehended Violence Order was made in the Burwood Local Court, by consent, against Ms Julie Passas and in favour of Ms Emma Brooks-Maher. Ms Passas and Ms Brooks-Maher were both local government councillors. It appears that local police acted on behalf of Ms Brooks-Maher. It also appears that Ms Passas was then legally represented. The magistrate was not involved in the making of that order.

The proceedings the subject of the complaint

- 48 On 15 August 2003 Ms Passas made an application for revocation of the Apprehended Violence Order. On this occasion she appeared unrepresented. Ms Brooks-Maher, who contested the application for revocation, was legally represented, by a Mr McLaughlin. The transcript of the proceedings makes it plain that the magistrate had, and had read, a document outlining the grounds upon which Ms Passas sought revocation. It may be inferred that the magistrate took the view that what were identified as grounds for revocation were more appropriate to an application for an order in favour of Ms Passas against Ms Brooks-Maher. She asked Ms Passas if she had sought to take out any complaint, to which Ms Passas replied:

"Your Worship, I don't know if you are aware I'm a Local Government Councillor and it's been very stressful --"

The magistrate interrupted and told Ms Passas that she was not concerned with her position, she wanted to know on what basis she was making the application for revocation. She asked again if she had considered taking out her own complaint. There was some discussion which it is not necessary here to record. Ms Passas said that she had proof that Ms Brooks-Maher had no reason to fear her and then made

mention of the fact that police had taken out the interim Order, but had ceased their involvement. She said she had spent thousands of dollars and was "in the hands of the court". She said that she had a witness present, and that she had paperwork from police officers that should prove that Ms Brooks-Maher was dishonest and had no fear of Ms Passas.

- 49 Mr McLaughlin intervened and made some submissions, and the magistrate then spoke again directly to Ms Passas. After making some other submissions, Ms Passas asked, rhetorically, why the police had "washed their hands of the issue". The magistrate replied:

"Probably because they have better things to do Ms Passas."

- 50 After another brief exchange, the magistrate said:

"Look, I'm not here to answer your questions. This is not a government forum; okay?"

- 51 Ms Passas asked who would answer the questions, to which the magistrate replied:

"Just listen to me ma'am. I'm suggesting your grounds for revocation do not comply with what is required. There's no change in circumstances; okay? The incident complained of is nothing. If you have genuine concerns about the other lady, you can take out your own complaint."

- 52 Ms Passas said that she was not afraid of Ms Brooks-Maher, and that she had a witness present. She said again that Ms Brooks-Maher had no fear of her. The magistrate said:

"Ma'am, the complaint originally was admitted or --"

- 53 Ms Passas interrupted, saying "without --"; it may be inferred that she wished to point out to the magistrate that consent was given to the making of the Order but without admissions. The magistrate said:

"Listen to me, please. Don't butt in, I know, without admissions of any liability or fault by you, you consented to an order for --"

- 54 The magistrate then referred to the order that had been made, which, she said, was in force for 12 months from the date it was made. Ms Passas said:

"So, your Worship, she can follow me and come to me where I am. Where is the fear? This is not the Australia I know. This is not the justice that I was brought up with. Thank you, your Worship."

The magistrate said:

"Look, there's no votes to be gained by making your little speech from your platform there, ma'am."

- 55 Ms Passas complained that she had not been given the opportunity to provide her evidence. The magistrate interrupted and said:

"I have not dealt with the matter, ma'am. Do you wish to hear me further, or do you wish to make another political statement?"

- 56 Ms Passas said it was not a political statement. The magistrate said:

"If you want to whinge, you whinge outside. I've got many people here I have to deal with --

I resent spending one more second on your matter. You have not outlined sufficient grounds, no change of circumstances."

- 57 Ms Passas said that she had no legal experience, and the magistrate dismissed the application for revocation.

- 58 Ms Passas asked for the opportunity to ask why the order was taken out or to show proof of her assertion that Ms Brooks-Maher had no fear of her. The magistrate said:

"Ma'am, get out of this courtroom, ma'am, please. It is not my function to do all that; okay?"

59 Mr McLaughlin asked to be heard, to which the magistrate replied that she declined to make any application (sic) in relation to costs.

60 At that point a Mr O'Regan, who, presumably, had been seated in the court, said:

"You've been denied justice."

61 The magistrate ordered him to "come back here" and asked who he was. He gave his name as "Jack O'Regan"; the magistrate asked him to repeat what he had said. Mr O'Regan said:

"And I'm disgusted to see the way that lady had been treated. She came here to present a case on her own. She got no help and she --"

62 The magistrate told him that she suggested that before anybody came into court, they should take appropriate legal advice. She asked Mr O'Regan if he had any legal training; he said he did not but that he had "a good sense of justice". The magistrate said:

"Well, make sure you get your facts right in relation to it. The matter has been determined because there's no proper ground as in accordance with the legislation. Your friend --"

63 Ms Passas said that the magistrate had not allowed the grounds to be submitted. Mr O'Regan began to say something else. The magistrate ordered him to go downstairs to get somebody to try to explain "to these people who are holding up this court". She then said:

"Otherwise I'll have you both charged with contempt of this court."

64 The full transcript of the proceedings, together with the sound recording, is Annexure A to this report.

65 The first complaint that was made about this matter was made by Mr O'Regan on 16 August 2003. He wrote to "Chief Magistrate" at the

Burwood Local Court. In his initial paragraph he somewhat misstated the facts, but not in any way that bears upon the present issues. Among other things, Mr O'Regan wrote:

"I felt that the brutal way Julie Passas was treated, and the way things were changed around in Emma Brooks-Maher's favour, was contrary to expected courtesies, help and Justice. This complaint is limited to the way Julie Passas was treated."

On 20 July 2004, Mr O'Regan made a further complaint, along the same lines.

66 On 21 July 2004 Ms Passas also made a complaint, on a form provided by the Commission. (It is reasonable to infer that she had previously complained in some other form.)

67 It is unnecessary to reproduce the terms of those complaints.

68 At a meeting of 11 October 2004, the Commission determined, pursuant to s 20(1)(h) of the Act, that each complaint be summarily dismissed.

(ii) *the Farago complaint (June 2007)*

Background

69 This complaint concerns a hearing that took place on 22 June 2007. A Ms Claire Simpson was charged with negligent driving. She was represented by a solicitor, Mr Richard Farago. It was Mr Farago's intention to argue that the driving by Ms Simpson that gave rise to the charge took place on private property and not, as was essential for the charge to succeed, on a road or "road related area". The argument he proposed to put involved questions of legal principle and precedent.

70 In fact, the matter first came before the magistrate on 1 June 2007, when Mr Farago announced his appearance and explained the nature of the

defence. The magistrate asked Mr Farago if he had any legal authority for the point he wished to make. He said that he did, but that he did not then have spare copies. The magistrate then said:

"If you're able to get copies **before** the next occasion." (emphasis added)

to which Mr Farago replied that he would do so. The magistrate then listed the matter for 22 June.

The proceedings the subject of the complaint

- 71 On 22 June, the transcript records, the proceedings opened with the magistrate saying:

"The matter was adjourned to today. Legal argument was foreshadowed in relation to the question of rove (sic – road) related area. I requested that any submissions to be relied upon to be forwarded to the court **well before today**. I don't consider 1.34 yesterday being well before today." (emphasis added)

Mr Farago said that he did not recall the words "well before today". The magistrate then said:

"Well let's think of it. I sat till quarter past five yesterday ... And nothing was sent to the prosecution at all."

The magistrate asked why not; Mr Farago said that he had copies for the prosecution. The transcript records that the magistrate then said:

"You expect them to spend time today when she's got another hearing as well. It's just general courtesy. This has been foreshadowed since 1 June. It's been from the outset, rove (sic – road) related area ... you know that's been foreshadowed and I get this when I leave last night. I took it home, read it in my own time. The prosecutor was handed a copy by me at 11.30 because she hadn't heard anything and now you're going to now expect me to make a ruling on it. Buckley's and none, I can tell you now. It's not good enough – professional courtesies ... I'm going to start Mr Stewart's matter then I'll get on to yours; okay?"

- 72 Mr Farago said that the authorities would normally be handed up at the hearing, but the magistrate had asked for them earlier. The magistrate replied:

“Yes I know I asked for them so we can try and save time today, because I am not a machine. I work every day. 9.30 I started today, when am I supposed to consider this. If you fax it through yesterday at 1.30 and I sat till quarter past five last night. When is the prosecution going to have time to consider what you’ve written if you’re going to throw it in front of her face at 12 o’clock today. So I’m asking any practitioner if they’re going to rely on law to give the courtesy to the court and to the other side whoever it is, likewise the prosecution, if they’re relying on any legal argument to provide the court with a copy and the other side well before the hearing dates, so court time does not need to be taken up with off the bench in my chambers for five hours okay. That’s the point I was making.”

The full transcript of the proceedings, together with the sound recording, is Annexure B to this report.

- 73 It is noted that, when the argument proceeded, the magistrate accepted the submissions made by Mr Farago and dismissed the charge against Ms Simpson.
- 74 By letter dated 4 October 2007 Mr Farago complained to the Commission. He enclosed a copy of the transcript of 22 June. He said that, as soon as the matter was called on, the magistrate’s attitude was “immediately aggressive” and that she raised the issue of having received the authorities only the day before. He said that she would not listen to his explanation. He said that when the matter was reached, the magistrate maintained her “initial belligerence” towards him. He said that he felt the way she behaved towards him was:

“... an unwarranted abuse of her position and extremely unhelpful to the perception of a client whose expectation of a judicial officer was for that person to behave in a civilised and courteous manner.”

He said that the delay in making the complaint was occasioned by delay in obtaining the transcript.

- 75 In accordance with s 18 of the Act the Commission conducted a preliminary examination of the matters of which complaint was made. It determined that the complaint should not be dismissed, but be referred, pursuant to s 21(2), to the relevant head of jurisdiction, the Chief Magistrate of the Local Court. Both Mr Farago and the magistrate were notified of this decision. The Chief Magistrate spoke at length with the magistrate concerning the findings of the Commission.

(iii) *the Castle complaint (June 2009)*

Background

- 76 The Castle complaint concerns a hearing in the Local Court at Ryde which took place on Friday, 29 June 2009. The proceeding was an appeal brought by Ms Amy Cooper, then 18 years of age, under cl 18(1)(c) of the *Road Transport (General) Regulation 2005* against the suspension of her provisional driving licence. She was represented by Mr Castle, a solicitor. Suspension had followed automatically upon Ms Cooper having been detected twice, within the space of a month, exceeding the speed limit. On each occasion, the offence had occasioned the accumulation of demerit points; on one occasion, because it occurred during a holiday period, the demerit points otherwise applicable were doubled. Since Ms Cooper's licence was a provisional one, the second offence resulted in its automatic suspension. The *Road Transport (General) Regulation 2005* permits a driver subject to automatic suspension to appeal against the suspension, and confers a discretion upon a magistrate to confirm or disallow the suspension. This was the appeal before the magistrate the subject of the proceedings that give rise to the Castle complaint.

The proceedings the subject of the complaint

- 77 The proceedings commenced with Mr Castle announcing his appearance, and telling the magistrate that his client requested referral to a programme called Traffic Offenders' Rehabilitation Program. Her Honour replied in terms that are indistinct on the sound recording, but which caused Mr Castle then to request an adjournment for two weeks. The magistrate did not respond to that application. Mr Castle told the magistrate that his client had "fairly pressing reasons" for needing her licence. He said that, if the magistrate was not prepared to adjourn, he was "happy" to have the matter dealt with then. The magistrate said that she would hear evidence from Ms Cooper, and then "may consider any further application that Mr Castle might make".
- 78 As Ms Cooper was called to the witness box, Mr Castle asked if he could tender some "testimonials". The magistrate said "not at the moment", and swore Ms Cooper.
- 79 Thereafter, as the sound recording demonstrates, the magistrate engaged in what can only and fairly be described as domineering and bullying behaviour.
- 80 After Ms Cooper was sworn and identified, Mr Castle began his examination in chief. It was immediately taken over by the magistrate, who interrupted Ms Cooper in virtually every answer. It is unnecessary to reproduce the whole of the exchange. (A full transcript is annexed to this report.) Some extracts will give the flavour (all questions were asked by the magistrate):

"[p 5/l 30]

Q. 97 in an 80 is what the camera got you at, okay. Those signs clearly say 80. Did you see the signs?

A. I don't know.

Q. Of course you didn't. You don't know that you saw the signs. You have to establish evidence to my satisfaction that you

are a fit and proper person to have a licence. The explanation for this does not cut it, okay?

A. Okay.

Q. All right?

A. Yes.

Q. You can't use the cruise control defence because there isn't one there. You are the one who has the control of the vehicle. Okay, you are now in the city. Get the cruise control off. You are the one who can see the speedometer right in front of you. You are the one who has your eyes opening out to see what the speed limit signs are because they do change, especially on major roads like that, from 100 to 110 to 100 to 80 to 90 whatever.

A. I'm not allowed to do 110.

...

[p 6/1 17]

Q. You are the one that has lodged an appeal. You have to establish that you are a fit and proper person to have your licence restored to you.

A. I am a fit and proper person.

Q. No, you're not. I'm saying (indistinct) on one offence, okay. You've got two speeding offences within a month of one another.

A. Okay.

...

[p 7/1 4]

Q. It's not good, is it? 5.04pm on Saturday, the 11th of April, Victoria Road, Rydalmere, 79 in a 60 zone. What the hell is going on there?

A. Okay. The road on Parramatta changes from a 60 zone to a 70 zone.

Q. It is never a 79 zone, is it? Or an 80 zone, is it? Do you agree with that?

A. May I continue?

...

[1 33]

Q. That's half a kilometre. You've got no idea about the road rules, do you, ma'am? You've got no idea that your responsibility is to ensure that you and only you comply with the road rules when you are behind the wheel of your car. It is not a hill, like you're going to be racing down there. It's a slight slope, okay. Now, 79 - 81 to 79 is what the police got you at, okay. They put 79 on the ticket, the lesser amount. That's still way above the 70 zone if you thought it was a 70 zone, right. That's a 60 zone, the area in which you were caught speeding. (Indistinct) 70 zone, 500 metres up the road. That's a half kilometre. That does not condone your actions. Why weren't you in a position to understand you were

travelling at 79? Once again, ignoring the signs; you didn't see the 60 zone sign. They are there.

A. ...

...

[p 8/l 22]

Q. I don't give a licence back to young people because they want to have it back for their own convenience. You've got to demonstrate why – there's nothing exceptional in any of these offences. In fact, your explanation leaves a lot to be desired. It clearly demonstrates to me you just don't have a clue about your responsibilities, okay. Why do you need a licence?

A. Because I've lots of responsibility. I help out --

Q. Don't we all? Don't we all? You've got two speeding offences within one month of each other very early in your driving career. That's not good enough. What do you do for a living?

A. I look after children.

...

[p 10/l 17]

Q. Once again it's another difficulty you have created for yourself. Why do we have a demerit point system, ma'am? You tell me.

A. To ensure – well, I think first of all most – it's a revenue raising thing, but to make sure --

Q. No, no, no. Exactly. Mr Castle has put his head in his hand. That's a disgusting response. That's the newspaper response, okay. You've committed two offences. Why shouldn't you pay a fine for committing those two offences --

A. I agree --

Q. Shut-up, please, ma'am. I'm going to talk to you now and you listen hard. That response is another black mark against you, okay – 'Revenue raising'. That is the most ridiculous thing any person can say to anybody else. All right? Why, in smaller points? (sic) I will tell you. It's pretty simple. To act as some sort of checking mechanism for all of us to ensure that we keep to the road rules when we are behind the wheel of a car, to make sure we're going to be safe drivers, and if we're not safe drivers, if we inadvertently are not concentrating and have one offence, we'll have three points deducted, or whatever the points are. And then we know 'Okay, for me I've got nine more to go. I must make sure – my licence is very important to me. I must make sure I do not lose it. But more importantly, I don't want to kill somebody out there on the road.' That's the reason why we have demerit points, okay. Do you understand now? Forget about revenue raising; that's a disgusting response. Gee, if I had the power to increase it, I would. Three months' inconvenience, and you think you're God's gift, do you?

A. No, I don't.

Q. Well why are you here wasting my time, because that's exactly what you are doing. You've got no idea. You have clearly demonstrated that by your own answers you've got no idea why we have road rules. You seem to think you're exceptional. You're not.

A. I don't.

Q. You're explanations are pitiful. I don't mean to embarrass you, but they are pitiful, and that answer there, I think everybody was thinking 'My god, what is this young lady doing? Putting herself deeper and deeper in a ditch?' Exactly, you don't. Okay, so you work at Gladesville. You live at Linley Point, so that's not a massive journey. Okay, church commitments; unfortunately other people are going to have to help you out there. You don't deserve to be on the road. And hopefully you are going to learn how important your licence is to you, which obviously didn't think about on 14th of March when you had your cruise control on going through the Eastern Distributor, or did you, on Victoria Road at Rydalmere, think about the consequences of the possibility of losing your licence? Double demerit points. You were aware of that. It was Easter time.

...

[p 12/ 9]

Q. It is a bus trip away. You might have to get two buses -- get the bus from Linley Point down Burns Bay Road into Gladesville street, Hunters Hill, then you hop on the 506. Easy. Fair dinkum. If you were born 80 years ago you'd have to walk 20 miles to school every day. Gosh knows how you're going to be treated.

A. At ah, night-time, late at night, there is no public transport --

Q. There's a train, isn't there?

A. -- at 11 o'clock at night.

Q. Yeah, I know, but other arrangements have to be made. You have -- you knew about all these commitments when you blatantly drove well in excess of the speed limit ... You knew full well of your commitments and you didn't care, you didn't think of them and now you're asking me to think of them. No, I'm not going to, because I have no guarantee you're not going to continue to offend again because you just think 'revenue raising'. That's a pitiful response.

A. They are there to protect us, but I believe that the demerit point system --

Q. Shut your mouth because I don't think it's going to do any good. Mr Castle is really aiming for you to be quiet. You have your own views on that. The speed cameras are there. They do pick up people who offend who breach the law.

...

[p 14/ 22]

[Q.] Now why is it that young people seem to think that since they live one suburb away from where they work that that inconvenience is going to be too great for them to bear? Welcome to the real world. We are spoilt, this generation, very, very spoilt. She seems to think she is hard done by by incurring 9 points – ‘it’s the car’s fault’, ‘it’s the hill’, ‘huge hill in Victoria Road’; I don’t think so. That’s never going to be an explanation. Double demerit points – she was aware of it. It was Easter time. No merit whatsoever.

...

[p 15/ 8]

HER HONOUR: She’ll have to arrange somebody else to drive the car. It’s taking place as of now, 5 to 10.

MR CASTLE: As you please, your Honour.

HER HONOUR: Ms Cooper, where did you park your car? We’ll escort you to make sure you don’t drive it.

...”

Although these extracts give some sense of the nature of the hearing, a full appreciation can only be gained by listening to the tape recording. The complete transcript, together with the sound recording, is Annexure C to this report.

81 Mr Castle’s initial written complaint included the following:

“At the outset, when I mentioned my appearance, [the magistrate] made it known, without hearing any representations from me and/or evidence by client that it was extremely unlikely that the appeal would be successful.

[The magistrate] refused my client’s application for enrolment in the Traffic Offender’s Rehabilitation Program and when I, on behalf of my client, requested an adjournment for two weeks, [the magistrate] made it known to me in no uncertain respect that my client’s application had no prospect of success unless my client could satisfy her that, having regard to the circumstances in relation to my client’s accumulation of demerit points, the appeal should be allowed.

...

Whilst my client was in the witness box, [the magistrate] harangued and bullied my client and on separate occasions told her to ‘**shut up**’ and to ‘**shut your mouth**’.

[The magistrate] severely berated my client for a response to a question posed to her by the Magistrate as to the reason for the existence of double demerit weekends. My client's response was, 'revenue raising' which given, may not have been the response that the Magistrate was looking for, was a truthful response in circumstances where my client was under oath.

Further, my client gave evidence of her requirement for a driving license (sic) in order to travel to work and attend at university, [the magistrate] offhandedly dismissed my client's sworn testimony stating, contrary to my client's evidence, that there was adequate public transport, in circumstances where the Magistrate clearly could not have known the frequency and times that my client was required to travel in order to meet her work and study commitments.

Further, as my client was entering the witness box, I offered to tender some character references, which included a reference from an employer stating my client was likely to lose her job if she lost her license (sic). [The magistrate] refused the tender of those references at that stage and then dismissed the appeal without seeking their tender.

In my view, my client was not only denied natural justice in being refused the opportunity to have her appeal heard in a fair and unbiased manner, but was subjected by [the magistrate] to the most outrageous abuse and bullying from the Bench that it has ever been my misfortune to encounter.

As an indication of the measure of the abuse and intimidation my client suffered in the witness box, two legal practitioners ... followed me out of Court and expressed their outrage at [the magistrate's] treatment of my client and urged, notwithstanding my resolve in any event to do so, that I lodge a formal complaint with the Commission ..."

The description of the hearing given by Mr Castle is entirely supported by the sound recording.

(iv) *the Maresch complaint (October 2009)*

Background

- 82 Mr Maresch had been issued with a Parking Infringement Notice by the Lane Cove Council. The infringement alleged was "stop in Loading Zone".

- 83 On 3 September 2009, in accordance with streamlining procedures established in the Local Court, Mr Maresch filed a "written notice of pleading" (Ex E) signifying his intention of pleading not guilty to the charge.
- 84 Mr Maresch was not asked to, and did not, indicate on the form the nature of the defence he proposed to raise. The magistrate listed the matter for 9 October. Mr Maresch appeared unrepresented.
- 85 The magistrate had presided over many such matters, and was aware of the practice of the Council, which was, in parking matters, to photograph the allegedly offending vehicle. She anticipated that a photograph would be available, which would, or might, prove the offence, and prompt Mr Maresch to reconsider his plea of not guilty.

The proceedings the subject of the complaint

- 86 The proceedings on 9 October opened with the Sergeant (presumably a police prosecutor) saying that the matter had been put over for the prosecution to obtain photographs which had been requested but not yet provided. The magistrate told Mr Maresch that she understood that he was intending to plead not guilty and that she had brought him to court because she thought that the Council had a photograph of him (his vehicle) in the loading zone. She said:

"Now, Mr Maresch, the photograph has been taken, but it's not with the prosecution file. If that photograph shows your vehicle in the loading zone and you're not a vehicle that supposed to be in a loading zone you will be found guilty, okay? So I'm not sure what the basis of your written plea of not guilty is, okay? ... It is a passenger vehicle sedan, which is not supposed to be in a loading zone anyway."

- 87 Mr Maresch replied that the vehicle was a passenger vehicle sedan, but that it was towing a trailer; he said that under the regulations he was permitted to park a vehicle "principally constructed for carrying goods", that

he needed a trailer for his business, and that he parked in loading zones quite often.

88 The magistrate said that:

"The only thing in the ticket is the sedan. They don't mention the trailer in there and the photograph is not here, okay?"

She suggested that it might be in Mr Maresch's interest to make representations to the Council and the matter was stood down for further inquiries to be made. To this point there could be no valid complaint about her conduct.

89 On resumption, the Sergeant told the magistrate that she had received, by email, some photographs, which showed that there was no trailer on the vehicle and that the prosecution was instructed to proceed. The magistrate asked Mr Maresch if he had had a look at the photographs; he said he had. She said:

"I know, but there's no trailer there. Let's not go to the trailer excuse for being in a loading zone."

(As it later emerged, at this point the magistrate had not seen the photographs. The assertion she made was therefore made without foundation.)

90 Mr Maresch said that he objected "to the actual condition of the photos". The magistrate made it clear that she was not listing the matter for hearing on that day; that it had been listed in order to ascertain "what the situation was"; that if the photographs showed a trailer present, the Sergeant had power to withdraw the charge without the need for Mr Maresch to return. She then said:

"She's got the photographs. They're not in colour. She hasn't spoken to the officer who issued the ticket, and the photographs don't show the sign. That officer is able on a hearing to give

evidence of where the sign is ... But that photograph clearly shows there's no trailer, okay, so your defence using trailer is not going to go – take you very far, okay? So really, I wanted you to come to court to tell me what is your defence. You've done that, and it appears that the prosecution evidence is there was no trailer attached to it, okay? ... So if your vehicle is parked there as a sedan in the loading zone, you will be found guilty, okay? ... So what do you want to do? Plead guilty now with an explanation as to why you blatantly parked your sedan in that loading zone or what?"

Mr Maresch began to say something, but the magistrate cut him off, and said:

"It's an offence of strict liability, sir, okay? ... You are not a lawyer, okay? ... And I've had a gutful of people such as yourself coming to this court pleading not guilty, having hearings and getting found guilty as soon as they open their mouth. That incurs costs on the community having the officers here, court time taken up, so that's why I wanted you to come today to give me your explanation as to why you are pleading not guilty."

91 Mr Maresch again attempted to say something, but the magistrate said:

"Just listen to me. I haven't finished yet, okay? I am trying to save you time. If the matter is set down for hearing and you're found guilty after all the evidence is given, the fine will be far greater than it was issued to you by the officer, okay? I can fine you up to \$2,200. The fact that you have got a particular view is your own business, okay? I'm trying to assist you because you haven't got legal representation. I'm not going to list the matter for hearing unless there's a valid defence. That's what you have told me – 'I had a trailer attached.' The prosecution have the photograph which clearly shows no trailer, so that defence may not be available to you. You have now had an option of seeing that photograph which may refresh your memory as to the circumstances of you being in that position on the 21st of April. If you wish to plead guilty, I can deal with it now. If you wish to plead not guilty and subsequently found guilty, it may be well and truly a lot bigger fine. I don't know."

92 Mr Maresch then asked if the magistrate would be hearing the matter. She said she would. Mr Maresch said:

"Well, I guess I might as well plead guilty, then, you know ... With respect to you your Honour, you know, you might have had a gutful, using your words, of people coming and pleading not guilty, but you haven't seen those photos, you weren't in the car."

The magistrate replied:

"I don't need to see them. I'm just trying to manage ... the court time, sir ... which I need to do."

93 Mr Maresch again began to say something. The magistrate said:

"Shut – be quiet, please. I need to manage court time because we are listing matters into end of February, many months down the track and I'm trying to bring that back and ensure that those matters listed for hearing are genuine pleas of guilty, pleas of not guilty after people have had appropriate legal advice. A lot of people such as yourself come before the court thinking -- pleading not guilty."

Mr Maresch twice said:

"Such as myself?"

94 The magistrate told him not to interrupt her. Mr Maresch said:

"You don't know me. You don't know me."

The magistrate said:

"Don't interrupt me, otherwise you will wait until after I do the other hearing, okay? Do not interrupt me again, thank you ... I'm trying to assist you. You can wait ... You can wait. You can wait. You are showing no respect to me. I'm trying to assist you, sir, and get you out of here instead of incurring further costs for yourself ... if you are subsequently found guilty after pleading not guilty."

Mr Maresch said:

"In the process you insult me without even knowing me, okay."

The magistrate said:

"Sir, you show respect to the court, otherwise you will be held in contempt."

95 The following exchange then took place:

MR MARESCH: I'm here and I'm showing respect --

HER HONOUR: No, you're not.

MR MARESCH: -- but I'm being told you've had a gutful of people like me, all right. That's what you're saying -- you've had a gutful of people like me without even knowing me.

HER HONOUR: I've requested you not to interrupt and you keep interrupting. If you're going to interrupt anymore I will wait until the end of the next hearing, okay. What do you want to do, plead guilty with an explanation or what?

MR MARESCH: Well, if you're handing the matter, your Worship, I'll plead guilty, okay.

HER HONOUR: You do it on your own volition, sir. Do you wish to --

MR MARESCH: No, I don't.

HER HONOUR: -- plead guilty with an explanation?

MR MARESCH: I'm doing it under duress and I'll plead guilty.

HER HONOUR: You're making a joke of this. The matter will be set down for hearing on the 8th of December before me. 8th of December at 10am.

MR MARESCH: I plead guilty.

HER HONOUR: No, I'm not going to accept your plea on that basis, sir. You're not going to hold me to ransom. The matter will be listed for hearing before the court. The court record has indicated what you've said, sir. There is no point laughing and shaking your head --

MR MARESCH: Oh, dear.

HER HONOUR: -- saying 'I am going to wish to plead guilty under duress'; I will not accept a plea of guilty on those circumstances. The matter will be dealt with as a hearing on Tuesday, the 8th of December at 10am.

MR MARESCH: Oh dear, oh dear, oh dear.

HER HONOUR: Be here by 10 o'clock, thank you. The court record will note that he's just gone off mumbling under his breath."

The full transcript is Annexure D to this report. As with the previous matters, the full flavour of the conduct of the proceedings can only be obtained from the sound recording. The sound recording will form part of Annexure D.

- 96 On 29 October 2009, after receiving advice from the Chief Magistrate's office, Mr Maresch, in a letter directed to "To Whom it May Concern", and received by the Commission on 4 November, complained of the magistrate's conduct of the hearing. He recounted some of what had occurred during the hearing, including that part of the exchange in which the magistrate indicated, without having seen it, that the photograph was proof of his guilt. He described her manner as "belligerent, insulting".

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- 97 At this point it might be observed that, in each case, the conduct of which complaint was made fell well below the basic standards of acceptable judicial conduct.

- 98 Other than the Farago complaint, which was essentially of gross discourtesy, and unfairness to a legal practitioner (but not unfairness in the outcome of the proceedings, or in the decision making process), the complaints are of conduct that call into question the impartiality of the magistrate, and, importantly, her capacity to discharge that most basic function of a member of the judiciary, to afford a fair, dispassionate and impartial hearing to litigants.

The particularisation of the complaints

- 99 It will be recalled that s 15 of the Act permits any person to make a complaint "about a matter that concerns the ability or behaviour of a judicial officer". Each complaint may properly be seen as concerning the behaviour of the magistrate. The conduct involved also raises questions about her ability to conduct judicial proceedings in an appropriate manner.

100 As indicated above, in order to assist the magistrate to respond to the complaints, specific aspects of each incident were particularised, with the characterisation which, it was proposed, ought to be placed upon the magistrate's conduct. In each case, what was alleged was supported by extensive transcript references. It is sufficient here simply to record the general allegations, as refined in the particulars of complaint provided to the magistrate. A copy of the particularised complaint is Annexure E to this report.

The s 26 determination: is any complaint substantiated?

The O'Regan/Passas complaint

"use of intemperate language."

The Farago complaint

Discourtesy.

The Castle complaint

- (a) the magistrate pre-judged the matter;
- (b) use of intemperate language;
- (c) the magistrate was rude, offensive and bullied Ms Cooper while she was giving evidence;
- (d) the magistrate did not permit Mr Castle an adequate opportunity to make submissions;
- (e) the magistrate did not conduct the hearing fairly.

The Maresch complaint

- (a) the magistrate pre-judged the evidence;
- (b) the magistrate used intemperate language to Mr Maresch;
- (c) without justification, the magistrate threatened Mr Maresch with, firstly, having to wait for his matter to be heard, and, secondly, with being charged with contempt;
- (d) the magistrate did not conduct the hearing fairly.

101 At this point it may be observed that, in the view of the Conduct Division, and for reasons that follow, each of these particulars is made out. So much was not, in the end, contested on behalf of the magistrate. In final oral submissions, her senior counsel said:

“It is accepted that there will be substantial substantiated complaints. We accept that the magistrate's conduct in various respects will allow a conclusion that the complaints are substantiated in various respects, including various significant respects.” (T 250)

Despite this general acknowledgement, senior counsel did not specify in what respects the complaints were conceded to have been substantiated.

102 The argument put on behalf of the magistrate was, essentially, that her medical condition is the foundation for what is now conceded (on her behalf) to be quite unsatisfactory and unprofessional conduct. Particularly is that contention made in respect of the Castle and Maresch complaints; in each case, the conduct of which complaint is made took place during the time that the magistrate's condition was, without medical supervision, unmedicated.

103 With respect to the O'Regan/Passas and Farago complaints, a further, or alternative, response was made: this was, in effect, that each of those complaints had previously been dealt with by the Commission, the first dismissed, and the second referred to the Head of Jurisdiction. Senior counsel therefore invoked s 20(1)(d) and s 20(1)(e) as a basis for the Conduct Division not to form the relevant opinion that would result in a report to the Governor that the conduct could justify parliamentary consideration for the removal of the magistrate. Section 20(1)(d) and s 20(1)(e) respectively require the Commission summarily to dismiss the complaint if the matter to which the complaint relates occurred at too remote a time to justify further consideration, or that there is or was available a satisfactory means of redress or dealing with the complaint. Each of those provisions is available to the Conduct Division to dismiss a complaint which has been referred to it (s 26).

104 Notwithstanding the concession made by senior counsel, the magistrate (as will appear below) was unable to bring herself to adopt it. Nevertheless, the concession, plainly made on instructions, means that, in making its findings of fact in respect of the particulars, the Conduct Division can be brief. Those findings are:

(i) the O'Regan/Passas complaint (intemperate language)

105 The language of the magistrate was plainly intemperate. This can be seen in the following extracts:

"Probably because they have better things to do Ms Passas ...

Look, I'm not here to answer your questions. This is not a government forum; okay?

...

Look, there's no votes to be gained by making your little speech from your platform there, ma'am.

...

... or do you wish to make another political statement?

...

If you want to whinge, you whinge outside ...

I resent spending one more second on your matter ...

Ma'am, get out of this courtroom, ma'am, please. It is not my function to do all that; okay?

...

Well, make sure you get your facts right in relation to it ..."

106 The level of intemperateness is best gauged by hearing the sound recordings. These show that the tone of voice, as well as the language used, was intemperate.

107 This complaint is substantiated.

(ii) the Farago complaint (discourtesy)

108 The magistrate was discourteous, to an extreme degree, to Mr Farago. Moreover, she was unfair in that her attack upon him was based upon a false factual premise – that is, that she had, on 1 June 2007, directed him to provide his authorities “well before” the date fixed for hearing. The entire exchange between Mr Farago and the magistrate was characterised by gross discourtesy on her part. It is unnecessary to take up further time in quoting specific passages from the transcript.

109 Again, the tone of voice heightened the perception of discourtesy that is evident even in a reading of the transcript.

110 This complaint is substantiated.

(iii) *the Castle complaint*

There are various particulars of this complaint, each of which needs to be considered.

111 (a) pre-judgment

The Conduct Division is satisfied that the magistrate plainly pre-judged the issues before her. When Mr Castle said that his client had "fairly pressing reasons" for a licence, she replied "won't do it ... won't get it ...", and "The explanation for this does not cut it, okay?"

112 When Ms Cooper said that she was "a fit and proper person", the magistrate said:

"No, you're not. I'm saying (indistinct) on one offence, okay. You've got two speeding offences within a month of one another."

113 (b) intemperate language

Although the entire exchange with Ms Cooper was intemperate, there were some specifically glaring examples. These include:

"Big deal, is what I'm going to say to you, okay ..."

"That's a disgusting response ..."

"Shut up, please, ma'am. I'm going to talk to you now and you listen hard."

"... and you think you're God's gift, do you?"

"Your explanations are pitiful ..."

"You're a very, very foolish young lady ..."

"Shut your mouth because I don't think it's going to do you any good ..."

114 (c) bullying

Many of the remarks extracted above also constitute bullying. The sound recording reveals that Ms Cooper was not permitted to complete any answer, and her solicitor, Mr Castle, was given no opportunity to elicit from his client the evidence he wished to adduce.

115 (d) no adequate opportunity to make submissions

The transcript and sound recording demonstrate that Mr Castle did not have any opportunity to make the submissions he sought to make.

116 This complaint is substantiated.

(iv) the Maresch complaint

There are various particulars of this complaint, each of which needs to be considered.

117 (a) pre-judgment

It is quite plain on the transcript and sound recording that the magistrate had pre-judged Mr Maresch's guilt. She told him that the photograph "clearly shows" that no trailer was attached to his sedan, so that his defence was not going to take him very far; she asked him if he wished to "plead guilty now with an explanation as to why [he] blatantly parked [his] sedan" in a loading zone; she said that she had had a "gutful" of people such as Mr Maresch pleading not guilty and being found guilty.

118 (b) intemperate language

The "gutful of people" comment is plainly intemperate, as was the earlier direction to Mr Maresch not to interrupt her (given the tone in which it was made).

119 (d) fairness in the hearing

The Conduct Division accepts that the whole of the transcript shows that the hearing was grossly unfair.

120 This complaint is substantiated.

121 As can be discerned from the sound recordings, the treatment of each of the litigants in question, and of Mr Farago, was characterised by a level of aggression and hostility quite alien to the proper conduct of judicial proceedings.

122 The consequence of these findings is that, pursuant to s 26(a), the Conduct Division must consider whether any complaint ought to be dismissed on any of the grounds specified in s 20.

123 Senior counsel urged that the Passas complaint ought to be dismissed on the basis provided by s 20(1)(d), that is, that it occurred at too remote a time to justify further consideration, and that it had previously been summarily dismissed by the Commission.

124 The Conduct Division appreciates the force of that submission. If it stood alone, the Passas complaint would not warrant further consideration. It warrants further consideration because of subsequent conduct on the part of the magistrate.

125 Senior counsel also urged that the Farago complaint ought to be dismissed on the basis provided by s 20(1)(e), that is, that an alternative satisfactory means of redress (ie referral to the Head of Jurisdiction) was available and had in fact been used.

126 One aspect of the Farago complaint that distinguishes it from the other three complaints is that, while it involved gross discourtesy, and was likely

to bring the administration of justice into disrepute, the unfairness was to a legal practitioner, and was not reflected (and could not reasonably be perceived as having been reflected) in the outcome of the proceedings. (The charge against Mr Farago's client was dismissed.)

127 The Conduct Division considers that the Farago complaint, if it stood alone, would not warrant Parliamentary action under s 53 of the *Constitution Act*. That does not mean, however, that the evidence relevant to that complaint is to be disregarded. The evidence concerning the proceedings remains relevant in the determination under s 28 that must be made in respect of the other complaints.

128 The Conduct Division has found that each complaint is substantiated. What that means is that the conduct alleged in each complaint has been established, and that in each case, it warrants the characterisation placed on it in the particularisation. What remains to be considered is whether any of the conduct proved constitutes misbehaviour, or establishes incapacity, and, if so, whether it could justify action by the Parliament under s 53 of the *Constitution Act*.

129 The Conduct Division makes the following findings:

- (i) in the Passas hearing, the magistrate used language that was intemperate, to a significant degree, and over a prolonged period of time;
- (ii) in the Cooper hearing, the magistrate used intemperate language to a gross degree, over an extremely prolonged period of time, prejudged the issues committed to her for determination, was rude, offensive and bullying, and denied Mr Castle, as legal representative for Ms Cooper, an adequate opportunity to make submissions and failed to conduct the proceedings fairly;

- (iii) in the Maresch hearing, the magistrate pre-judged issues committed to her for determination and used intemperate language repeatedly;
- (iv) in the Simpson hearing (the Farago complaint), the magistrate was discourteous to Ms Simpson's legal representative, Mr Farago;
- (v) in each case, the conduct was such as to create a perception in a fair-minded observer that justice was not being administered fairly, or according to law, and thus to bring the administration of justice into disrepute;
- (vi) at the time of the Cooper (the Castle complaint) and Maresch hearings the magistrate had, unwisely, ceased use of medication without medical advice or supervision;
- (vii) that the absence of medication was operative in (although not the sole cause of) her unsatisfactory conduct in those hearings;
- (viii) that, shortly before the Cooper hearing the magistrate had suffered a family bereavement in a road trauma, and that this was partly operative upon her unsatisfactory conduct in that case;
- (ix) that the magistrate has resumed medication; to the extent that her unsatisfactory conduct was attributable to her unmedicated medical condition, that circumstance no longer applies.

130 The Conduct Division further notes that the evidence establishes that in respect of the Passas and Castle complaints, actual injustice can be seen to have been done in the sense that each hearing proceeded to a determination in the absence of a duly conducted judicial hearing. That is not the case in respect of the Maresch hearing, in which the issues were ultimately determined by another magistrate, or in the Farago matter where the matter proceeded to final hearing before the magistrate, with a ruling in favour of Mr Farago's client.

The s 28 determination

131 The next step in the sequence is to determine, under s 28, whether or not the matter could justify parliamentary consideration of the removal of the magistrate from office. Section 53 of the *Constitution Act* permits removal of a judicial officer on only two grounds – proved misbehaviour, or (proved) incapacity. Neither term is defined either in the *Constitution Act*, or in the Act. Thus, whether the matter justifies parliamentary consideration of removal from office depends, firstly, upon whether or not the conduct under consideration:

- (i) amounts to misbehaviour; or
- (ii) evidences incapacity; or
- (iii) both.

132 A question arises in the mind of the Presiding member of the Conduct Division concerning the entity to which, under s 53, misbehaviour or incapacity must be proved. That is, **to whom** must misbehaviour or incapacity, under s 53, be proved? Is it the Parliament, or the Conduct Division? There are powerful reasons to consider that it is the Parliament.

133 By entrenching s 53 in the *Constitution Act*, the people of NSW have committed to the Parliament the ultimate decision when removal of a judicial officer is under consideration. There are two limbs to a decision under s 53:

- has misbehaviour/incapacity been proved?
- if so, is the misbehaviour or incapacity of sufficient magnitude for the Parliament to seek removal of the judicial officer from office by the Governor?

- 134 There is nothing in s 28, s 29, or s 41 of the Act that establishes that the function of deciding whether misbehaviour or incapacity is proved has been delegated to the Conduct Division. What the Conduct Division is required to do is decide whether "the matter could justify parliamentary consideration of a removal of the judicial officer": that is, that the conduct in question **could** amount to misbehaviour, or **could** establish incapacity; and, if so, whether the misbehaviour or incapacity is of sufficient magnitude that **could** justify consideration of removal.
- 135 Some support for that view is to be gained from reference to s 72 of the *Constitution of Australia*, which is essentially replicated in s 53. There can be no doubt that the entity to whose satisfaction misbehaviour or incapacity must be proved is the Parliament. That is, if for no other reason, because there is no body equivalent to the Commission or a Conduct Division in a position to make those judgments.
- 136 That view does not entirely reflect what has happened on previous occasions. In the limited number of cases which have been referred to a Conduct Division, the Conduct Division has itself determined misbehaviour or incapacity: see, for example, Report of the Conduct Division to the Governor regarding complaints against The Hon Justice Vince Bruce, 15 May 1998, in which each member of the Conduct Division found either misbehaviour, or incapacity, or both, proved. No attack was made on that position in the application for judicial review of the decision contained in that report: see *Bruce v Cole* (1998) 45 NSWLR 163.
- 137 It will, therefore, be appropriate that the Conduct Division express its own views, while noting that the ultimate decision is that of the Parliament.
- 138 It is the view, however, of the Honourable D H Lloyd QC that whilst the ultimate decision as to whether the judicial officer *should* be removed is a matter for Parliament, the Conduct Division is charged as a fact-finding body with the function of deciding whether misbehaviour or incapacity has been proved. In another way, the Parliament should have a report before

it setting out the Division's opinion that the matters referred to in the report *could* justify parliamentary consideration of the removal of the judicial officer on the ground of proved misbehaviour or incapacity. Each House of Parliament would then consider whether it *should* address the Governor.

139 There is some support for this view in the obiter remarks of Chief Justice Spigelman (at 202) and of Justice Priestley (at 207) in the case of *Bruce v Cole*. Mr Lloyd QC derives further support for this view from s 41 of the *Judicial Officers Act*, noted at para [8] above, which states that a judicial officer may not be removed from office in the absence of a report of the Conduct Division that sets out the Division's opinion that the matters referred to in the report could justify parliamentary consideration of the removal of the judicial officer "on the ground of *proved* misbehaviour or incapacity" (emphasis added). The Conduct Division could not, it seems, set out such an opinion unless it had in fact found the misbehaviour or incapacity to have been proved.

140 In other words, Mr Lloyd QC is of the opinion that incapacity or misbehaviour must first be proved to the Conduct Division. It is then the role of the Parliament to find whether misbehaviour or incapacity has been proved, as the material before each House will not necessarily be the same as that which was before the Conduct Division. As Justice Priestley noted in *Bruce v Cole* (at 207), there is no reason why a House should not take into consideration events bearing on the incapacity of the judicial officer which have taken place since the giving of evidence before the Conduct Division. The parliament must then decide whether it would or should address the Governor seeking the removal of the judicial officer on the ground of proved misbehaviour or incapacity.

141 Mr Moroney has expressed a preference for the view of the Presiding member.

Misbehaviour

- 142 There has in the past (in the context of the *Constitution of Australia*, which, in s 72, contains a provision in terms relevantly identical to s 53) been a debate about the reach of the term “misbehaviour” where applied to potential removal of a judicial officer. That debate has primarily concerned whether the provision extends to misbehaviour in circumstances not directly relevant to the discharge of judicial functions: see, for example, the Reports of a Parliamentary Commission of Inquiry Re: The Honourable Justice L K Murphy, 19 August 1986.
- 143 In this case, all the conduct alleged to be misbehaviour is directly connected with the discharge of judicial functions, and the 1986 debate is irrelevant. There have (fortunately) been relatively few other occasions on which what is encompassed in the notion of judicial misbehaviour has had to be considered.
- 144 The Conduct Division considers that, as in the 1986 Report just mentioned, the word “misbehaviour” ought to be given its ordinary meaning. It means, simply:
- “to behave badly” (Macquarie Dictionary Online);
- “bad behaviour, improper conduct” (Oxford English Dictionary)
- “to behave badly or wrongly; to conduct oneself improperly”
(Oxford English Dictionary)
- 145 An interesting and helpful discussion of what constitutes judicial misconduct is to be found in The Hon Justice James Thomas AM: *Judicial Ethics in Australia*, 3rd ed (2009) LexisNexis Butterworths, Chapter 3 and Chapter 4.
- 146 The Conduct Division respectfully agrees with and adopts the views of the learned author at 4.6:

“Nothing negates justice more directly and visibly than the judge who lacks the primary judicial requirement of ability and desire to hear both sides. My conclusion is that a judge who repudiates this essential judicial quality affords a serious case of misconduct, and the misconduct could be serious enough to justify removal. Of course one would need a convincing accumulation of instances to reach such a conclusion, but the gathering of such evidence would be quite possible.”

- 147 The learned author quoted Francis Bacon, in ‘Of judicature’ in Essays, Civil and Moral, 1625:

“Let not the judge meet the cause half way, nor give occasion to the party to say his counsel or proofs were not heard.”

In the following paragraphs Mr Thomas discusses the impact of offensive remarks and judicial bullying.

- 148 All of this is particularly pertinent to the present Inquiry.

- 149 Even more direct guidance as to proper behavioural standards of judicial office is to be found in the *Guide to Judicial Conduct* (Second Edition), published for The Council of Chief Justices of Australia by the Australasian Institute of Judicial Administration Incorporated (2009). At p 3 are stated three basic principles against which judicial conduct should be measured. They are:

“Impartiality;
Judicial independence; and
Integrity and personal behaviour.”

Three main objectives of the principles are stated as:

- “• To uphold public confidence in the administration of justice.
- To enhance public respect for the institution of the judiciary;
- To protect the reputation of individual judicial officers and of the judiciary.”

150 These are expanded, or explained, in Chapter 4, as follows:

"4 CONDUCT IN COURT

4.1 Conduct of hearings

It is important for judges to maintain a standard of behaviour in court that is consistent with the status of judicial office and does not diminish the confidence of litigants in particular, and the public in general, in the ability, the integrity, the impartiality and the independence of the judge ...

... the entitlement of everyone who comes to court – litigants and witnesses alike – to be treated in a way that respects their dignity should be constantly borne in mind ...

A judge must be firm but fair in the maintenance of decorum, and above all evenhanded in the conduct of the trial ...

4.2 Participation in the trial

... A judge must be careful not to descend into the arena and thereby appear to be taking sides or to have reached a premature conclusion."

151 In 1988, in Queensland, a Parliamentary Judges Commission of Inquiry ("the Commission of Inquiry") was established by statute (*Parliamentary (Judges) Commission of Inquiry Act 1988 (Qld)*) specifically for the purpose of inquiring into the conduct of two named judges, one of the Supreme Court of Queensland, and one of the District Court of Queensland (see First Report of the Parliamentary Judges Commission of Inquiry, undated ("the First Report")).

152 The function of the Commission of Inquiry, in relation to each judge, was to advise the Legislative Assembly whether:

"... any behaviour of [the judge] constitutes such behaviour as, either of itself or in conjunction with any other behaviour, warrants his removal from office as a Judge ..." (s 4)

153 It is apparent that no equivalent of s 41 of the Act or s 53 of the *Constitution Act* applied. Queensland Supreme Court judges, by two separate Acts of Parliament (the *Supreme Court Act 1867 (Qld)*, s 9, and

the *Constitution Act 1867-1978* (Qld), s 15 and s 16) held office “during good behaviour”.

- 154 On that basis, in the First Report, which was concerned with the behaviour of the Supreme Court judge, the members of the Commission of Inquiry concluded that:

“... whatever other powers exist to remove judges, the Legislative Assembly may exercise its power to address the Crown for the removal of a judge on the ground of misbehaviour.” (the First Report, para 1.5.5)

- 155 The members of the Commission of Inquiry considered what constitutes misbehaviour in that context. They wrote:

“1.5.9 ... before an opinion can be reached that behaviour of a Judge of a Supreme Court warrants his removal from office, the behaviour must be such that, having regard to all the relevant surrounding circumstances, no right thinking member of the community could regard the fact of its having taken place as being consistent with the continued proper performance by the judge of judicial duties, and hence with the holding of judicial office. Put another way, if the behaviour is such that, in the circumstances, the judge would, in the eyes of right thinking members of the community, no longer be fit to continue to remain a judge, then the judge has fallen below the standard demanded of members of the judiciary.

1.5.10 The members of the Commission [of Inquiry] therefore are required to apply community standards in their task of forming an opinion as to whether any behaviour of [the judge] warrants his removal from office as a Judge of the Supreme Court. The Commission [of Inquiry] recognises and accepts that the community requires the standards of behaviour of the judiciary to be set and maintained at a very high level indeed. Judges themselves, as well as the community, expect that the standard of behaviour of members of the judiciary should be a very high one. On the other hand, to adopt too stringent a standard, or too pharisaical an approach, would imperil the independence of the judiciary, which would be eroded if a judge might too readily be removed from office. Moreover, there may be judicial misbehaviour which ought not to be condoned, and indeed may be deserving of censure, even severe censure, but which would not warrant the removal of a judge from office. Questions of degree may be involved, and minds may differ in making what is in effect a moral and social judgment on such a matter.

...

1.5.12 The Commission [of Inquiry] is of course, aware that the final decision whether an address should be presented for the removal of [the judge] rests with the Legislative Assembly, but the Commission [of Inquiry] is charged with the responsibility of considering whether his behaviour would warrant removal."

- 156 These remarks are equally apposite to the conduct of any judicial officer, and are relevant in the consideration by the Conduct Division in the discharge of its obligations under s 29 of the Act.
- 157 In the opinion of the Conduct Division, in each of the O'Regan/Passas, Castle and Maresch complaints, misbehaviour has been proved. There are, of course, grades and variations of misbehaviour. Whether demonstrated misbehaviour warrants parliamentary consideration of removal of a judicial officer from office depends upon the gravity of the misbehaviour, and, in some cases at least, the extent (if any) to which conduct of the kind is repeated. A single instance of even serious misbehaviour may not reach the necessary threshold; on the other hand, repeated instances of less serious misbehaviour may do so. The Conduct Division is of the view that the misbehaviour here in question does reach the requisite level of gravity. The finding that misbehaviour has been proved encompasses the lesser finding that the conduct is such that the Parliament could find misbehaviour proved.

Incapacity

- 158 In his work on *Judicial Ethics*, Mr Thomas (*op cit*) considers the question of incapacity at 4.52. However, his consideration is brief and is limited to physical incapacity or mental incapacity caused through, for example, alcoholism, drug dependency, senility or debilitating illness. The Conduct Division considers that incapacity within the meaning of s 53 extends beyond physical or mental incapacity caused by an identifiable disorder (such as senility). That emerges when the question "incapacity for what?" is asked. In the view of the Conduct Division, it is incapacity to discharge the duties of judicial office in a manner that accords with recognised

standards of judicial propriety. These standards are those referred to by Mr Thomas, and in the publication by the Council of Chief Justices, and 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.

159 Failure by a judicial officer to adhere to these standards will inevitably cause litigants and observers to lose faith in, and respect for, the decision-making process, and the resultant decisions, and bring the administration of justice into disrepute.

160 A related question was considered in *Stewart v Secretary of State for Scotland* (HL, 22 January 1998), in which the House of Lords considered the meaning of the word "inability" in s 12 of the *Sheriff Courts (Scotland) Act 1971*, which enabled the removal of a sheriff (judicial officer) from office "by reason of inability, neglect of duty or misbehaviour". Lord Jauncey of Tullichettle, who spoke for all members of the House of Lords, said:

"Section 12 is concerned with the removal of a Sheriff Principal or Sheriff who is unfit for office. This is a provision which is directed to the proper administration of justice, not to the benefit of individual holders of the office. It is in the public interest that members of the Shrievalty should be fit for the office which they perform and this objective must be borne in mind when the section is being construed ... Section 12 deals with other cases of unfitness and is, in my view, intended to cover all those cases where a Sheriff does not retire voluntarily but is unfit for performance of his duty."

161 There is, in the opinion of the Conduct Division, no relevant distinction between the word "inability" and the word "incapacity". The Conduct Division considers the ruling in *Stewart* to be of significant guidance.

- 162 In this case it is to be remembered that the magistrate has now held office for close to 17 years. It would be difficult to see four individual instances of unjudicial conduct or even misbehaviour (without more), in a 17 year career, as proof of incapacity. For that determination, it is necessary to look further.
- 163 An essential quality of a judicial officer is an appreciation of what constitutes proper judicial conduct, and what does not. The absence of that quality is apt to signify incapacity to discharge the judicial functions.
- 164 The absence of that quality does not carry, as a necessary concomitant, that every proceeding in which the judicial officer is involved is affected, or that every decision made by that judicial officer is flawed, or even questionable.
- 165 The issue for the determination of the Conduct Division is whether it has been shown that the magistrate lacks the capacity to carry out her judicial function. It is important also to remember that the issue is present and future incapacity. Past incapacity, if proved, is relevant only insofar as it casts light on present and future capacity, or incapacity.
- 166 Three questions immediately present themselves. First, is there an explanation for all or any of these instances of unsatisfactory conduct? If so, does that explanation bear upon the magistrate's present or future capacity to discharge the duties of her office? Does the magistrate's attitude to her conduct on these four occasions give any indication of her capacity in the future to discharge her judicial functions appropriately?
- 167 The Conduct Division accepts that the medical evidence provides some explanation for what occurred that gave rise to the Castle and Maresch complaints. Each of these events occurred at a time when she had unwisely (as it turned out) ceased taking her anti-depressant medication. Further, the Castle matter involved breaches of road traffic rules at a time

very shortly after the death of her uncle in a road accident, an event which, the Conduct Division accepts, had a substantial impact on her.

168 No such explanation is available in respect of the O'Regan/Passas or Farago complaints.

169 The medical evidence provides some basis for the argument advanced on behalf of the magistrate that, by reason of the resumption of medication, and the treatment regime provided by Dr Klug, any incapacity that gave rise to the 2009 complaints has ceased.

170 Dr Phillips considered that the magistrate made significant improvement, with the help of the psychologist she consulted in 1995, but suffered major stress and a set-back when confronted with a death threat. (There is a difficulty with this: Dr Phillips initially gave the date of the death threat as 13 August 2007. In her statement, the magistrate gave the date as 13 March 2003. Dr Phillips accepted that 13 August 2003 was the date the magistrate gave him. The difference in the months is immaterial, but the difference in years – 2003-2007 – is not.) In 2009, having scaled down her anti-depressant medication, the magistrate again developed psychiatric symptoms. The death of her uncle in that year was a significant factor in the re-emergence of those symptoms.

171 Dr Phillips observed (at para 115) that the magistrate had:

“... only recently developed insight into her aberrant behaviour”

and that she expressed distress and remorse that she had acted as she did. The “aberrant behaviour” was behaviour aberrant from the judicial norm, and not from her own ordinary behaviour.

172 Dr Phillips reviewed the magistrate on 8 March 2011, at the request of the Conduct Division. He reported that, by then, she was “symptomatically improved”, was “barely symptomatic”, and that such symptoms as she had

did not reach a threshold for any diagnosable psychiatric disorder. Dr Phillips considered it unlikely (assuming continued compliance with the treatment regime to be determined by Dr Klug) that her behaviour would become problematic with the risk that she might act inappropriately in the discharge of her duties.

173 Dr Klug said that the symptoms were in substantial but not complete remission. He recommended that the magistrate remain under the care of a psychiatrist for ongoing treatment and for more intensive treatment in the event of any deterioration. He saw the likelihood of recurring inappropriate behaviour as low if not negligible.

174 In evidence, Dr Phillips acknowledged (T 20) that a person who has a biological depression (as he had previously found the magistrate had) is less resilient to stressors and therefore at risk of exacerbation of the disorder.

175 At the conclusion of his evidence, Dr Phillips said;

“... I see the magistrate as being properly treated and as being pretty much asymptomatic at the present time and believing that insight will be much improved now that she is non depressed, it would be my view that she could continue in a professional role and the public could be reasonably protected in her continuing to work.” (T 41)

176 Dr Klug accepted that, because he had characterised the condition as “recurrent”, repetition was likely. He said:

“The fact that she has got a recurrent condition makes it more likely for her to have further such episodes statistically speaking than if she had had no episodes in the past at all.”

177 All of these circumstances, including Ex C, which resulted from an investigation of other hearings by the magistrate, not the subject of complaint, tend to suggest that the magistrate does not lack the capacity to

function appropriately as a judicial officer. There are, however, other considerations, to which reference will shortly be made.

The magistrate's attitude to the matters the subject of the complaints

178 The Conduct Division considers that the most significant additional factor bearing upon the question of incapacity is the magistrate's own attitude to her conduct. In this respect, her various responses, and most particularly her oral evidence, are of grave concern.

179 The magistrate's attitude to her behaviour can be traced through the various responses she has made to the Commission, to what she has told Dr Phillips and Dr Klug, what is contained in her sworn statement, and the oral evidence she gave in the Inquiry.

(i) the O'Regan/Passas complaint (intemperate language)

180 The magistrate was notified by the Commission of the complaints by Mr O'Regan and Ms Passas by separate letters dated 23 July 2004. She was invited to respond. This was almost a year after the event. The magistrate responded by letter dated 24 August. At that time she did not have available to her any court papers or transcript. She pointed out the difficulty of addressing the issues raised in the complaints. She recounted her recollection of the circumstances of the hearing. Of the application to revoke the Apprehended Violence Order she said:

"There was no merit that I saw in the application to revoke and it was eventually dismissed."

She also referred to the difficulty of dealing with unrepresented litigants. She launched something of an attack upon Ms Passas, saying:

"It appears that she has complained to everyone in relation to all her court proceedings. She has unsuccessfully applied for Ashfield Council to pay her costs. She and Mr O'Regan also seem to blame some sort of dark forces for her failure to be reelected ..."

181 She dealt with some other matters that are not presently relevant, and then wrote:

"I do not wish to respond to any thing else in Mr O'Regan's and Mrs Passas' complaint ... it is up to them if they think that some form of conspiracy has taken place. I do feel that my reputation has been sullied by their rantings and ravings ..."

She said that she was willing to provide a further response after having had access to the court papers and the transcript. They were supplied, and she provided the further response by letter dated 14 September 2004. She referred to some of the history of the application, and extracted legislation that provides that a court may decline to hear an application for revocation if satisfied that there has been no change in circumstances. She said:

"I was satisfied that there was no change in the circumstances accordingly dismissed the application."

She did:

"... concede that my choice of words could have been better in the circumstances ..."

182 In her statement she adhered to her initial responses to the Commission, and described Mr O'Regan's complaint as making "outlandish claims". She said that the sound recording showed that Ms Passas' demeanour was "excitable" (para 105). With respect to the particular that alleged that her response to Ms Passas "probably because they've got better things to do, Ms Passas" was intemperate, she quoted a dictionary definition of "intemperate" as:

"not temperate, unrestrained, unbridled, lack of moderation or due restraint" (para 116)

and denied that her response was in any way intemperate. She continued to deny that any part of her conduct during the course of that hearing was intemperate. She did accept that she could have used "more felicitous language" but expressed the opinion that Ms Passas had been engaging in a "frivolous" waste of the court's time (para 135).

- 183 Notwithstanding her counsel's general concession about the complaints, the magistrate maintained, even in her oral evidence, that she had not been intemperate or immoderate in the way she dealt with the application. She was asked by her counsel:

"Q. Do you still think that actually you didn't do anything too bad here?"

She replied:

"A Look, the benefit of hindsight of course is a wonderful thing. For some reason that I still don't understand she responded to my first question, 'Well, I don't know if you understand but I am a member of Ashfield council'. For the life of me I don't understand why someone would want to say something like that unless they want some form of special treatment, and that's the interpretation I took by responding to that question in that way. As I said before, the benefit of hindsight is a wonderful thing, but after seeing the letter from [the Commission] it gave me a better idea of what is required. I don't know why they don't forward more information to judicial officers when matters are summarily dismissed. It's not helpful."

This last was a reference to a distinction in the letters finalising the matters sent to Mr O'Regan and Ms Passas, and to the magistrate. The answer was hardly responsive, and amounted to turning the attack upon the Commission itself.

- 184 In cross-examination the magistrate demonstrated a degree of obstructiveness and inability, or refusal, to direct her mind to the issues about which she was being questioned. For example, she was asked if it were incumbent upon her as a magistrate to listen to an application made

by an unrepresented litigant. That is a simple question with only one correct answer. She replied:

"It is not as simple as that, Mr Gormly." (T 116)

When asked further about this, she said:

"She didn't respond to that, and that's what we do find in a lot of unrepresented people. They do not have the ability to focus on what's on point and I was endeavouring to get her back on point because it was just using up valuable court time. Yes, we do have a role in relation to unrepresented people, but we are not their lawyer and that's the difficulty because there is no assistance available for people such as Mrs Passas at that time and still isn't, with the reduction of services by the department of Attorney Generals." (T 117)

185 Finally, in respect of this matter, she said:

"I dealt with the matter appropriately according to the law, bearing in mind all this was represented and indicated any hearing would take four days and it would be a rehashing of the original application, which is not the same grounds as a revocation application." (T 119)

186 She accepted that certain references to Ms Passas making speeches, and votes, were "inappropriate and sarcastic".

187 She continued to refuse to accept that her comments had been "intemperate", but did agree to "inappropriate".

(ii) *the Farago complaint*

188 A copy of this complaint was forwarded to the magistrate on 12 October 2007. On 17 October 2007 she provided her first response. She recorded some of the factual background of the matter, and then said:

"It appears that Mr Farago's complaint is all about his perception of my dealing with him. Time at court was spent to give him time to read the Police brief and he did not appreciate what a Prima Facie case submission really means when he tried to call his client.

There is no basis for his complaint and it appears that he is trying to save face with his client.

It is my practice to request legal practitioners to assist the Court to reduce issues to save valuable court time ... This was all explained to Mr Farago on 1st June, 2007 when I requested any authorities to be forwarded to the court well before the hearing date ..."

- 189 On 5 February 2008 the magistrate provided her second response. She repeated something of a history, including her assertion that she had, on 1 June:

"requested that any authorities being relied upon be forwarded to the court well before [22 June]."

She then said:

"Mr Farago complains that I did not give him the opportunity to explain why the authorities were sent late. In my view, there was nothing to be gained by wasting court time in hearing such an explanation ...

I concede there was robust discussion between Mr Farago and myself in relation to the matter ...

In my view, Mr Farago appears to be trying to save face with his client by making such a claim. In my view, there is not substance to it."

- 190 It is quite plain from the transcript of 1 June that, when the magistrate said, in her second response, that she had directed, or requested, that any authorities be forwarded to the court "well before" the hearing date, she perpetuated her original error. As the transcript of 1 June reveals, she had merely asked that the authorities be provided "before the next occasion". This was done – the day before the hearing. Mr Farago had complied with the direction given. There was no reason, from what the magistrate said on 1 June, for him to divine that she had intended their provision at some earlier time. In her statement, the magistrate denied she was discourteous "in any way" to Mr Farago, and, again, referred to a dictionary definition of "discourteous". She said that she was direct and blunt, but not discourteous.

191 In her oral evidence she steadfastly maintained this position. She characterised her conduct as "direct and quite forthright in my displeasure in the use of court time that day" (T 142). She explained in the following way:

"He provided them before the hearing date so he did comply with my request. However, I inferred that he would understand the reasoning behind my request and would make sure, since he had them on the day, that it would get to me sooner rather than later. So that was my disappointment when he forwarded to the court because he had them available on 1 June and I expected them to be lobbed on my desk the week after." (T 144)

192 Contrary to the position maintained by the magistrate, the Conduct Division is of the view that her treatment of Mr Farago was, indeed, discourteous. The discourtesy is exacerbated by the fact that the magistrate was, in fact, in error in believing that she has specified "well before" the hearing as being the time at which the authorities were to be provided. Had she listened to Mr Farago, she may have understood that he had not disobeyed her direction to be as she later perceived it. He was, as it happened, correct.

(iii) *the Castle complaint*

193 Like Mr Farago, Mr Castle is a solicitor, and was able to formulate his complaint rather more precisely than Mr O'Regan, Ms Passas or Mr Maresch. The complaint Mr Castle made was that the magistrate;

- "(1) told [Ms Cooper] ... to 'shut up' and 'shut your mouth';
- (2) bullied and harangued [Ms Cooper];
- (3) did not afford [Ms Cooper] the opportunity of a fair and proper hearing; and
- (4) did not determine the appeal properly on its merits"

He provided more elaborate details of the complaint.

194 The magistrate provided her initial response in a letter dated 3 August 2009. It is not apparent that, at this time, the magistrate had available to her a transcript of the proceedings, although she did have, and provided to the Commission, a copy of the court papers.

195 The magistrate wrote:

"The onus is upon the appellant to satisfy the court that she is a fit and proper person. I have to hear evidence from the appellant first before any references are handed up. Mr Castle failed to do so at the end of Ms Cooper's evidence.

It appears that this complaint has been motivated by a disappointed client and at the urging of two other legal practitioners ..."

196 By letter dated 28 November 2009 the magistrate provided a further response. By this time she had had the opportunity of listening to the sound recording of the proceedings. She wrote:

"1. I have had the opportunity of listening to the cd of the court proceedings ... and at the outset I can only say that it clearly shows that I, at times, was rude and discourteous to her. I regret this sincerely.

2. I made some comments during Ms Cooper's evidence that clearly should not have been made at that time if at all. I regret that also.

3. Mr Castle complains that I did not grant him an adjournment for his client to attend the Traffic Offenders Programme. That is a decision that is within a court discretion to make. There is no basis for this complaint.

4. Mr Castle complains that I did not grant him an adjournment for two weeks. He gave no reasons for such a request and his application was refused. [The magistrate then referred to the Chief Magistrate's Practice Note 1 of 2001 in relation to adjournments.]

...

9. ... Each matter is dealt with on its merits.

...

11. In my view Ms Cooper's matter was dealt with on its merits. There is no basis for his complaint in this regard.

12. Of concern to me are the words I used. I was shocked when I heard the cd and am very embarrassed by it. I have since taken steps to ensure that nothing like this ever happens again. I have sought professional help in relation to dealing with the stress of being a judicial officer and have put in place procedures and changes to how I run the court.

13. I have no explanation for my words other than I succumbed to the accumulation of 'judicial stress'."

The magistrate attached some unsolicited letters of appreciation from litigants and their relatives in other cases she had conducted.

197 In her sworn statement the magistrate adhered to the responses of 3 August and 28 November, and went further. She said that she was "appalled" by some of the things she had said and apologised unreservedly. However, she denied the allegation that she had pre-judged Ms Cooper's application; she acknowledged that the word "blatantly" should not have been used, and that her comment "big deal" was "uncalled for and intemperate"; she accepted that she "certainly" should not have told Ms Cooper to "shut up" or said to her "you think you're God's gift do you?". However, she denied that her conduct amounted to bullying, and she denied that she did not permit Mr Castle an adequate opportunity to make submissions. She concluded by saying that she was "very embarrassed" by what she had said to Ms Cooper and that much of what she said should not have been said. She said she was sure she would never say such things again.

198 In her oral evidence the magistrate continued to reject the proposition that she had pre-judged the matter. She did accept that she had used intemperate language and cited "blatantly" and "shut up" as the basis for that acceptance. She declined to accept that her conduct was "bullying", but accepted that she was "overbearing". She accepted that on occasions,

her conduct had not been “judicial”. She did not accept that she had denied Mr Castle an adequate opportunity to make submissions.

199 Her evidence under cross-examination was somewhat more detailed. She was, for example, asked about the request by Mr Castle for a two week adjournment, following the magistrate’s negative response to the preceding request for referral to the Traffic Rehabilitation Offenders Programme. She said that the Chief Magistrate’s Practice Direction required applications for adjournment to give “cogent and compelling reasons”, and said that Mr Castle had given no reason. She accepted that an adjournment for two weeks could not be perceived as an adjournment for the purpose of attending that programme, and therefore that it could be expected that Mr Castle had some other reason for that application. Her position remained that Mr Castle had given no reasons for that application.

200 It is quite clear, in the opinion of the Conduct Division, that the magistrate forestalled any attempt by Mr Castle to give reasons for his application. She interrupted him by asking for representation from the RTA (Roads and Traffic Authority) and then turned her attention to Mr Castle again, and to the substance of the application. In the view of the Conduct Division, it is unfair of the magistrate to suggest that it was Mr Castle’s failure to give reasons for the application for the two week adjournment that deflected her from considering it. She accepted that she should not have said to Ms Cooper “the explanation for this does not cut it, okay?” (T 166). She said that was because it was “not judicial” and “not appropriate to say that at any time” (T 167). When pressed as to why that was not appropriate, she referred to the language – presumably the colloquial nature of the language – and rejected the proposition that that statement conveyed to Ms Cooper that the magistrate had already rejected her explanation. She agreed (T 177) that telling Ms Cooper to “shut up” involved preventing Ms Cooper from responding to the criticism that the magistrate had just made of her. She agreed that that was inappropriate. However, when asked if that was in breach of her judicial obligations, she merely replied:

"That is not for me to judge." (T 177)

When pressed further on the same question, she said:

"Well, that is another difficult question to answer what are judicial obligations. Yes, by being rude, totally inappropriate, yes, definitely." (T 177)

Ultimately, when pressed, she did make that concession.

201 In respect of her comment:

"You're explanations are pitiful";

she accepted that that was in breach of her judicial obligations because it gave an indication that the magistrate took an adverse view of Ms Cooper's answers and that that was an inappropriate time to convey that information.

(iii) *the Maresch complaint*

202 The complaint made by Mr Maresch was, in substance, that, even in proceedings in which he was not involved, the magistrate was "extremely aggressive", "had little patience with matters of detail or substance", and that, in his case, her manner was "belligerent, insulting" and that she decided his guilt before seeing any evidence.

203 The magistrate's first response regarding this complaint was made by letter dated 17 November 2009. She had not then heard the sound recordings. She wrote:

"As you are aware courts are very busy and a lot of court time is taken up with unrepresented defendants who have pleaded not guilty and are subsequently found guilty after giving evidence. There is no provision for legal advice to be given to such persons and the courts are limited in what they can tell defendants in relation to the legal aspects of their respective cases. This gentleman was upset that his explanation of parking with a trailer

attached to his car was not borne out by the photographic evidence. My attempts to explain things to him were futile. In the future I will list everything for hearing and let the hearings take their course."

Her second response to the Commission was made by letter dated 28 November (in conjunction with her response to the Castle complaint). Even at that time, she did not have a transcript or sound recording. She said that Mr Maresch was a very difficult man to deal with, and she believed that she acted in good faith in giving him the opportunity of seeing any photographs that existed in order to enable him to obtain the benefit of a plea of guilty if that is what he wished to do. To her earlier communication she added that she had subsequently disqualified herself from hearing Mr Maresch's matter. She wrote:

"15. On occasions in the past defendants have raised issues in Court which could affect whether the prosecution proceeds or not. On occasions the prosecutor has sought instructions and subsequently withdrawn a Court Attendance Notice. This has meant that a potential hearing was able to be dealt with more appropriately with less expense to the community and inconvenience to the defendant.

16. Mr Maresh (sic) was a very difficult man to deal with.

...

18. I believe that I acted in good faith in giving Mr Maresh (sic) the opportunity of seeing any photograph to enable him to get the benefit of a plea of guilty if that is what he wished to do. This would save court time and expense for the community as well as result in a lesser fine for him.

23. I reject Mr Maresh's (sic) claims 'before I'd been given a chance to speak, and without looking at the photos, Betts said that the photos were proof of my guilt'. I did not look at the photograph at any stage."

She again referred to the difficulties of dealing with unrepresented litigants, and the burdens so placed upon courts.

204 On 4 December 2009, after having been provided with the sound recording of the proceedings, the magistrate provided a third response. She said:

"I did, regretfully, make the comment 'I've had a gutful of people such as yourself coming to court pleading not guilty ...' I regret this. I endeavoured to explain what I meant later on when he interrupted me and I was unable to do so."

She denied having told Mr Maresch to "shut up", pointing out that the transcript records her saying "Shut, be quiet". She rejected Mr Maresch's claim that she had decided his guilt before any evidence was presented. She said she did not hear any evidence nor did she ever look at the photograph.

205 She also wrote:

"I reject Mr Maresh's (sic) claim that I decided his guilt before any evidence was presented. I did not hear any evidence nor did I ever look at the photograph ..."

206 On 9 December the magistrate wrote again to the Commission, advising that the charge had been heard in the Ryde Local Court by another magistrate and that Mr Maresch had been found guilty but the charge was dismissed under s 10(1)(a) of the *Crimes (Sentencing Procedure) Act* 1999. She said that she had been advised that Mr Maresch had relied upon the "trailer" explanation and suggested to the Council officer that the photograph had been "photoshopped" taking out the trailer. She then wrote:

"I am still at a loss as to why this gentleman complains that I allegedly coerced him into a plea of guilty and then refused to deal with it ... that just does not make sense. The transcript clearly outlines why I could not deal with his plea 'under duress'. I guess he is now happy that I did not deal with it!"

207 In her sworn statement, she adhered to these responses, and repeated that she should not have told Mr Maresch that she had "had a gutful of people" like him. She denied pre-judgment; she accepted that the "I've had a gutful" comment was intemperate. She denied unfairness in the proceedings. In her oral evidence she said that she believed that she dealt with the matter fairly because she gave him the opportunity of seeing

the photograph and had rejected his offer to plead guilty under duress. She continued to deny pre-judgment.

- 208 These responses by the magistrate afford the Conduct Division little cause to believe that the magistrate has even the most basic appreciation of the judicial function. Even when confronted with incontrovertible evidence, in the form of sound recordings, of her misconduct, she failed to recognise or acknowledge the implications of that misconduct. The failure to recognise the pre-judgment convincingly established in the Castle and Maresch matters represents an incapacity to understand (and therefore adhere to) proper standards of judicial conduct. That incapacity is present and permanent.
- 209 Both Dr Phillips and Dr Klug maintained that the magistrate had developed insight into her admittedly unsatisfactory behaviour. Dr Phillips distinguished between “emotional” and “intellectual” insight, and was of the view that the magistrate had developed both.
- 210 Some limited portions of their evidence are of relevance to the issue presently under consideration. Dr Phillips said (at T 20) that a person suffering from biological depression (as he found the magistrate to be) is less resilient to stressors and therefore at risk of an exacerbation of the disorder. He said (at T 26) that, if a person in a role such as that of a magistrate had personality characteristics of combativeness, irritability or impatience, and those characteristics were moderately deeply ingrained and manifest much of the time, then fulfilling the professional role of a magistrate would become difficult. If, on the other hand, that combative style of interaction were episodic and particularly based in mood disorder then, he considered, it would be of less concern because more easily treated. He accepted (at T 29), in effect, that insight is the key to forecasting future conduct. He gave his conclusion (at T 41):

“... looking at the issue in a medical psychiatric sense ... I see the magistrate as being properly treated and as being pretty much

asymptomatic at the present time and believing that insight will be much improved now that she is non depressed, it would be my view that she could continue in a professional role and the public could be reasonably protected in her continuing to work."

- 211 Dr Klug (at T 60) agreed with the proposition that the condition from which the magistrate suffers is a recurrent one, not in complete remission, and therefore it is more likely that she will have further episodes in the future than if she had no history of this kind of behaviour.
- 212 The Conduct Division accepts the medical evidence that, from a psychiatric point of view, the magistrate has gained insight into her conduct. That insight was not apparent in her oral evidence. Certainly, absent from her evidence was any insight into the quality of her conduct measured against the standards of judicial propriety. Her evidence disclosed a worrying lack of appreciation of the judicial role, and, more particularly, of her established failings in that regard. The hostility that permeated each of the hearings under consideration also surfaced in the Inquiry.
- 213 On the other hand, there is evidence, which the Conduct Division accepts, that the magistrate does in fact function in the judicial role.

Statements and evidence of professional colleagues

- 214 Of course, it is a feature of the judicial role that (except in appellate courts) the judicial officer's conduct in court is unobserved by judicial colleagues. None of the judicial colleagues who provided statements was able to comment upon the magistrate's conduct whilst in court.
- 215 Mr Dennis Burdett had worked with the magistrate at the Blacktown Local Court for almost three years between January 2004 and December 2006. He was the co-ordinating magistrate. Mr Burdett wrote of some operational difficulties in the work environment (due to asbestos removal). He described the magistrate as:

"friendly, pleasant, always punctual and very conscientious ...
compassionate, considerate and understanding ..."

He was previously unaware that she had suffered from depression.

- 216 Mr Peter Norton had known the magistrate since 1974 when she commenced employment as a junior clerk at the Redfern Local Court. Even then, he formed the view that she was:

"... strong willed, competent and determined."

- 217 Mr Norton was Chief Magistrate of the Burwood Local Court from 1994 to 2000, during part of which period the magistrate also served at Burwood. Mr Norton found her to be:

"... an extremely determined, efficient and hardworking magistrate
..."

- 218 During that time, Mr Norton said, he received no complaints from any of those involved about the magistrate's conduct.

- 219 Mr Marsden, who was currently working with the magistrate at the Parramatta Local Court, was the only colleague able to give contemporaneous evidence. He has been co-ordinating magistrate at Parramatta since January 2008. There are five courts in that complex. The magistrate has been posted to that court since January 2010. Mr Marsden found her to be "a very valuable member" of the court, demonstrating a sound and current knowledge of the laws of evidence and civil and criminal law. He said that she interacts well with other members of staff.

- 220 Notwithstanding the evidence that the magistrate does, at times, function, and functions judicially, the Conduct Division has concluded that incapacity has been proved. That is because she has demonstrated a failure to

understand quite basic concepts of judicial behaviour. That finding, of course, encompasses the lesser finding that the evidence could be found by the Parliament to be sufficient to prove incapacity.

221 Ultimately, the standard of misbehaviour or incapacity which will result in the removal of a judicial officer from office is a matter for the Parliament, with the assistance of the expertise of the Commission and applying contemporary community standards. The Conduct Division has decided, pursuant to s 28(1)(a) that the matters considered herein could justify parliamentary consideration of the removal of the magistrate from office on either of the available grounds, that is, proved misbehaviour or incapacity.

222 The Conduct Division wishes to emphasise that this report ought not be taken as the expression of opinion that the magistrate ought to be removed from office. That is a matter peculiarly within the province of the Parliament.

Report to the Governor

223 The Conduct Division finds:

- the complaints of Mr O'Regan and Ms Passas are substantiated;
- the complaint of Mr Farago is substantiated;
- the complaint of Mr Castle is substantiated;
- the complaint of Mr Maresch is substantiated;
- misbehaviour has been proved;
- it would be open to the Parliament to find that misbehaviour has been proved;

- incapacity has been proved;
- it would be open to the Parliament to find that incapacity has been proved;
- the misbehaviour found proved could justify Parliamentary consideration of the removal of the judicial officer;
- the incapacity found proved could justify Parliamentary consideration of the removal of the judicial officer.

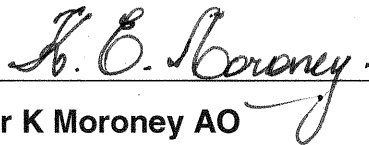
224 The Conduct Division so reports to the Governor.



The Honourable Justice Simpson



The Honourable D H Lloyd QC



Mr K Moroney AO
