

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

**The Honourable Michael Campbell QC
Her Honour Deputy Chief Magistrate Mottley
Ms M Jabour
6 MAY 2011**

**REPORT OF THE CONDUCT DIVISION TO THE GOVERNOR
REGARDING COMPLAINTS AGAINST
HIS HONOUR MAGISTRATE BRIAN MALONEY**

Contents of Report

	Paragraph numbers
Introduction	1–18
Removal of a Judicial Officer	19
The function of the Conduct Division	20–26
Background	27–51
The complaints	52–58
• The Altaranesi complaint	59–93
• The Banovec complaint	94–136
• The Wallace/Kiloh Centre complaint	137–204
Breach of undertaking	205–210
The screen saver matters	211–250
References	251–262
Medical issues	263–339
Incapacity	340–339
Discussion	386–437
Findings of the Conduct Division	438
Annexures	A–C

Introduction

1. On the 14 September 2009 the Members of the Judicial Commission of New South Wales appointed, pursuant to s 22 of the *Judicial Officers Act* 1986 (the Act), the Honourable Michael Campbell QC, her Honour Deputy Chief Magistrate Jane Mottley and Ms Martha Jabour to be members of the Conduct Division for the purposes of exercising the functions of the Division relating to complaints made to the Judicial Commission by Mr Oliver Banovec and Mr Tareq Alteranesi against his Honour Magistrate Brian Maloney of the Local Court. The Honourable Michael Campbell QC was appointed Chairperson of the Division.
2. The Conduct Division was requested to consider these complaints having regard to the undertakings given by Magistrate Maloney to the Conduct Division in respect of his conduct as referred to in an earlier Conduct Division report dated 13 December 1999.
3. On 8 February 2010 with effect from 12 February 2010 the Judicial Commission referred to the Conduct Division a further complaint by Dr Duncan Wallace. Subsequently that complaint was extended pursuant to s 31(1) of the Act to include matters hereinafter referred to as the screen saver matters.
4. By that time the complaints referred on 14 September 2009 had been examined by the Conduct Division pursuant to s 23 of the Act. The Division had determined that there should be a hearing in respect of the complaints (s 24(1)).
5. At a directions hearing on 12 February 2010, hearing dates previously fixed for March 2010 were vacated in view of the requirement that the Conduct Division examine the new complaint. Argument on an outstanding issue as to whether the hearing should be private or public was deferred.
6. During the course of examination of the further complaint the Division formed the opinion that Magistrate Maloney may be mentally unfit to exercise efficiently the functions of a judicial officer and pursuant to s 34(1)

of the Act on 20 May 2010 requested the magistrate to undergo examination by one of two nominated psychiatrists.

7. Magistrate Maloney agreed to be examined, however, there were discussions as to a suitable psychiatrist which, together with availability issues, meant that the magistrate was not examined by Dr O'Dea, forensic psychiatrist, until 7 and 26 July 2010. Dr O'Dea first reported to the solicitors assisting the Division on 11 August 2010.
8. In the meantime Magistrate Maloney had consulted Dr Nielssen, a psychiatrist, as to his mental health. Following the doctor's advice he ceased work from 8 February 2010 and commenced a course of treatment which is ongoing. Magistrate Maloney was advised by Dr Nielssen that he could return to work and he did so on 2 August 2010. Since his return he has been allocated longer matters avoiding list work.
9. At a directions hearing on 30 August 2010, hearing dates were fixed for the hearing beginning 17 January 2011, the intervening period allowing for the examination by Dr Phillips, consulting psychiatrist, referred to in [11].
10. Written submissions had been provided as to the issue of a public or private hearing, however, having had an opportunity to consider the reports of Dr Nielssen and Dr O'Dea, the Division determined, for reasons given at the directions hearing, that it would order that the hearings be private.
11. Dr O'Dea and Dr Nielssen differed on their diagnosis and Magistrate Maloney was examined by Dr Phillips at the request of the Division on 23 November 2010. The doctor reported to the solicitors assisting the Division on 13 December 2010.
12. It is convenient to say that the three psychiatrists now agree that Magistrate Maloney suffers from a bipolar 2 disorder and has probably done so since the mid 1990s.
13. The hearing occupied five days commencing on 15 January 2011. Mr Gormly of Senior Counsel and Ms Edwards of Counsel instructed by Ms Catherine Follent of the Crown Solicitor's Office appeared to assist the

Division and Mr Boulten of Senior Counsel instructed by Mr Greg Walsh appeared for Magistrate Maloney. As will appear, Mr Altaranesi was given leave to make submissions in respect of his complaint.

14. At the conclusion of the hearing, the Division took time to consider its response.
15. On 2 February 2011 Mr Walsh advised Ms Follent that further material had come to light which might found an application to re-open the hearing.
16. At a directions hearing on 4 March 2011, Mr Gormly and Mr Walsh advised that they considered a further hearing day was required. The Division accepted that view and fixed 28 March 2011 for that further hearing. Ancillary orders were also made.
17. On 28 March 2011 further evidence was taken and submissions made.
18. It is convenient to say at this point that the Division accepts Mr Boulten's submission that the critical issue that has emerged from the examination of the complaints and the hearings is Magistrate Maloney's capacity to perform the duties of a judicial officer in view of his bipolar 2 disorder.

Removal of Judicial Officer

19. Section 53(2) of the *Constitution Act* 1902 provides:

53 Removal from judicial office

- (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.

Section 53(3) provides that legislation may lay down additional procedures and requirements to be complied with before a judicial officer may be removed from office. Section 41(1) of the *Judicial Officers Act* 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.

Function of the Conduct Division

20. The function of the Conduct Division of the Judicial Commission is to examine and deal with complaints referred to it by the Commission.
21. The Division must conduct an examination of the complaint referred to it (s 23) and may hold hearings (s 24).
22. If the Division decides that a complaint is wholly or partially substantiated it may form an opinion that the matter could justify parliamentary consideration of the removal of the judicial officer from office (s 28)(1)(a)).
23. If the Division forms such an opinion it must present to the Governor a report setting out the Division's findings of fact and that opinion (s 29(1)).
24. Alternatively, if the Division decides that a complaint is wholly or partly substantiated it may form an opinion that the matter does not justify the consideration referred to in [22] and should therefore be referred back to the relevant head of jurisdiction (s 28(1)(b)).
25. If it forms such an opinion it must send a report to the relevant head of jurisdiction setting out the Division's conclusions (s 28(2)). Such report may include recommendations as to what steps might be taken to deal with the complaint (s 28(3)).
26. It will be a matter for the Houses of Parliament as to what action, if any, is taken in relation to a report presented to the Governor pursuant to s 29(1) of the Act. In *Bruce v Cole* (1998) 45 NSWLR 163 at 208, Priestley JA said:

The Conduct Division's report was based on the opinion that the matters referred to it *could* justify parliamentary consideration of removal. The very different question for decision which will face each House is whether the material before it, including but not necessarily limited to the Conduct Division's report, leads the House to decide that it *will* address the Governor

seeking removal on the ground of incapacity of the judge which the House *itself has judged to be proved*. (Emphasis in original.)

And see Spigelman CJ at 202.

Background

27. Most of the background material set out below comes from the Agreed Statement of Facts tendered as Exhibit A.
28. Magistrate Maloney was born on 14 October 1952. From 1971 to 1976 he was the Associate of a District Court judge. He was admitted as a non-practising barrister in 1978 and as a solicitor in 1980.
29. After varied legal experience he was appointed a magistrate on 8 July 1996.
30. Until 2003, Magistrate Maloney sat mainly in regional country and suburban courts. Since then he has been based at the Downing Centre Local Court.
31. Prior to 1998, Magistrate Maloney had been the subject of three complaints to the Judicial Commission (complaints of Menzani, Bates and Ford) which were not summarily dismissed by the Commission under s 20.
32. Those complaints were each classified as “minor” by the Judicial Commission under an earlier provision of the Act and referred to the Head of Jurisdiction for determination. This classification applied to all undismissed complaints other than those that could, if substantiated, justify Parliamentary consideration of the removal of the judicial officer complained about from office: s 30(1) of the Act.
33. In about July 1998, Magistrate Maloney received some informal counselling in relation to those complaints from Chief Magistrate David Landa and Magistrate Kevin Maughan, the Regional Co-ordinating Magistrate for the Illawarra Region and Senior Magistrate at Sutherland Local Court.
34. Chief Magistrate Landa delegated the conduct of the counselling to Magistrate Maughan. The counselling from Magistrate Maughan included

advice about the care required as to comments that should be made during court proceedings. Magistrate Maloney was advised in counselling not to comment on or refer to his personal or family law issues during the course of proceedings.

35. On 25 August 1998 a complaint was made to the Judicial Commission by Mrs Adair. The complaint concerned the manner in which Magistrate Maloney conducted contempt proceedings on 24 September 1997 involving her alleged breach of *Family Law Act* orders allowing her ex-husband access to their children.
36. On 8 March 1999 a complaint was made to the Judicial Commission by Mrs Willoughby. The complaint concerned the manner in which Magistrate Maloney had conducted himself during a "list day" of Apprehended Violence Orders ("AVO") matters at Wollongong Local Court on 5 March 1999.
37. Magistrate Maloney was informed about the complaints of Mrs Adair and Mrs Willoughby in a letter from Mr Schmatt, Chief Executive of the Judicial Commission, on 11 March 1999. He provided written responses in respect of each matter in that month.
38. The complaints were classified as "minor" by the Judicial Commission and referred to the Conduct Division.
39. A hearing in relation to both complaints was held from 26–29 July 1999. The hearing was conducted in private.
40. During the Conduct Division hearing Magistrate Maloney gave an undertaking as to his future judicial conduct. The undertaking was:

not to be too loquacious, not to interrupt solicitors, not to introduce matters reflecting his personal experience, to be more judicial and to allow matters to run their course without interfering.
41. The Conduct Division delivered its findings on 13 December 1999.

42. The Conduct Division determined that, while the Adair complaint was partially substantiated, no further action needed to be taken in respect of that complaint.
43. It did find substantiated an allegation that: "the judicial officer made inappropriate remarks that could have been construed as prejudicial to a woman whose husband sought access."
44. It also found substantiated an allegation that:
- the judicial officer frequently interrupted proceedings and made inappropriate and gratuitous comments that created the impression in the mind of the complainant that the judicial officer had prejudged her case.
45. In relation to the Willoughby complaint, the Conduct Division examined a large number of particulars relating to remarks made during the conduct of the AVO list.
46. The Division found a number of the particulars unsubstantiated, however, it found substantiated particulars relating to a named litigant in that: "Magistrate Maloney had failed to be sensitive or deal appropriately with a litigant who was apparently disturbed and to whom more careful attention and sympathy should have been extended."
47. The Division also found substantiated the use of a clearly salacious (our term) remark in respect of the Christian Brothers and reference to midday as the "Gary Cooper hour".
48. The Division also observed, as to a number of particulars not substantiated individually, that when taken together they convey the impression that:
- the Magistrate thought that he was not there to hear and determine cases for citizens who came to court for redress, but that he was there to entertain anyone who might be in court with a litigant or member of the public and such display of attempted mirth and informality were liable to reduce the perception of persons as to the seriousness of the court proceedings.
49. The Conduct Division were of the view that the matters established may have affected the performance of judicial duties by the magistrate but were

not matters which would justify parliamentary consideration of his removal from office.

50. A majority of the Conduct Division issued a reprimand to the magistrate, together with a warning against similar conduct in the future.
51. A minority report agreed with the findings and reasoning of the majority, but did not consider the Conduct Division had the power to issue a reprimand.

Complaints

52. Before turning to the details of the complaints, it is appropriate to observe that this exercise can be somewhat shortened because of two factors.
53. First, Magistrate Maloney has admitted inappropriate conduct in respect of most of the particulars of complaint, apologised and explained the events by reference to his "disease".
54. Second, the Division accepts, for reasons developed later in this report, that Magistrate Maloney's inappropriate conduct has, been substantially caused by his bipolar 2 disorder.
55. The screen saver matters do give rise to considerable factual dispute and there are, as will appear, other factual issues to be resolved.
56. The screen saver matters occurred in February 2002, however they are best dealt with in association with the Dr Wallace complaint.
57. Chronologically the complaint of Mr Banovec preceded the complaint of Mr Altaranesi; however, particulars were given and the hearing proceeded with the Altaranesi complaint dealt with first. It is convenient to adhere to that order.
58. It should be noted that the complaints (and their particulars) not only make statements of facts but also indicate the aspects of misbehaviour which the complainant contends arises from the facts in their context.

When we hold that a complaint has been accepted, made out or substantiated we are finding the facts in the complaint established and,

unless we expressly state otherwise, that those facts would involve misbehaviour were it not for Magistrate Maloney's bipolar 2 disorder.

The Altaranesi complaint

59. On 9 January 2009, Magistrate Maloney was sitting at Burwood Local Court. He did not regularly sit at that court although he had done so from time to time.
60. The majority of the matters listed on that day were AVO proceedings.
61. Mr Tareq Altaranesi was a defendant in an AVO application brought against him by Ms Gisela Travers. He was also an applicant for a related AVO against Ms Travers. The matters were for mention and, if appropriate, the fixing of a hearing date. The clerk did not hand up to Magistrate Maloney the two files but only the one in which Mr Altaranesi was the defendant. No criticism could be directed to Magistrate Maloney for not appreciating that there was a second matter.
62. Magistrate Maloney explained in evidence that, believing that there was the one matter, he thought it would be in Mr Altaranesi's interest for him to give a suitable undertaking and avoid the risk of an order being made against him. Magistrate Maloney also had in mind that such an undertaking would assist the court's list.
63. The transcript of the proceedings, and even more, the sound recording of those proceedings reveal, from the calling on of the matter until the eventual fixing of a date for hearing, a most unjudicial course of conduct. Except for some matters, to which we will come, Magistrate Maloney admits as much.
64. On 5 May 2009, Mr Altaranesi lodged a complaint with the Judicial Commission — the magistrate was not named — in the following terms:

I am applicant of AVO application File No. 00187733/08/46.

During the trial on 9th January 09 in Burwood Court the Judge (I don't know his name) tried to force me to with-draw my application in bias of the defendant although I submitted my substantiated evidences to support my

case. I refused to withdraw my application because this my right to seek the safety and justice the Judge then insulted me in the court and let who were in the court laugh. I felt at the moment that the Judge humiliated me and sowed me and expressed his own pre-judicial before reading the case, by asking me to be gentleman with the defendant (lady), after several times from him to withdraw the application. I refused, then ordered someone speak my own language to explain to me the meaning of "gentleman".

After my insisting on to not withdraw the application, the Judge adjourned to other session which dealt by other Judge and ordered AVO in my favour against the defendant.

Why the Judge of 9/1/09 insulted and swore me.

As far as I know once I filled an application, I am responsible of what it contains and I have liability about it.

I have tape record of what happened and it is ready to give to whom may concerned.

On or about 12 May 2009 he supplied further particulars as follows:

With reference to my complaint against a Judicial Officer on 5th May 09 and to the telephone conversation with yourself today, I herewith reply the enquiries you raised to me today:

- Name of Judicial Officer is: Judge Maloney (Burwood Court). This name was given to me today by Registry of Burwood Court.

- What he said in the session: He swore me in public trail by saying "bastard" and said "you have to be gentleman" plus made me ridiculous and mock which led the public to laugh. And forcing me to withdraw my application plus he said to the respondent "don't worry about it". Particularly I refused the withdraw [sic] and consisted on to continue the case.

For further information, I can send to you a copy of Recording Tape of what exactly happened in this court.

65. By letter dated 8 July 2009 to the Chief Executive of the Judicial Commission, Magistrate Maloney replied to Mr Altaranesi's complaint as follows:

I reply to your letter of 24 June 2009.

I deny that I tried to force Mr Altaranesi to settle his matter. I was conducting a list at Burwood Local Court that contained both Apprehended Domestic Violence and Apprehended Personal Violence applications. The list was not a hearing list, rather a case management list. Attempts to bring about a resolution to the mutual benefit of both parties as well as a reduction in case volume for the court is a constant objective.

The list was large and is conducted in an exceptionally small courtroom. There is a need when managing such a list in these circumstances to do so with expedition and, in my opinion, a friendly manner. The litigants are usually emotionally charged and some may become volatile. Accordingly, it is appropriate to dispose of as many matters in the shortest possible time.

Mr Altaranesi I first identified as being a respondent to an application for a Personal Violence Order brought by a work colleague. I attempted to ascertain whether the parties had explored resolution through the Community Justice Centre. The applicant advised that she was prepared to withdraw her application on the basis of a formal undertaking. I attempted to advise Mr Altaranesi of the advantages of such a course of action. It became apparent that the court may best assist him if the services of an interpreter could be used; Burwood being a busy court interpreters are often to be found. Fortuitously a Police Senior Constable and DVL Officer spoke Arabic fluently and offered to assist.

Unfortunately, I was later appraised by my court officer that a cross application existed and orders sought from a Ms. Travers. This misunderstanding may have caused embarrassment to Mr Altaranesi and I apologise for any hurt occasions. I noted that in each application another magistrate had made Interim Apprehended Violence Orders.

On his return to court after advice from the DVLO he was promptly given a date for the hearing of his matter.

I further advise that comment recorded sotto voce were to my court officer alone and not to the complainant.

I further note that Mr Altaranesi makes complaint that I referred to him as a "bastard". I deny that I did so. The copy recording supports me in this regard.

I wish to advise the Commission that I try to maintain a friendly manner in court at all times. In cases where a person or litigant is not fluent in English I try to speak in relatively simple terms. My ability to converse in the manual deaf language in the deaf community gives me an appreciation of the special needs of members of the community who have communication difficulties.

Since 1999 I have conducted many PV and DV lists without complaint. Further, whilst at Fairfield Court for three years I conducted the majority of these lists at the request of the legal profession, Police Domestic Violence Liaison Officers and the Domestic Violence Court Support personnel.

I often receive letters of appreciation from persons who have appeared in my court, copies of which I can provide if required.

Again I express my regret and extend to Mr Altaranesi my humble apology. I ask that the Judicial Commission summarily dismiss the complaint.

66. Prior to the hearing, particulars of the complaint were provided as follows:

A. Mr Tareq Altaranesi

The following complaint is made about the behaviour of the Judicial Officer, Magistrate Brian Vincent Maloney, while acting in the course of his duties at Burwood Local Court on 9 January 2009.

1. Ridicule

The Judicial Officer ridiculed Mr Altaranesi, an unrepresented litigant in the court.

Particulars

- (a) His Honour ridiculed the name of Mr Altaranesi by announcing it in an exaggerated accented fashion at the commencement of proceedings.

HIS HONOUR: Mr Tareq Altaranesi. p 1.1

- (b) His Honour incited laughter at Mr Altaranesi by making public comments such as:

HIS HONOUR: You don't believe the police — then take somebody from the audience. p 4.44

HIS HONOUR: Please do. In Arabic words like “and” and “but” so he understands. p 5.20

HIS HONOUR: You can lead a horse to water can't you. p 5.38

HIS HONOUR: Phew, Cheerio, I'll put that down for four hours. That'll go forever and ever. p 7.7

- (c) His Honour embarrassed Mr Altaranesi by asking him a procedural question which demanded a response in a manner which may have been demeaning to Mr Altaranesi.

HIS HONOUR: Do you know what can happen if we have a hearing? p 2.8

ALTARANESI: Yes I know sir. p 2.11

HIS HONOUR: What happens — you tell me? p 2.13

2. Bullying

The Judicial Officer bullied and belittled Mr Altaranesi in an attempt to pressure him to give an undertaking rather than have a hearing in his matter.

Particulars

- (a) His Honour publicly speculated about the personal adverse consequences at Mr Altaranesi's work to frighten or deter him from having a hearing.

The passage commencing: HIS HONOUR: All right. People talk don't they ... But in the workplace, particularly a hospital - chatter, chatter, chatter, chatter, chatter, p 2.26 continuing through to ... tongues start to wag at work “Guess what happened to Tareq? You wouldn't believe it”, by the time it gets to the tenth person it's changed. p 3.

- (b) His Honour publicly speculated about the personal adverse experiences and outcome of a hearing to frighten or deter him from having a hearing.

HIS HONOUR: When you get in the witness box it's like open heart surgery. They cut you open — pull you open like some Portuguese chicken and mess with your bits. p 3

HIS HONOUR: ... the last thing you want is an order from the court to help your employer give you the sack. p 5.1

- (c) His Honour repeatedly frustrated Mr Altaranesi's desire for a hearing date to pressure him to give an undertaking.

HIS HONOUR: You don't need to tell me anything — all you need to tell me as a gentleman — that you're going to let this lady live her life. All right. Order dismissed. p 3.25

HIS HONOUR: But you've got an undertaking — you're giving me an undertaking aren't you? p 3.41

ALTARANESI: Yes but — p 3.41

HIS HONOUR: You've given me your word. Thank you. That's all I need. p 3.43

INTERPRETER: I insist on a hearing. p 4.21

HIS HONOUR: No you're not getting one.

ALTARANESI: Yes sir.

HIS HONOUR: No, no, no it's a silly thing to do. Just give me your word that you'll leave Gisela alone. That's all I want — just your word. Before God you say "Look I promise". That's all I want.

ALTARANESI: OK. Give me a chance to listen to hear from me.

HIS HONOUR: I don't need to have a hearing — I've got all these people waiting. p 4.33

ALTARANESI: But I not withdraw my hearing ...I ...my appeal my appeal .. I not withdraw myself. p 5.12

HIS HONOUR: Your reputation is now intact. You've saved your own personal dignity. p 5.15

- (d) His Honour continually spoke over Mr Altaranesi or did not allow him to speak.

ALTARANESI: It looks the other way ... p 2.19

HIS HONOUR: Wait a minute ... p 2.20

ALTARANESI: Can I have some commencement I tell you, sir. Can I say something? p 3.22

HIS HONOUR: You don't need to tell me anything. p 3.25

HIS HONOUR: But you've got an undertaking — you're given me an undertaking aren't you? p 3.38

ALRATANESI: Yes but — p 3.41

HIS HONOUR: You've given me your word. Thank you. That's all I need. p 3.43

ALTARANESI: OK. Give me a chance to listen to hear from me. p 4.31

HIS HONOUR: I don't need to have a hearing — I've got all these people waiting. p 4.35

ALTARANESI: No just two minutes please ... p 4.36

HIS HONOUR: No not even that. p 4.38

ALTARANESI: Your Honour can I say something — look sir I'm just a victim here ... p 6.1

HIS HONOUR: I don't know if she did. p 6.4

- (e) His Honour used ridicule to embarrass Mr Altaranesi and pressure him to accept an undertaking.

See Transcript references at A1(b) above.

3. Denial of Natural Justice

The Judicial Officer attempted to deny natural justice to the unrepresented litigant, Mr Altaranesi.

Particulars

- (a) His Honour refused or ignored a number of requests by Mr Altaranesi for a hearing.

See transcript references at A2(c) above

- (b) His Honour continually talked over Mr Altaranesi.

See transcript references at A2(d) above.

- (c) His Honour purported to provide disinterested legal advice to an unrepresented litigant which was contrary to the expressed wishes of Mr Altaranesi.

The passage commencing: HIS HONOUR: All right. People talk don't they ... But in the workplace, particularly a hospital — chatter, chatter, chatter, chatter, chatter, p 2 continuing through to, There's a way of resolving this. See let's just say the worst case scenario for you — you lose ... tongues start to wag at work "Guess what happened to Tareq you wouldn't believe it" ... by the time it gets to the tenth person it's changed. p 3.

HIS HONOUR: When you get in the witness box it's like open heart surgery. They cut you open — pull you open like some Portuguese chicken and mess with your bits. p 3

INTERPRETER: I insist on a hearing.

HIS HONOUR: No you're not getting one.

ALTARANESI: Yes sir ...

HIS HONOUR: No no, no it's a silly thing to do. Just give me your word that you'll leave Gisela alone. That's all I want — just your word. Before God you say "Look I promise;. That's all I want."
p 4.5

HIS HONOUR: The last thing you want is an order from the court to help your employer give you the sack. p 5.1

67. The particulars do not refer to the allegation that Magistrate Maloney called Mr Altaranesi "a bastard". No doubt that is because those advising us could not hear the word on the tape which appears to be a complete recording of what took place during the hearing.

68. Mr Boulten, very properly, did not object to the issue being dealt with. Mr Altaranesi gave evidence that he had heard Magistrate Maloney call him "a bastard" and asserted that it could be heard on the recording.

69. Ms Holla Altaranesi, Mr Altaranesi's 18-year-old daughter gave evidence in cross-examination by Mr Boulten:

Q: Did you hear the magistrate call your father a bastard?

A: I did but it was very slight it was almost a whisper.

Q: Is this something you have discussed with your father?

A: Well naturally. My father told me that the magistrate called him a bastard yes, because he was clearly angry that he would deserve.

70. Mr Altaranesi was given leave to address us and he put to us in submission that we should find that Magistrate Maloney had so called him. He did not suggest that the recording played to us, which was a CD taken from the original tape, was incomplete. The CD is Exhibit B and a copy appears at Annexure A.

71. Magistrate Maloney denied that he called Mr Altaranesi "a bastard".

72. We have listened to the recording on a number of occasions, including after Mr Altaranesi's address, and we do not hear those words. We do

hear other words that Magistrate Maloney claims were meant to be sotto voce.

73. Further, it does not seem to us that such direct abuse fits with the way in which Magistrate Maloney was speaking to Mr Altaranesi or about him, reprehensible though that was.
74. Mr Altaranesi and Ms Altaranesi were clearly upset at the way Mr Altaranesi was being treated. However, we think they were mistaken in believing, as we think they do, that the word “bastard” was used.
75. Whilst listening to the sound recording of 9 January 2009 gives a fuller picture of what occurred on that day, it is appropriate to give an account of some of the events including some extracts from the transcript.
76. Magistrate Maloney called the matter on by an exaggerated pronunciation of Mr Altaranesi’s name. He agreed in evidence that that was inappropriate. After Ms Travers had indicated that an attempt at mediation had failed, saying “... for settlement. He wouldn’t be in agreement — we’re here today for a hearing date”, Magistrate Maloney established that Mr Altaranesi and Ms Travers worked at the same place and went on:

HIS HONOUR: All right. People talk — don’t they? People gossip. I mean it doesn’t matter who we are, what we are everybody wants to talk about somebody or some thing at some time or another that doesn’t really or shouldn’t really involve them but humans are like that they just can’t keep their mouths shut. Some people talk more than others. But in the workplace, particularly a hospital - chatter, chatter, chatter, chatter, chatter (laughter). And then when you get in the witness box over here and then she gets in the witness box, we’ve got to make a determination who to believe. Now it could be you — it could be her.

ALTARANESI ... Yes sir.

HIS HONOUR: There’s a way of resolving this. See let’s just say the worst case scenario for you — you lose. That’s really the court — it won’t be me because I don’t sit here all the time. I just come — I’m a blow-in — I come every now and again. Don’t I Cathy? A couple of times a year — about four times a year and it could be Mr Pierce, it could be Magistrate Mottley, it could

be Magistrate Barkell or Garry Still from Bankstown might make a cameo performance — come over here, an appearance, makes a determination against you. Which is really the judicial officer saying “I don’t believe you, I believe her.” And then tongues start to wag at work “Guess what happened to Tareq? You wouldn’t believe it.” And when somebody tells the story to somebody else by the time it gets to the tenth person it’s changed. That’s what happens. So — but if you say “Look I don’t believe what she says — what she says in her is a lot of rot. I don’t want a hearing, then she can go away and say “Guess what happened at Court?” Unless you want to accept some sort of formal undertaking from him to leave you alone. Formal undertaking — that’s not even an order. A formal undertaking — you as a gentleman — give your word that you’ll just step out of her life, save in so far as you might have some contact at work. I might just say draw the analogy to your work at the hospital. When you get in the witness box it’s like open-heart surgery. They cut you open — pull you open like some Portuguese chicken and mess with your bits. It’s very painful. But here — this lady here is offering you an olive branch. She’ll accept your formal undertaking to this court as a gentleman that you virtually have no contact. That’s all you want isn’t it? Would you take that olive branch as a gesture in which it is given?

ALTARANESI: Can I say something?

HIS HONOUR: You don’t need to tell me anything — all you need to tell me as a gentleman — that you’re going to let this lady live her life — All right Order dismissed on formal undertakings in the terms of the order sought that you as a gentleman giving your word. All right?

ALTARANESI: Sorry sir I not understand?

HIS HONOUR: It’s not an order. I’m just acknowledging that you are giving me your word as a gentleman. That’s what Gisela wants. OK? There’s no order against you.

ALTARANESI: Thank you.

HIS HONOUR: But you’ve got an undertaking — you’re given me an undertaking aren’t you.

ALTARANESI: Yes but —

HIS HONOUR: You’ve given me your word. Thank you. That’s all I need.

Mr Altaranesi then asked for an interpreter. Following a conversation in court, presumably in Arabic, the following took place:

INTERPRETER: I insist on a hearing.

HIS HONOUR: No you're not getting one (much laughter).

ALTARANESI: Yes sir —

HIS HONOUR: I don't need to have a hearing — I've got all these people waiting.

ALTARANESI: No just only two minutes please —

Magistrate Maloney then said:

HIS HONOUR: Not even that. Who else speaks Arabic here? Can you tell him in Arabic in another way — all I want is his gentlemen — his word as a gentleman.

The last thing you want is an order from the court to help your employer give you the sack.

Mr Altaranesi refused to withdraw his application and the transcript continues:

HIS HONOUR: Oh, there's a cross application. My God! He wants to have his word against her too. I just realised.

...

HIS HONOUR: Oh shit ... I ... do you want to withdraw your's against her?

...

ALTARANESI: No. I not withdraw my ...

HIS HONOUR: Talk to the senior constable — go outside and talk to the senior constable. Just wait, you can lead a horse to water can't you.

After a short break the hearing continued and the transcript continues:

HIS HONOUR: Senior — Leading Senior — Barred Up Leading Senior (Loud Laughter) cause he's got a bar up. He's been in the job more than twelve

years at least more than twelve, probably thirteen by the looks of it
(continuing loud laughter) what are we doing with these two people.

...

ALTARANESI: I don't withdraw anything.

INTERPRETER: Your Honour he insisted on a hearing date.

HIS HONOUR: OK

INTERPRETER: Even if it's going to cost him.

HIS HONOUR: OK. Everybody gets — everybody has their day in court —
Everybody's entitled to their day in court.

...

HIS HONOUR ... Everybody has orders on each other. All right everybody
stays away from each other. Phew (after a pause) Cheerio. I'll put that down
for four hours. That'll go forever.

77. Before turning to the particulars which are set out in [66] it is relevant to
note that Mr Boulten early in his submissions in the Altaranesi matter
observed:

The general picture we concede shows that the Magistrate fell short at times
of the standards that are required of judicial conduct at various times, but we
do not accept that some of these particulars are established.

78. The first particular is an allegation that Magistrate Maloney ridiculed Mr
Altaranesi, an unrepresented litigant in the court.
79. We find this particular made out. We do not see any utility in examining
each of the subparticulars in relation to this aspect in detail.
80. In cross examination by Mr Gormly, Magistrate Maloney gave the following
evidence:

Q: I'll just put this to you, Magistrate Maloney: at the time these exchanges
occurred, you were using humour, ridicule, and the refusal of a hearing date
in the face of insistence that there be one granted, to pressure Mr Altaranesi
into giving an undertaking. What do you say to that?

A: In the context of having knowledge of one set of proceedings only, and not the others, then if I had have known that it was the other ones, I wouldn't have done it. But he knew more about these proceedings than I did, at the beginning of time with him, and constant - as - as a result we were at cross purposes. I didn't know that there was another set of proceedings.

There was no denial, only an explanation.

81. He agreed that the statement "you can lead a horse to water, can't you" was a statement that would have the inevitable effect of ridiculing Mr Altaranesi in a public place if it were said for everybody to hear. He said that it was intended to be for his clerk and sotto voce. However, it is clearly evident on the tape and Magistrate Maloney had said in his reply to the complaint that it was an exceptionally small courtroom. Other remarks that appear in the transcript were clearly designed to provoke laughter, which came in good measure, and it is difficult to see those words otherwise, not to mention the remark after fixing the date: "That'll go for ever".
82. Mr Boulten contended that it was not a "proper characterisation" of Magistrate Maloney's conduct to call it "ridicule". That word, he put, "requires somebody to intentionally belittle somebody". He put that Magistrate Maloney was trying to resolve the list taking into account Mr Altaranesi's interests and that the misunderstanding as to the further claim explained much of what took place. Magistrate Maloney, Mr Boulten submitted, did not intend to ridicule Mr Altaranesi or embarrass him.
83. It seems to us that in the passage quoted at [74] Magistrate Maloney did admit to using ridicule to attend his end.
84. In any event Mr Boulten did not offer textual support for the meaning he ascribed to ridicule. The *Shorter Oxford Dictionary* offers, amongst other meanings for the noun ridicule:

The act or practice of making persons or things the object of jest or sport; language intended to raise laughter against an object.

A piece of derisive mirth or light mockery.

As a verb, a meaning "to treat with ridicule or mockery; to make fun of, deride, laugh at ..." is offered.

Beginning with the exaggerated accent in the calling of Mr Altaranesi's name, which Magistrate Maloney admitted was inappropriate, and continuing throughout the proceedings, Magistrate Maloney used language intended to raise laughter against Mr Altaranesi and make him an object of jest.

Mr Boulten pointed to a quality of sensitivity and anxiety which was apparent in Mr Altaranesi when he gave evidence before us; however, that provided no justification for the magistrate's conduct towards him. Indeed, in cross-examination Magistrate Maloney gave the following evidence:

Q: It would seem that he was tense or anxious or worried when he was before you. Do you agree with that?

A: Yes.

Q: He was the very sort of litigant that, on your observation at the time, that should never be ridiculed by a judicial officer. Do you accept that?

A: I do, now, yes.

Q: He is the very sort of litigant that should never be made the subject of laughter.

A: Correct.

85. As earlier observed we consider the allegation of ridicule made out.
86. The second particular is that "The Judicial Officer bullied and belittled Mr Altaranesi in an attempt to pressure him to give an undertaking rather than have a hearing in the matter".
87. Mr Boulten put in his address "... we do not accept that the Magistrate bullied and belittled Mr Altaranesi. His comments, as they are outlined throughout pp 2 and 3 as it happens of the particulars, are inappropriate and perhaps excessive pressure in an endeavour to reach a settlement ...", but of course the magistrate's evidence of his explanation about why

he came to that view that the case was ready for settlement isn't challenged.

He went on to point to the magistrate's explanation that he thought there was only one matter and would not have pressed for settlement had he known there was at least one other associated matter.

88. This circumstance does not, however, answer the allegation as to what Magistrate Maloney actually did. We accept that the cumulative effect of the matters set out in the particulars, to which it is unnecessary to go, does amount to the bullying and belittling of Mr Altaranesi in an attempt to pressure him to give an undertaking.
89. The third particular is that "the Judicial Officer attempted to deny natural justice to the litigant, Mr Altaranesi" by refusing or ignoring a number of requests for a hearing, continually talking over Mr Altaranesi and purporting to provide disinterested legal advice contrary to Mr Altaranesi's expressed wishes.

Mr Boulten's submission on this aspect appeared in the following passage of the transcript of his address:

The denial of natural justice particular, particular number 3, is likewise a matter which deserves sophisticated, if I might say so, with respect, consideration because in the general scheme of things, of course, Mr Altaranesi was granted a hearing and once the magistrate understood that this was an inter-related set of proceedings and that Mr Altaranesi was intent on a hearing, he got the hearing. So that in —

MR CAMPBELL: You would have to think, Mr Boulten, that a litigant would have to be a person of a fairly determined frame of mind to withstand what was being put to him wouldn't you?

MR BOULTEN: Yes, and the magistrate, despite criticisms from counsel assisting, the magistrate did accept yesterday, and has accepted in writing, that the way he handled it was inappropriate and largely because of that, your Honour.

I don't wish to say anything more about the particulars.

90. Again the circumstance that Magistrate Maloney did, ultimately, fix a date for a hearing and that part, at least, of his behaviour may have been due to his belief as to there being only one matter does not provide any answer to the allegations set out in the particulars.
91. We do think that the particular relating to the purported provision of disinterested legal advice might have been put somewhat differently, however, Mr Boulten took no point as to this and the substance of the complaint is clear and made out.
92. We consider particular 3 made out.
93. The complaint in the Altaranesi matter is partly substantiated, albeit, as we shall discuss in detail later, the substantial cause of the conduct complained of was Magistrate Maloney's bipolar 2 disorder.

The Banovec complaint

94. Mr Oliver Banovec was the defendant in proceedings relating to a number of charges brought by the Australian Securities and Investments Commission ("ASIC"). Those charges included "fraudulent misappropriation of money" (s 178A *Crimes Act* 1900 (NSW)), "make false statement on oath amounting to perjury" (s 327(1) *Crimes Act* 1900 (NSW)) and "make statement false or misleading in a material particular lodged with ASIC" (s 1308(2) *Corporations Act* 2001 (Cth)).
95. Committal proceedings were part heard before Magistrate Curran at the Downing Centre Local Court on 10 September 2008 and stood over to 24 September 2008 when the magistrate was to determine any outstanding issues as to witnesses to be called pursuant to s 91 of the *Criminal Procedure Act* 1986 (NSW).
96. On 10 September 2008 certain subpoenas issued by Mr Banovec were called upon and two of them, one to Mr Peter Frampton and one to Mr Lachlan McGregor, were stood over to 17 September 2008.

97. At the hearing on 10 September 2008, Mr Banovec had been represented by Mr Luitingh of Counsel and Mr Frampton and Mr McGregor by Mr Hodges, solicitor.

98. The entry on the Bench Sheet that day read:

Order:(1) FM — Return of Subp. On Frampton & McGregor on 17 Sept. 2008

SOFM: 24 September 2008 Pt Hd Curran

99. On 17 September the matter came on before Magistrate Maloney. Mr Dawson of counsel appeared for Mr Frampton and Mr McGregor. Mr Banovec was unrepresented.

100. Mr Dawson pressed for an application to strike out the subpoenae to be heard and filed a Notice of Motion in court to that effect. He also handed up detailed written submissions. Mr Banovec put that the matter was only listed for a date to be fixed for hearing the argument, that for that reason Mr Luitingh was not present and in any event supporting material had not been served.

101. In the event, Magistrate Maloney determined that the strike out motion should be heard, struck out the subpoenae and made an order for costs of \$7,500 plus GST against Mr Banovec without calling upon or hearing from Mr Banovec in respect of that costs order. The extent to which Magistrate Maloney heard Mr Banovec on the other issues is dealt with later.

102. On 16 May 2009, Mr Banovec made a complaint to the Judicial Commission in the following terms:

In proceedings brought before his honour on 17 Sep 08, his honour conducted himself in a manner offensive and disrespectful to the writer.

In addition, his honour did not uphold the principals [sic] of natural justice, did not act impartial or displayed any judicial independence and displayed a personal behaviour that was offensive toward the writer, not in line with what ought to be expected from an judicial officer and offensive to the writers [sic] dignity.

Details of complaint

1. On 17 September 2008 a return of subpoena was brought before his honour Magistrate Maloney.
 2. My opponents brought a notice of motion seeking to have the subpoenas set aside.
 3. Mr Dawson appeared with his instructing solicitor Mr Hodges. The writer appeared in person.
 4. Upon the matter being called the magistrate took a very biased view towards the writer. See transcript of 17 September 2008 (T 17/09) page 5 lines 40–47.
 5. His Honour continued with his inappropriate and offensive remarks (T 17/09 p 6 145, p 7 15–24.
 6. His honour, denying the writer natural justice, found against the writer, set aside two subpoenas and ordered costs against the writer.
 7. His honour failed to allow the writer to be heard, failed to allow the writer to make an adjournment application and continued to hear the motion when the writer was prejudiced by the lack of notice of the notice of motion and the lack of representation and not being given the opportunity to be heard (amongst other things) on costs.
 8. I attach to these Details of Complaint the Transcript of local court proceedings on 17 September 2008 and Submissions prepared for the writer in supreme court proceedings No 15425/08 which sought order setting aside the decision of his honour.
103. Having been provided with a copy of the complaint, Magistrate Maloney responded to the Chief Executive of the Judicial Commission on 10 June 2009 as follows:

I reply to your request for a response as contained in your letter of 19 May 2009. Although I was not provided with a copy of the relevant transcript I have a copy of the submissions the complainant's counsel made on the

appeal provided for under the provisions of s 74 Local Courts Act. I reply as under.

The failure on my part to allow Mr Banovec the opportunity of making a submission on the question of costs was an oversight on my part which I regret.

During the proceedings before me I formed the view that the various prosecutions of Mr Banovec had been protracted, involved at least two prosecutions of Mr Banovec by ASIC before Justice Walsh in the Supreme Court and that much animosity existed between the litigants. At no time did I intend to be offensive or disrespectful. In what was a rather tense courtroom environment I attempted to use analogy to better explain the reasonable expectations of the court in allocated [sic] a hearing date for the matter. On reflection, given Mr Banovec's complaint, I appreciate that the analogy may not have been apposite.

Should I by word or deed have given offence to Mr Banovec such was not my intention and I unreservedly apologise.

104. On 18 June 2009 the Chief Executive of the Judicial Commission wrote to Magistrate Maloney as follows:

I have received your letter of 10 June, 2009 regarding the complaint about you from Mr O.K. Banovec.

As you are aware the Commission is examining this complaint. In order to complete its examination the Commission has requested that you provide your comments regarding paragraphs 34 and 37 of the Conduct Division Report dated 13 December, 1999.

In particular the Commission has asked that you address the undertakings given by you to the Conduct Division and referred to in those paragraphs at pages 46–47. A copy of the Report is enclosed.

To assist with your response to this request I have also enclosed a copy of the transcript of your evidence before the Conduct Division.

The Commission notes that you have not responded to its invitation to make submissions concerning what action it should take in relation to the

complaint. I would be grateful if you would provide any submission you wish to make in that regard.

Please forward your response to me by 10 July, 2009.

105. On 2 July 2009 Magistrate Maloney replied as follows:

I respond to your letter of 18 June 2009.

I acknowledge the full nature and extent of the undertakings I gave the Conduct Division in December 1999. I advise that each day whilst on the Bench I strive to uphold those undertakings and be faithful to my oath of office.

I note that almost ten years has [sic] passed since then and in that time only two complaints have been made, to the best of my recollection. Both of those complaints did not involve allegations of inappropriate use of humour, loquaciousness or that I was offensive. Both were summarily dismissed.

I respectfully request the Judicial Commission to be appraised of the volume of matters I have concluded, particularly since I have been allocated to the Downing Centre Local Court for the past five and a half years. According to BOCSAR statistics, in 2007 (later statistics are not available) I concluded 1,679 criminal matters. I estimate that when including Police and IPB, local council and other authority prosecutions, AVO applications, Bail applications, Civil matters as well as case management listings, I would preside over approximately 3,000 matters each year.

Since I have been at the Downing Centre I have been allocated to the Defended Hearings List in Court 5.1 on average 80 days each year; 46 times in the first six months of 2009. I have been allocated to the Charge Court 17 times this year. Both lists are extensive lists to conduct, both in terms of number and complexity. At least half are unrepresented defendants/litigants. I endeavour to conduct each list efficiently, effectively and as the Rules require with regard to justice.

I strive to demonstrate to all litigants, and to those interested in each proceeding before me, that I am understanding, caring, compassionate and empathetic. I admit that I am not beyond making a mistake. Where I have done so and offence be taken I sincerely apologise.

I respectfully request the Judicial Commission summarily dismiss the complaint.

106. Prior to the hearing, particulars of the complaint were supplied as follows:

B. Mr Oliver Banovec

The following complaint is made about the behaviour of the Judicial Officer while acting in the course of his duties at the Downing Centre Local Court on 17 September 2008.

1. Denial of Natural Justice

The Judicial Officer attempted to deny natural justice to the unrepresented litigant, Mr Banovec.

Particulars

(a) His Honour refused an adjournment application without properly hearing from Mr Banovec.

Passage commencing HIS HONOUR: Why do you want an adjournment? p 5.28 continuing until p 7.25.

Passage commencing DEFENDANT BANOVEC: But your Honour I would need to be able to be given a proper opportunity to respond to Mr Hodge's affidavit. p 11.06 continuing

DEFENDANT BANOVEC: Your Honour without — I must tell you again that I have not been given the opportunity to properly respond ... I have not been able to prepare any submissions. p 12.25 continuing

DEFENDANT BANOVEC: Your Honour I'm not in a position to make any submissions if your Honour is minded to proceed today. p 13.01 continuing

DEFENDANT BANOVEC: That is entirely correct your Honour but I should still be given . p 13.31 continuing

DEFENDANT BANOVEC: Your Honour all these things you mentioned are valid points. p 15.39

HIS HONOUR: Thank you. p 15.42

DEFENDANT BANOVEC: But your Honour therefore you should allow me the opportunity to prepare proper submissions which I have not had. p 15.44

HIS HONOUR: I can't see, at all, no matter who you brought along, who appeared for you, even if it was Chester Porter himself out of retirement, could get you over the hurdles that you've got. There aren't hurdles. This is like pole vaulting from a standing start. You will not get over this. No way. p 15.47

DEFENDANT BANOVEC: Your Honour I have nothing further to say except ...

HIS HONOUR: Well I've said what I've said ... Both the subpoenas [sic] are set aside. p 15.39–16.15

(b) His Honour continually talked over Mr Banovec.

Paragraph commencing DEFENDANT BANOVEC: "your Honour may I just ..." p 10.25

Passage commencing DEFENDANT BANOVEC: "But your Honour I would need to be given a ..." p 11.06

Passage commencing DEFENDANT BANOVEC: "No your Honour it hasn't ..." p 11.24

Passage commencing DEFENDANT BANOVEC: Your Honour if I may ... p 11.29

Passage commencing DEFENDANT BANOVEC: Your Honour without ... p 12.23

Passage commencing DEFENDANT BANOVEC: Your Honour I'm not in a position. p 13.01 — continuing to

HIS HONOUR: But have you ... p 13.20

DEFENDANT BANOVEC: That is entirely correct your Honour but I should still be given ... p 13.31 continuing

DEFENDANT BANOVEC: You see your Honour all these ... p 14.46

DEFENDANT BANOVEC: I agree with your Honour that ... p 15.5

DEFENDANT BANOVEC: Hear your Honour but ... p 15.21

DEFENDANT BANOVEC: Your Honour ... p 15.34

- (c) His Honour dispensed with the rules relating to the service of a notice of motion to set aside a subpoena without properly hearing from Mr Banovec (Clause 47 *Local Court (Criminal and Applications Procedure) Rules 2003*)

HIS HONOUR: I haven't got it, I haven't got the motion. p 5.19

DAWSON: The intention was that we'd file that in court and file the affidavit in court once we got here. p 5.21

HIS HONOUR: Give me your motion. p 8.17

DAWSON: I'll file in court with your Honour's leave a notice of motion ... p 8.19

Passage commencing DEFENDANT BANOVEC: But your Honour I would need to be able to given a proper opportunity to respond to Mr Hodge's affidavit ... p 11.06

See also passages at p 7.30, p 8.05–8.15.

- (d) His Honour set aside subpoenae issued by Mr Banovec without hearing from Mr Banovec on the conclusions which the Judicial Officer adopted concerning the subpoenae, namely:

- they were issued for a collateral purpose

Passage commencing at p 13.35–p 14.11

Passage commencing p 16.5

- they had a paucity of particulars

Passage commencing p 15.5

- they were a fishing expedition

Passage commencing p 16.5

- they had no legitimate forensic purpose and were an abuse of process

Passage commencing p 13.45

Passage commencing p 15.25

Passage commencing p 16.5

- (e) His Honour granted a significant costs order against Mr Banovec without hearing from Mr Banovec.

Passage commencing: DAWSON: As your Honour pleases ...
p 16.17 continuing to HIS HONOUR: While I sit here for the whole
day yeah all right \$7,500 plus GST. p 17.25

- (f) His Honour made a significant costs order without inquiring as to how quantum was arrived at.

Passage commencing: DAWSON: As your Honour pleases ...
p 16.17 continuing to HIS HONOUR: While I sit here for the whole
day yeah all right 7,500 plus GST. p 17.25.

2. Inappropriate conduct

The Judicial Officer refused the adjournment application of Mr Banovec in an inappropriately humorous and loquacious manner, not befitting of legal proceedings.

Particulars

Passage commencing HIS HONOUR: The Stadium's been booked, the pies, sausage rolls, fizzy drinks ... p 7.05 continuing HIS HONOUR: They're on the plane yesterday at 4 o'clock. They're having breakfast ... through to p 7.25.

107. Before turning to the particulars it is convenient to refer to the following portions of Magistrate Maloney's evidence in chief:

Q: All right. Can I take you to the events of Banovec?

A: Yes.

Q: On 17 September 2008, you were sitting —

A: In 5.1

Q: When this matter came on before you, is that correct?

A: It was in the list for allocation in 5.1 that day

...

Q: Did you form a view after hearing some of the exchanges, that what Mr Dawson said about the procedure that was to take place was accurate?

A: Yes.

Q: Did you regard then Mr Banovec's contention that the case was not listed for argument as incorrect?

A: Certainly. I might add that looking at its history —

...

Q: Did the fact that the case had been listed so many times and was listed for a s 91 application very soon, impact on your thinking about what should or should not happen in relation to the subpoena argument that was before you that day?

A: Yes, and I also had consideration for what had occurred on the file, as written by my colleague.

Q: How did it all affect your thinking?

A: Well, it affected my thinking to the extent that here it was, 15 times it had been before the court. We had a 91 argument or paper committal scheduled for the week afterwards. Here was the subpoena issue that had to be resolved, that it wasn't resolved the preceding week and I considered that in light of the Chief Magistrate's direction about completion of matters within certain timeframes, that the committal had to proceed when it was scheduled to proceed or the 91.

...

A: I considered the success of a 91 application to be remote for want of a better word and the matter would proceed by way of argument on the brief and proceed by way of paper committal otherwise.

Q: You've heard the tape of this hearing?

A: Yes.

Q: Are there aspects of your conduct that you know were inappropriate?

A: I should have given Mr Banovec more time to be heard, at least from his application for an adjournment and any other aspect so far as the subpoenaed documents were concerned, and of course ultimately on the question of costs at the end.

Q: What about the way that you spoke with him; were there aspects of that that you —

A: I shouldn't have interrupted him.

Q: What about the content of what you said, for instance about the rugby league match?

...

A: Not apposite. But what I was attempting to do was to — if I had have said I was applying the Hunt protocol he wouldn't have understood that, so I was trying to draw an analogy that the common man would understand, that everything was scheduled for that day and it should proceed.

MR BOULTEN:

Q: Mr Dawson ultimately asked for costs?

A: Yes.

Q: And it's quite clear that you did not ask Mr Banovec to make submissions in relation to that issue?

A: That's true.

Q: What —

A: I regret that.

Q: You should have given him an opportunity to be heard on the costs?

A: I should, yes.

108. Magistrate Maloney also gave evidence in cross-examination as follows:

Q: Thank you. It seems, Mr Maloney, that you accept that you talked over Mr Banovec and did not allow him to speak. Do you recall that?

A: Yes.

Q: Can you tell us about your state of mind when that was occurring?

...

A: Yes. I, now, see myself as being of a — in an elevated mood.

Q: Would you say that that was the explanation for your conduct at the time?

A: Yes.

...

Q: So was the problem then that you thought that you were entitled to rely on what Mr Dawson said, or was it because there was irritability. Which was it that caused you not to listen to Mr Banovec?

A: Both.

Q: Do you think at the time you were conscious that you were not listening to Mr Banovec?

A: At the time, no; now, yes.

...

Q: Did you cut him off on a number of occasions?

A: Yes.

...

Q: Let me move to the costs order issue, can you tell me by what standard did you arrive at the figure of \$7,500 for costs?

A: I can't remember now.

Q: Would you agree with me that there's nothing disclosed in the transcript?

A: Yes.

Q: And there doesn't seem to be any form of calculation or any table provided to you to show what the costs would be?

A: That was true, that's - well, I think from when we heard the tape, Mr Dawson wanted something like ten or \$12,000, and I think I said then, "Well, we'll have to adjourn that for some other day and hear argument about it". Then he came up with the figure of \$7,000 and Mr Banovec said, "Can I be excused?"

...

A: Mmm.

...

Q: And you've made some comment there ending with, "All right 7,500 plus GST"?

A: Mm.

Q: Is there anything that you can say to explain how you arrived at that figure, other than by reference to Mr Dawson's figures?

A: No.

Q: Would you accept now that that appears to be a very high figure for what occurred?

A: Yes.

...

Q: What do you think you'd order perhaps now?

A: I'd — if I considered that a costs order was appropriate, I'd order there be costs and then they could come back with a bill later on for consideration and give Mr Banovec's side a chance to respond to it.

...

A: Me acting in haste. Being irritable. Wanting to get on with the rest of the list.

Q: Is there anything else that you would want to say about cutting Mr Banovec off as to whether or not that was explicable by your condition?

A: I believe it to be part of that condition and I've understood from the doctors that particularly Dr Neilssen, that part of the bipolar condition that I have is that one gets undulations. It's not days of hypomania, it can be moments of hypomania, and part of the hypomania is, as I explained earlier, irritability. Not exercising proper judgment, taking time.

109. In respect of the alleged attempt to deny natural justice to Mr Banovec the first particular relied upon is that Magistrate Maloney refused an adjournment application without properly hearing from Mr Banovec.

It is unnecessary to go to the references to the transcript referred to in the particulars. A reading of the transcript and a hearing of the tape, in particular in relation to the references, demonstrates quite clearly that

Magistrate Maloney did not allow Mr Banovec to put his argument for an adjournment. Magistrate Maloney admits as much himself.

110. Mr Boulten relied upon the unsurprising concession from Mr Gormly that a judicial officer is entitled to rely upon what he is told by Counsel. However, that is only where what is put is unchallenged. If it is, the judicial officer should hear each side of any issue and resolve it. Here it was clear that Mr Dawson's instructions were at odds with what Mr Banovec was seeking to put was the position.
111. It is not necessary for the Division to seek to resolve for itself what occurred in and about the hearing before Magistrate Curran. What concerns the Division is the failure to allow Mr Banovec to put what he claims occurred then and subsequently.
112. Mr Boulten referred to the following passage in the transcript:

DEFENDANT BANOVEC: ...

DAWSON: Well your Honour there's a problem with this, I'm sorry to (not transcribable)

HIS HONOUR: Let him go, let him go.

DAWSON: Well he's about to make some serious allegations (not transcribable)

HIS HONOUR: No well if he's — I'll hear him and then I'll hear you don't worry

as demonstrating Magistrate's willingness to hear Mr Banovec. However, Magistrate Maloney thereafter did not follow his own advice.

113. Mr Boulten referred to the fact that the matter — not in relation to the subpoenas themselves — had been in the list some fifteen times and that Magistrate Maloney noted that the committal itself would probably be completed on the papers in the following week. He submitted that there were good reasons for Magistrate Maloney to press the matter on. However, these were not good reasons to abandon proper process.

114. In our view the particular (1)(a) is made out.
115. The second particular 1(b) alleges that Magistrate Maloney continually talked over Mr Banovec. It is again unnecessary to go to the transcript references. Magistrate Maloney clearly admitted what is, in fact, undeniable. This particular is made out.
116. Particular 1(c) is that His Honour dispensed with the rules relating to the service of notices of motion to set aside subpoenas without properly hearing from Mr Banovec (Clause 47 *Local Courts (Criminal and Applications Procedure) Rule* 2003).
117. Clause 47(4) provides:

47 Subpoena may be set aside

- (4) Unless leave is granted by the Court, the time for filing and serving the notice of application by the applicant in accordance with this clause is not less than 3 days before the date that the subpoena is returnable.

118. On any view of the dispute as to what had been arranged there had been discussions relating to documents. Mr Banovec raised no objection when Mr Dawson said "I'll file in court with your Honour's leave a notice of motion and ..." Magistrate Maloney immediately prior to that said "Give me your motion". Clearly there was a grant of leave. Further, Magistrate Maloney later made the finding in relation to the notice of motion "The notice of motion doesn't take you by surprise anyway ..." Mr Banovec then raised objections, which seem strong, as to service of an affidavit and argued for time to respond. We do not consider that Magistrate Maloney, in the circumstances, was bound to invite Mr Banovec to make submissions on the leave aspect, albeit it might well have been prudent to do so.
119. We do not find this particular made out.
120. Particular 1(d) alleges that his Honour set aside subpoenae issued by Mr Banovec without hearing from Mr Banovec on the conclusions which the judicial officer adopted concerning the subpoenae, namely:

- they were issued for a collateral purpose
- they had a paucity of particulars
- they were a fishing expedition
- they had no legitimate forensic purpose and were an abuse of process.

121. In the ordinary course of a matter such as this if an adjournment is refused, the party failing on the application will make the best case, whether it be evidence or submissions, that it can. However, upon occasion, that party will elect to take no further effective part in the proceedings. If that occurs, whatever might be said as to the decision to deny the adjournment, the judicial officer cannot usually be separately criticised for failing to hear the party that has elected not to continue.

122. While the confused way in which this matter was conducted makes it difficult to be sure we think this is such a case.

123. Mr Banovec put during argument:

Your Honour I'm not in a position to make any submissions if your Honour is minded to proceed today.

124. After Magistrate Maloney put to Mr Banovec certain difficulties with the subpoenae the following occurred:

DEFENDANT BANOVEC: Your Honour all these things you mentioned are valid points —

HIS HONOUR: Thank you.

DEFENDANT BANOVEC: But your Honour therefore you should allow me the opportunity to prepare proper submissions which I have not had.

HIS HONOUR: I can't see, at all, at all, no matter who you brought along, who appeared for you, even if it was Chester Porter himself out of retirement, could get you over the hurdles that you've got. These aren't hurdles. This is like pole vaulting from a standing start. No way.

DEFENDANT BANOVEC: Your Honour I've nothing further to say except —

HIS HONOUR: Well I've said what I've said ...

125. While Magistrate Maloney did draw Mr Banovec into a dialogue in which Mr Banovec made a number of assertions he really did not put anything that could be characterised as a formulated submission.
126. On this basis, we do not think it established that Magistrate Maloney set aside the subpoenas without hearing submissions by Mr Banovec for any reason other than that Mr Banovec did not make them.
127. Accordingly we do not find particular 1(d) established.
128. Particulars 1(e) and (f) may be dealt with conveniently together. Particular 1(e) alleges that Magistrate Maloney granted a significant costs order against Mr Banovec without hearing from him. Particular 1(f) alleges that Magistrate Maloney made a significant costs order without enquiring as to how the quantum was arrived at.
129. Magistrate Maloney admitted both these matters. He also did not dissent when it was put to him that the quantum "appears to be a very high figure for what occurred".
130. Particulars 1(e) and (f) are made out. The award of \$7,500 plus GST in these circumstances fell well below the standard of care and attention expected of a judicial officer.
131. Particular 2 under the heading "Inappropriate conduct" alleges that Magistrate Maloney refused the adjournment application of Mr Banovec in an inappropriately humorous and loquacious manner not befitting legal proceedings.
132. Mr Banovec having indicated that he sought an adjournment there was some discussion and then Magistrate Maloney said:

HIS HONOUR: The stadium's been booked, the pies, sausage rolls, fizzy drinks and beer have all been ordered. It's like the Roosters and the Warriors on Friday night.

...

HIS HONOUR: They're on the plane yesterday at 4 o'clock. They're having breakfast or have had breakfast after they've trained this morning, the Roosters, everybody's geared up for Friday night. For all intents and purposes this is your Friday night. It's today.

133. In his statement tendered as part of exhibit C, Magistrate Maloney said:

I did not intend to cause offence to Mr Banovec and simply sought to analogise the fact that the matter was to be heard and there was to be no adjournment.

134. We consider such an analogy to be quite out of place in a court room, the more so as Mr Banovec was obviously an educated and articulate man.

135. We consider particular 2 substantiated.

136. The complaint in the Banovec complaint is partially substantiated, albeit, as we shall discuss in detail later, the substantial cause of the conduct complained of was Magistrate Maloney's bipolar 2 disorder.

The Dr Wallace/Kiloh Centre complaint

137. Mental health inquiries under the *Mental Health Act* 2007 were scheduled for 23 December 2009 at the Caritas Unit at St. Vincent's Hospital at Darlinghurst and later in the day at the Kiloh Centre at the Prince of Wales Hospital, Randwick.

138. The 23 December 2009 was a rostered Chamber day for magistrates, however, on 22 December 2009 Magistrate Maloney was told he was to conduct a Mental Health Inquiry, at either Liverpool and Bankstown Hospitals or St Vincent's and Prince of Wales Hospital. He gave evidence:

I didn't like the idea that I was going and everybody had the day off, but being a worker, I said "Well, that's it, I'll go but can I go to St. Vincent's and Kiloh."

139. Magistrate Maloney had some prior experience in conducting Mental Health Inquiries but did not conduct them regularly. He gave evidence, which we accept, that he had always previously been provided with a monitor to record the proceedings. It was the practice for the magistrate at

Caritas (St Vincent's) and Kiloh (Prince of Wales) to record the proceedings himself or herself, however, it was explained to Magistrate Maloney by the roster clerk that he could not be provided on that day with a sound recorder and would have to take notes.

140. On 23 December 2009, matters were dealt with by Magistrate Maloney at Caritas and no complaints have been received by the Commission in respect of them. The majority, if not all, of the patients presented were represented by Ms Eileen Peck, a solicitor with the Mental Health Advocacy Service.
141. At about 11.30 am Magistrate Maloney arrived at the Kiloh Centre where there is a hearing room used for mental health inquiries. Present on that day, apart from Magistrate Maloney, were Ms Peck, Ms Jean McDonald, the Administrative Assistant for the Kiloh Centre, and two Health and Security Systems (HASS) officers, Lennox Miller and Nicholas Condos.
142. During the course of the afternoon some 14 matters were dealt with. This was a heavier than usual load because of the forthcoming holidays.
143. A complaint dated 21 January 2010 by Dr Duncan Wallace, Medical Superintendent of the Kiloh Centre, reads as follows:

My complaint concerns the conduct and behaviour of Magistrate Maloney at the Kiloh Centre, Prince of Wales Hospital on 23 December 2009. The details of my complaint are outlined in my attached letter dated 23 December 2009.

That letter reads:

Re: Complaint about the conduct of Mr Brian Moloney, Attending magistrate at the Kiloh Centre, Prince of Wales Hospital, 23 December 2009

Further to my telephone call to your Office Manager, Ms Helena Potter, I am writing to you to complain about the conduct of the above magistrate. No less than six different staff members spoke to me after today's magistrate session to complain about the manner in which Mr Moloney spoke to them and the patients appearing before him.

Our two security guards, Mr Lennox Miller and Mr Nick Condos, described him as being 'comical' and 'clowning around'. Mr Condos said Mr Moloney made comments about his weight, suggested he needed to be fitted with a 'special uniform' and tapped him on the abdomen. He was uncomfortable that Mr Moloney was so over-familiar with him. Mr Condos said Mr Moloney joked with a Jewish patient presented to him and made a remark to the effect that 'all the Jews are in Melbourne'. Mr Condos was unsure of Mr Moloney's meaning, but felt uncomfortable about the remark. Both security guards commented they had never seen a magistrate behave like this before.

Dr Alison Bautovich, Psychiatry Registrar, told me she also felt uncomfortable, when Mr Moloney repeatedly asked her to stand up in the Magistrate's Room to demonstrate how pregnant she was. Dr Bautovich told me she declined to do so, but as Mr Moloney was so persistent, she relented. When she did stand up, Mr Moloney insisted she turn around to show the other staff members how pregnant she was. Mr Moloney made numerous comments about his own wife being pregnant. Ms Jean McDonald, Administrative Assistant, was present throughout and also thought this was unusual and inappropriate behaviour.

Dr Swapnil Sharma, Staff Specialist in Psychiatry, told me he was 'frankly shocked' (quote) after he presented two patients to Mr Moloney. Dr Sharma said Mr Moloney asked inappropriate personal questions of the patients, eg about how much money one woman earned. Dr Sharma said Mr Moloney asked the same woman about being able to afford to send her children to private schools and about her old boyfriends in a joking manner. He also made a joke about her occupation as an antique restorer, implying that she could 'restore' her husband. The patient was severely clinically depressed.

Dr Sharma said Mr Moloney went on to make adverse remarks about the facilities at the Kiloh Centre, saying that he would be depressed if admitted here. He went on to discuss his wife's pregnancy.

Personally, I presented one patient to Mr Moloney and did not observe any problems.

We were also concerned that the proceedings were not taped, as is the usual practice.

144. Prior to the hearing, particulars of the Wallace/Kiloh Centre complaint were provided as follows:

The following complaints are made about the behaviour of the Judicial Officer, Brian Vincent Maloney in the course of his duties whilst conducting Mental Health Inquiries at the Kiloh Centre, Prince of Wales Hospital on 23 December 2009.

1. Inadequate attention to judicial function

- 1A. The magistrate failed to give adequate attention to the substance of his function in the mental health inquiry in relation to the patient RI.

Particulars:

- i. The magistrate failed to comply with the provisions of the *Mental Health Act*
- ii. The magistrate did not ask the patient at the beginning of the inquiry if she had been given a written statement of her legal rights and other entitlements, s 34 and Sch 2, s 2 of the *Mental Health Act 2007*
- iii. The magistrate did not ask if the patient had been informed of the duty imposed under s 76 on the authorised medical officer relating to the giving notice of the inquiry to her and her primary carer, s 76 and Sch 2, s 2 of the *Mental Health Act 2007*
- iv. The magistrate did not inquire as to the administration of any medication to the patient or assess the effect of the administration of the medication on the assessable person's ability to communicate, s 35(2)(a)(c) of the *Mental Health Act 2007*
- v. The magistrate did not give proper consideration to the reports and recommendations of the authorised medical officer and other medical practitioners who examined the patient under s 27 after the person's detention, s 35(2)(a) of the *Mental Health Act 2007*

vi. The magistrate discharged the patient without:

1. making a determination as to whether the patient was or was not a mentally ill or a mentally disordered person, s 35(1);
2. inquiring if the discharge was in the best interests of the patient or if the discharge order should have been deferred [to provide the patient with assistance and treatment] for a period not exceeding 14 days, s 35(4);
3. inquiring as to whether available "gazetted" or "declared" mental health facilities could be used for any further detention of the patient;
4. inquiring about the possible consequences of the discharge to the patient's own protection from serious harm;
5. considering the impact of the discharge on any likely deterioration of the patient's condition, and the likely effects of any such deterioration;
6. inquiring as to the possible consequences of the release of the patient on the protection of others, in particular her son, from serious harm;
7. inquiring if care of a less restrictive kind than detention was appropriate and reasonably available for the patient, such as discharging the patient into the care of her primary carer or making a Community Treatment Order, and considering the necessity or desirability of such care for the treatment of the patient, s 35(5).

1B. In relation to the patient RI, the magistrate failed to observe the suggested procedure for conducting a Mental Health Inquiry as described in the Judicial Commission *Local Court Bench Book* without justification.

Particulars

i. The Bench Book suggests the following format for conducting an inquiry.

1. Introduce yourself as a magistrate, and advise those present of the purpose of the inquiry.

2. Ask the legal aid lawyer if he or she has had the opportunity to speak to the assessable person.
3. At the beginning of the inquiry, ascertain what order is sought (usually an adjournment for two weeks, an order that the person remain as a temporary assessable person for a number of weeks, or a community treatment order) and ask the solicitor if the assessable person consents to that order. Often there is consent at this late stage, and the evidence is required to be called and be abbreviated.
4. If the suggested order or adjournment is opposed, announce the procedure to be adopted in the inquiry.
 - (a) the presenting doctor is asked to give his or her evidence as to a diagnosis, the assessable person's current and future treatment, and the doctor's assessment of the least restrictive treatment regime available and appropriate [word missing]?
 - (b) the solicitor will be invited to ask the doctor questions
 - (c) the primary carer can ask questions or make statements
 - (d) other witnesses (such as a social worker), may be called and examined
 - (e) the assessable person may wish to personally ask the doctor questions, or address the inquiry, and it is important to offer an opportunity for the assessable person to make a contribution — this can often be a telling factor in the final decision, and
 - (f) after all the evidence, the solicitor is given an opportunity to make submissions and if appropriate, the doctor may be given the opportunity to make a final comment.
- 1C. The magistrate failed to ensure that the proceedings on 23 December 2009 were recorded as required by s 8 of Schedule 2 of the *Mental Health Act 2007* and as noted in the Bench Book.

Particulars

The magistrate conducted hearings on 23 December 2009 without using any audio recording equipment or recording device.

2. Inappropriate and loquacious questions and comments

The magistrate engaged in inappropriate and loquacious questions and comments during the course of the Mental Health Inquiries.

Particulars

2A. During the Mental Health Inquiry for the patient KB, the magistrate made the following remarks to expert witness Dr Alison Bautovich:

- i. The magistrate asked questions about her pregnancy using words to the effect of “how pregnant are you?” and “how many weeks have you got to go” and “when are you due” and “is this your first?”
- ii. The magistrate used words to the effect of “my second wife is pregnant”
- iii. The magistrate used words to the effect of “would you stand up and show us that you’re pregnant”
- iv. The magistrate repeated the request using words to the effect of “stand up and show us you’re pregnant: or “stand up and show everyone”
- v. The magistrate again repeated the request using words to the effect of “go on” or “go on, stand up”.
- vi. After Dr Bautovich stood up, the magistrate used words to the effect of “stand side-on so we can see how pregnant you are”.
- vii. After Dr Bautovich stood up, the magistrate commented on the appearance of Dr Bautovich using words to the effect of “my wife is bigger than you” or “you are bigger than my wife”.
- viii. The magistrate spoke about his wife’s pregnancy using words to the effect of “its my second wife” and

- ix. The magistrate asked Dr Bautovich words to the effect of "are you going to antenatal classes?"
 - x. The magistrate made comments using words to the effect of "ante natal classes are a waste of time".
 - xi. The magistrate addressed remarks about the pain of childbirth to Dr Bautovich.
- 2B. During the Mental Health Inquiry for the patient, EM, the magistrate made the following remarks to the patient:
- i. The magistrate said words to the effect of "If I was an inpatient here I would get depressed too"
 - ii. The magistrate said words to the effect of "where do you live?"
 - iii. After being informed where the patient lived the magistrate said words to the effect of "why do you live there?"
 - iv. After being informed the patient lived where her husband had lived the magistrate said words to the effect of "did your husband get you to move across the bridge?"
 - v. The magistrate said words to the effect of "What school do your daughters go to?"
 - vi. The magistrate said words to the effect of "How many daughters do you have?"
 - vii. The magistrate said words to the effect of "How do you manage to afford that school?"
 - viii. The magistrate said words to the effect of "How old is your husband?"
 - ix. After discovering the patient had been employed as an antique restorer, the magistrate said words to the effect of "You could restore your husband".

- x. The magistrate asked the patient questions about her previous relationships with men.
- 2C. During the Mental Health Inquiry for the patient, ZZ the magistrate made the following remarks to the patient:
- i. The magistrate said words to the effect of "My wife is pregnant".
 - ii. The magistrate said words to the effect of "You'll be let out in 7 days".
- 2D. In the course of Mental Health Inquiries, and in the presence of patients, the magistrate made the following remarks:
- i. The magistrate said words to the effect of "my wife is having a baby any day now".
 - ii. The magistrate said words to the effect of "the hospital can't even afford good sandwiches".
 - iii. The magistrate said to HASS officers Nick Condos and Lennox Miller words to the effect of "You two are big boys".
 - iv. The magistrate said to HASS officers Nick Condos and Lennox Miller words to the effect of "You would need special uniforms to fit you".
3. Abuse of judicial power

- 3A. The magistrate abused his judicial power by requesting an expert witness, Dr Alison Bautovich, to stand up during a Mental Health Inquiry.

Particulars

- i. The magistrate used words to the effect of "would you stand up and show us that you're pregnant".
- ii. The magistrate repeated the request using words to the effect of "stand up and show us you're pregnant" or "stand up and show everyone"

iii The magistrate again repeated the request using words to the effect of "go on" or "go on, stand up:

3B. The magistrate abused his judicial power by requesting that Dr Bautovich move whilst she was standing so as to display herself and her pregnancy to the magistrate during a Mental Health Inquiry,

Particulars

The magistrate used words to the effect of "stand side-on so we can see how pregnant you are".

3C. The magistrate abused his judicial power by making comments about the appearance of Dr Bautovich after he had requested her to stand during a Mental Health Inquiry on 23 December 2009.

Particulars

The magistrate used words to the effect of "my wife is bigger than you".

3D. The magistrate abused his judicial power by making an inappropriate and sexualised gesture to Dr Bautovich.

Particulars

In the context of discussion about the pain of childbirth and the efficacy of antenatal classes, the magistrate raised both hands to his mouth with each of his index fingers extended but hooked. He put one finger on each of the inside corners of his mouth.

3E. The magistrate abused his judicial power by making comments, gestures and requests of Dr Bautovich, in relation to her pregnancy, which may have been demeaning to her.

Particulars

See all of the Particulars for (3) above.

3F. The magistrate abused his judicial power by making comments suggesting the HASS officers were overweight and ridiculing the officers about their weight.

Particulars

- i. The magistrate said to HASS officers Nick Condos and Lennox Miller words to the effect of "You two are big boys".
- ii. The magistrate said to HASS officers Nick Condos and Lennox Miller words to the effect of "You would need special uniforms to fit you".

4. Failure to behave judicially

The magistrate failed to conduct the Mental Health hearings at the Kiloh Centre on 23 December 2009 in a manner consistent with his obligations as a judicial officer allocated to that task and with the interests of the patients brought before him.

Particulars

See all of the Particulars above.

5. The magistrate inappropriately introduced matters personal to the magistrate into the Mental Health Inquiries

Particulars

5A During the Mental Health Inquiry for the patient KB:

- i. The magistrate used words to the effect of "my second wife is pregnant: and its my second wife: and "I have kids from a second marriage" and "now this wife wants to go to antenatal classes".
- ii. The magistrate asked Dr Bautovich words to the effect of "are you going to antenatal classes?"
- iii. The magistrate made comments to Dr Bautovich using words to the effect of "antenatal classes are a waste of time".

- iv. The magistrate addressed remarks about the pain of childbirth to Dr Bautovich.
 - v. During the Mental Health Inquiry for the patient, EM, the magistrate said words to the effect of “If I was an inpatient here I would get depressed too”.
 - vi. During the Mental Health Inquiry for the patient, ZZ, the magistrate said words to the effect of “My wife is pregnant”.
6. The magistrate engaged in inappropriate comments and conduct with respect to the two Health and Security Systems Officers (“HASS officers”) at the Kiloh Centre who were present at the Mental Health Inquiries.

Particulars

- i. The magistrate made comments suggesting the HASS officers were overweight including words to the effect of “You two are big boys”.
 - ii. The magistrate made comments of ridicule concerning the large amount of material that would have been required to make uniforms for the HASS officers using words to the effect of “You would need special uniforms to fit you”.
 - iii. The magistrate patted, rubbed or touched the stomach of HASS officer Nick Condos at the conclusion of the Mental Health Inquiries at the Kiloh Centre.
7. Breach of undertaking — see [207].
145. It is appropriate at this point to refer again to our view that the events of 23 December 2009 were substantially caused by Magistrate Maloney’s bipolar 2 disorder. It is also appropriate to note that whatever qualifications or doubts may have been expressed in respect of earlier events, it is common ground that Magistrate Maloney was suffering from a hypomanic phase of his bipolar disorder during the events at the Kiloh Centre.

146. A Mental Health Inquiry is, as Ms Peck emphasised in evidence, very unlike a normal court hearing. It is not adversarial and relatively informal. An illustration of how one might be conducted can be found in the extract from the Judicial Commission Local Court Bench Book set out in particular 1B(i) at [144].

147. An overview of Magistrate Maloney's behaviour during the hearing at Kiloh appears from the statement of Mr Condos, which we accept, as follows:

The other thing which stood out that whole day was that it was a very comical sort of environment. I do not know whether it was because it was the end of the year for the Magistrate or because he had a wife who was having a baby in the next couple of days. At some point during the day the Magistrate said words to the effect of "my wife is having a baby any day now". The magistrate was really comical the entire time, through most of the hearings.

The magistrate was a very funny person. I mean that he was both very amusing and a bit unusual. His mood was overly happy. He was never rude or disrespectful to anyone. The only way I can put it is "over happy". I felt like I was watching a comedy routine all day. I remember going home and telling my wife about it because I had not seen anything quite like it before.

148. Magistrate Maloney accepted in cross examination that he seemed to have been in an elevated mood at the Kiloh Centre. However, he said that at the time he was feeling "terrible, I felt again, very depressed". He gave the following evidence:

Q: Yes?

A. But, then, as was my need to beat depression, I had to punch through it. It's like fighting pain, punch through it, get through it, meet the adversity; and, in the course of doing so, you lose sight of — you get into an elevated mood and you lose sight.

Q: Mr Maloney, I'm just struggling with the idea that you were very depressed but that the explanation for your conduct on 23 December was an elevated mood. Can you just assist us with that? Were you

feeling in an elevated mood; that is, a high, a good mood, or were you depressed?

- A. Being depressed with bipolar disorder, as has been explained to me, and I accept, is that there is this underlying depression. And with the bipolar concept, you have your highs and your lows. And I understand, with my condition, that you get into an elevated mood because here I saw a need to get in and get out and I didn't think it would take so long. Because, historically, in other places, when I've gone to the country, you start at half past 8, you're back on the Bench by 10 o'clock. So — as the day progressed, the day got hotter, and I fought my way through it and wanted to make the best of a very bad situation, as I see myself now looking back on myself then.

It should be added that Magistrate Maloney said that he did not, at the time, think he was doing anything wrong. As will appear he has now altered that view in a number of respects.

149. We now consider the events at Kiloh in conjunction with the particulars set out in [144]. The particulars are lengthy. To save unnecessary repetition reference should be made to them in order to follow parts of the discussion below. For convenience, an additional copy of the particulars in respect of all complaints appears at Annexure B.
150. Particular 1 alleges "Inadequate attention to judicial function" and relies, first, upon an allegation 1A that "the magistrate failed to give adequate attention to the substance of his function in the mental health inquiry in relation to the patient RI". Particulars of that failure are set out in subparticulars (i) to (vi).
151. Patient RI was presented at the inquiry by Dr Sachin Patil, a Psychiatry Registrar. The patient suffered from schizophrenia and had been admitted to the Kiloh Centre following serious trouble with a member of her family. Dr Patil's long term plan was for her to be discharged under a community treatment order, however, he sought an order for her to be detained as an

involuntary patient for eight weeks while appropriate medication was established.

152. At the time of the hearing RI was housed at the “mental health rehabilitation unit” (“rehab unit”). She had been admitted to the Kiloh Centre but been transferred to the rehab unit because there were not enough beds in the Kiloh Centre. Dr Patil said in his statement:

We use the whole unit when there is bed pressure in the Kiloh Centre. The patient is usually transferred on a weekend to the rehab unit for a few days and then transferred back to the Kiloh Centre when a bed becomes available, it is a kind of extended leave. We select the most behaviourally stable patients for transfer.

153. When the hearing commenced, Ms Peck took up with Dr Patil the issue that RI was held during the day and overnight in the rehab unit. He agreed and said that the hospital did not have room for her in a gazetted unit — the Kiloh Centre was such a unit and the rehab unit was not.
154. Ms Peck put, it would seem to both Dr Patil and Magistrate Maloney, that the Act requires that a patient be detained in a gazetted unit and that you cannot have involuntary patients in a non-gazetted unit. She suggested that RI be discharged.
155. Magistrate Maloney agreed with her submission and ordered that RI be discharged. He said in his statement that her submission “jogged his memory”. This may well be so as both Ms Peck and her Honour Judge Syme, a former Deputy Chief Magistrate, gave evidence of a long running issue on this and related questions in mental health inquiries.
156. It is not for the Division to consider for itself the actual legal position or the appropriateness of the order made by Magistrate Maloney. If he were wrong in his acceptance of Ms Peck’s submission, it was an error of law and not a question of misconduct.
157. Dr Patil considered that he was not able to put material that he wished to put, however, it is clear that that material related to RI’s medical condition and not the legal issue. It became clear, even if there was any doubt

before, during Dr Patil's examination before us that he was in no position to offer accommodation in a gazetted unit. As he quite properly relied upon, decisions on the policy of the hospital — to which he made reference — and the availability of beds were issues for those senior to him.

158. It is put in subparticular (vi) that Magistrate Maloney discharged the patient without carrying out the steps referred to in subparagraphs 1 to 7. We do not consider that he was under any duty to do so even if, in respect of some of them, he had jurisdiction.

159. Judge Syme explained the appropriate procedure where a magistrate orders that a patient be discharged on such grounds. She said in her evidence:

Q: Would you accept the view that at a mental health inquiry where it became known to a magistrate that a person who suffered from a mental illness or a mental disorder within the terms of the Act and who had been scheduled by two psychiatrists on that basis, whatever the actual admission procedure, that is whether through gazetted premises or not, it came to the attention of the magistrate that a person in that position was being held in gazetted premises — being non-gazetted premises, that there would fall to the magistrate at least the task of enquiring whether this person could be transferred to gazetted premises before they dismissed them?

A. I think the solution was probably even easier than that. If there was concern by the psychiatric staff, they could reschedule them.

Q: And then do it properly?

A. Do it properly. As I understand it, that could happen pretty well immediately.

Q: That does create a gap, of course, between the termination of one scheduling and the start of another?

A. That may well do.

Q: A way of dealing with the problem, would you agree, would be for the magistrate to simply ask, can this person be accommodated in gazetted premises?

A. I can't necessarily agree that that would be the correct way of solving it. As I indicated, that was a view that some magistrates took.

160. As it happened, Dr Patil told RI outside the hearing room that he proposed to reschedule her. She objected and he consulted Dr Power, a consultant psychiatrist. Ms Peck put to them in strong terms that they should not do so and, in the event, they did not reschedule RI but discharged her. Magistrate Maloney had, according to Ms Peck, said to tell "them" from him "that she's discharged". That appears to be no more than the order he made and left it open to the doctors to make such later decision as they thought fit. Ms Peck delivered a much stronger message.
161. Magistrate Maloney has said in evidence that with greater experience in such matters he might have dealt with it differently, however, we do not consider that this particular has been made out.
162. We return to particular 1A(i) to (iv).

Clause 2 of Schedule 2 to *the Mental Health Act 2007* which was given effect by s 34(3) of that Act provides:

2 Notification and information given to assessable person to be checked by Magistrate

- (1) As soon as practicable after the beginning of a mental health inquiry, the magistrate must ask the assessable person whether the person:
- (a) has been given a written statement, in the prescribed form, of the person's legal rights and other entitlements, as required by s 74, and
 - (b) whether the person has been informed of the duty imposed under s 76 on the authorised medical officer relating to the giving of the notice specified in that s.

- (2) As soon as practicable after the beginning of a mental health inquiry, the magistrate must ascertain from the authorised medical officer whether the written statement and notice referred to in subclause (1) have been given or all such things as are reasonably practicable have been done to give that statement or notice, as the case requires.

Section 35 (2)(c) of the *Mental Health Act 2007* provides:

35 Purpose and findings of mental health inquiries

- (2) For that purpose, the magistrate is to do the following:

...

- (c) inquire about the administration of any medication to the person and take account of its effect on the person's ability to communicate.

163. Magistrate Maloney did not assert in his statement that he had taken the steps referred to in (ii) to (iv).

In evidence he said:

Q: Did you ask any of the patients whether they had been given a written statement of their legal rights and other entitlements?

A: No.

Q: Did you know there was a statutory provision that mandated that?

A: I do now.

Q: You didn't then?

A: Didn't then.

He did not give any evidence as to informing the patient of the duty imposed under s 76. It would seem likely that he was unaware of that also. Ms Peck's statement contains a statement which refers to the magistrate's introduction in the RI matter without reference to this requirement (but it does not expressly say that it was not made).

As to (iv) in evidence Magistrate Maloney said:

Q: Did you make any inquiries about medication?

A: Well, when the doctor presents, I say, "Doctor, you're presenting the patient, has the patient had any medication this morning that may impair the patient's understanding of these proceedings today?" And what is sought in 100 times out of 100, the doctor will say, "No medication this morning", affecting, the —

This appears a statement of general practice. Ms Peck's evidence did not contain such an inquiry. Ms Peck gave evidence in answer to Mr Boulten:

Q: It's also important under the provisions of the Act as it was at that time that the magistrate ascertain very early in the process that the patient understands what their rights are, isn't that correct?

A: Yes.

Q: And in fact is it not the case that there was a provision that mandated questions of the patient to ensure that they had been given a written statement of their rights and entitlements?

A: Yes.

Q: Did the magistrate, Magistrate Maloney do that in these hearings?

A: It was a busy day, there were a lot of matters. I don't recall him specifically saying it every single time. He may well have done every single time. I don't remember that there was any lack of formality in the introduction.

As we know from Magistrate Maloney he did not do so and was unaware of the requirement.

Ms Peck did say that she was not aware of any lack of formality in the introduction, however, the impression given is that it was a busy day and that her attention was elsewhere. She said that it was not her practice to correct a magistrate if he did not comply with the formal requirements. She did say:

Q: Can I ask you this —

A: Sorry, I was going to say, the one other thing is that generally that Kiloh unit was pretty much up to date, they were pretty efficient in providing, and I would've — in my memory they would usually provide the patients with their statement of rights. It wasn't something that had been an issue in the past.

164. We think it clear that Magistrate Maloney did not comply with the requirements referred to in 1A(ii) and (iii). That fact makes out those particulars and also, necessarily, (1). We do not make such a finding in respect of (iv).

165. Particular (v) we consider is not made out for the same reasons as particular (vi).

166. Particular 1B reads:

In relation to the patient RI the Magistrate failed to observe the suggested procedure for conducting a Mental Health Inquiry as described in the Judicial Commission Local Court Bench Book without justification.

167. The Bench Book offers guidance and assistance to judicial officers however, it is not prescriptive. Failure to adopt a "suggested procedure" in such a book is not, of itself, misconduct. This particular is not made out.

168. Particular 2 alleges that Magistrate Maloney engaged in inappropriate and loquacious questions and comments during the course of Mental Health Inquiries.

169. Dealing with this particular in address, Mr Boulten said:

Particular 2, "inappropriate and loquacious questions and comments", there is no serious suggestion he didn't make them. Whether each individual comment particularised has been made or not is not really the point. But there's sufficient amongst the evidence to demonstrate that he was inappropriately loquacious and made inappropriate comments, including the comments about Dr Bautovich. Whether they were at the time of the hearing, before the hearing, or at the end of the hearing, it is accepted that it was inappropriate for him to engage in that discussion irrespective of whose

version you accept. Where there are differences, though, it might be difficult to determine exactly which one is which.

170. Particular 2A alleges that during the Mental Health Inquiry for the patient KB, the magistrate made the following remarks to expert witness Dr Alison Bautovich. There are then 11 instances relied upon.
171. KB was a long term patient in the general hospital in respect of whom an electroconvulsive treatment (ECT) order had already been made by the Mental Health Review tribunal. Ms Peck does not recall seeing him, however, she had read his file and talked to the senior nurse who had been on duty when he was admitted in a catatonic state. Ms Peck had formed the view that she would not object to an order for three months to allow ECT to take place. KB was not well enough to be brought to the hearing.
172. Dr Alison Bautovich presented the matter. She was 29 weeks pregnant and, as she put it in her statement, "showing noticeably". As she enquired where to sit Magistrate Maloney made a comment to the effect that "you are the second pregnant psychiatry registrar I have seen today".
173. Dr Bautovich's statement then continues:

The next thing I remember is the magistrate talking about my pregnancy. He said words to the effect of "my second wife is pregnant". I got the impression that he thought I looked reasonable despite my pregnancy. From my observations of his behaviour, his words and his tone I got the impression that the magistrate was disinhibited and flirtatious. His comments were irrelevant to the task at hand and inappropriately familiar. I felt uncomfortable.

Then the magistrate asked me to stand up. He said more than once words to the effect of "would you stand up and show us how pregnant you are". I do not recall the exact words he used each time but they were to the effect of "stand up and show us you're pregnant" or "stand up and show everyone". I think the first time he said it I was kind of laughing it off and I said "I don't think that's relevant" or something like that. The magistrate kept persisting saying words to the effect of "go on" and "go on, stand up". It got to the point

where I thought "this is going to hold the hearing up" and I just did it. I remember thinking "I probably shouldn't be doing this" but I did not quite know what else to do to make the hearing get underway and so I just stood up. At the time I was focused on the task at hand but later I was a little upset about the whole incident.

I do not think anyone in the hearing room said anything but I got the feeling that it was quite awkward in the room. I do not remember how long I was standing up or if I moved. I think the magistrate may have said words to the effect of "stand side-on so we can see how pregnant you are". I do not remember if I did this.

Then the magistrate started talking about his wife's pregnancy. He said words to the effect of "it's my second wife" and "I have kids from a previous marriage" and "now this wife wants to go to antenatal classes". The magistrate asked me words to the effect of "have you been to antenatal classes?" and I said "Yes". Then he commented words to the effect of "antenatal classes are a waste of time".

The magistrate then spoke in some detail about the pain of labour. I do not recall the words he used. He then raised both hands to his mouth with each of his index fingers extended but hooked. He put one finger on each of the inside corners of his mouth. The only inference I could draw from that action was that he was stretching his mouth in the same way that a vagina would be stretched whilst giving birth so as to demonstrate how painful it would be. I thought okay, that's really stepping over the line" and I said words to the effect of "how about we get back to the patient".

Because I said something at that time the magistrate did not complete the gesture which I was expecting. He had his fingers in his mouth but I do not think that he stretched his lips back because I jumped in. The magistrate was not laughing at this time but I got the impression that it was all in jest.

174. Dr Bautovich was given the order she sought, however, she made the point that it seemed to her that the investigation by the magistrate was inadequate.
175. Her statement then goes on:

In my experience all magistrates vary in their style of presentation but this magistrate was definitely less professional and much less formal than I have previously experienced. He was much more jovial and “disinhibited” because he was incorporating irrelevant personal details relating to him and me into the hearing.

I even considered that the magistrate might be mentally ill. I believed that he might be “hypomaniac” which is a stage in bi-polar disorder. I formed that view because the magistrate was really disinhibited, he was bringing up personal details in a serious hearing, he was talking about inappropriate and quite explicit details regarding labour, he seemed distractible and disorganised and his mood seemed elevated. He also did not really let people speak during the hearings. I would not say that he had pressured speech, but he was definitely verbose.

176. Magistrate Maloney in his statement said that these remarks took place after the “matter was finalised”. He had support on this assertion from Ms Peck.
177. However, Dr Bautovich would not accept this. She was supported by Ms McDonald and Mr Miller. Ms Peck, having indicated no opposition to the order, had no further interest and also indicated that she tended to “switch off” to discussion of pregnancy and babies.
178. We are satisfied that the remarks were made during the hearing and, in particular, note the comment, which we accept was made by Dr Bautovich, “how about we get back to the patient”. We think Magistrate Maloney and Ms Peck to be mistaken on this question.
179. We accept that the comments as particularised in 2A(i) to (xi) (at [140]) were made and that their making was a departure from appropriate behaviour by a judicial officer.
180. Particular 2B refers to remarks made to patient EM. There are then 10 instances relied upon. In his statement Magistrate Maloney said that after reading Ms Peck’s statement he had a “faint recollection of speaking to EM, however it is difficult to remember the details”.

181. EM was presented by Dr Sharma, a consultant psychiatrist. Dr Sharma in his statement stated that Magistrate Maloney made the comments referred to in particulars 2B(i) to (x). He was concerned that the patient was seriously ill and was particularly sensitive in the psychiatric sense to issues relating to her family and personal relationships.
182. During the presentation of EM Ms Peck was moved to say "This is a new magistrate. We don't normally chat quite so much and we don't talk about schools this long".
183. Magistrate Maloney said in his statement that "he had no recollection" of the remarks in (i), (ix) and (x). The remarks, he said, were made to put the patient at ease and to demonstrate that he was interested in her case.
184. In evidence Magistrate Maloney said he had no recollection of a patient who was a furniture restorer, however, it is likely that not remembering that particular part of the hearing he did not associate EM with the words "furniture restorer".
185. Whether that was so or not we accept that the remarks were made and that these particulars are made out.
186. Particular 2C refers to the patient ZZ who was also presented by Dr Sharma. The doctor asked for a 14-day order which Magistrate Maloney made and noted on the relevant record. However, Magistrate Maloney said to ZZ that "you'll get out in 7 days". This has not been shown to be more than an inadvertent slip and we do not consider this particular made out.
- Particular 2C also refers to words "[M]y wife is pregnant", however, we are not satisfied that these words were used during ZZ's presentation and this part of the particular is not made out.
187. Particular 2D refers to the making of remarks (i) to (iv). As to (i) the remark was made and inappropriately so.
188. As to (ii), Mr Condos said in his statement that Magistrate Maloney made a comment about the sandwiches Ms McDonald had brought in and observed that there was a patient in the room.

However in cross-examination, Mr Condos agreed that the comment was made to Jean (Ms McDonald) and gave the following evidence:

Q: When there was no hearing taking place

A: No but when I — I can't be exact now. I can't say yes or no, it was just a comment that was made.

...

Q: You said you don't remember when he made it, but it was when there was a patient in the room. Are you sure about that?

A: I wouldn't want to say either way. I can't remember exactly.

Without more information as to the circumstances we are not prepared to hold this to be an inappropriate remark.

189. As to (iii) and (iv) Mr Miller said in his statement that Magistrate Maloney "at one point during the hearing he looked at us and said words to the effect "you two are big boys". He also made some comments to the effect of "you would need special uniforms to fit you". The "two" referred to were Mr Miller and Mr Condos. Mr Miller said that the remarks made him feel self conscious.

190. Ms McDonald remembers a remark to the effect "you are too big for a normal uniform, you would need a special uniform". She also said that she did not recall the events that followed the statement.

191. Mr Condos in his statement said:

I also remember the Magistrate making a joke about me and Lennox Miller and our uniforms. Lennox Miller and I do not wear uniforms to work. I do not remember exactly what I was wearing but I would have been wearing a polo top and three quarter length jean shorts because I wear that every day. I remember that a female patient at a hearing said words to the effect of "I am a bit scared on the ward". Female patients often say that. I think the Magistrate was trying to reassure her when he said words to the effect of "Oh look, you've got these two big burly fellas on the ward." Then he said words to the effect of "Oh but look, they don't have uniforms. Oh, it's probably

because the Hospital couldn't afford it or maybe there wasn't enough material because they are big boys." Lennox Miller is a bit wider than myself so I thought it was a quick-witted funny thing to say. That is what it was like all day. The Magistrate would make a quick punchline and then move on to something else.

192. In cross-examination he said:

Q: Do you see paragraph 12 where you describe comments that the magistrate made about you and your colleague, Lennox Miller?

A. Yeah.

Q: And you said on page 4 in that paragraph that the magistrate said words to the effect "Ah, look, you've got these two big burly fellows on the ward". Do you see that?

A. Yeah.

Q: Did you get the impression that he was saying that to sort of reassure the lady that she's got nothing to fear?

A. Yeah, definitely. Yeah.

Q: Because she had said that she was a bit scared leaving the ward?

A. Correct.

Q: So he was basically saying—

A. Reassuring.

Q: "Well look, you know, you've got these big fellows, they'll make sure that any harm comes to you" words like that?

A. Yeah.

Q: Then he made a comment about uniforms?

A. Hm mm.

Q: You weren't wearing uniforms?

A. No.

Q: Do you normally wear uniforms?

A. No.

Q: All right, so the words about the fact that you weren't wearing uniforms were said as part of an explanation to the lady to explain to her that you are security guards basically?

A. More than likely.

Q: Then he made that joke or attempted joke about perhaps there wasn't enough material to make uniforms?

A. I don't think there was any harm meant in it, it was just a – probably to get the patient to be a bit more relaxed.

He went on to say that the patient was not upset and "we weren't either".

193. In this context, whilst other language would have been more apposite, the words used reflect unjudicial behaviour. In this context we bear in mind Ms McDonald's comment in her statement that:

Some patients are very uptight and nervous going before a magistrate, but I am sure this Magistrate made the patients feel more relaxed as he was friendly towards them.

194. Particular 3 alleges an abuse of judicial power. Mr Boulten put generally a denial of that particular, however, when his arguments are examined the challenge is to 3D and 3E. He correctly observes that there is an element of duplication in the particulars, however, one matter may well offend a number of aspects of behaviour.
195. We are satisfied that particulars 3A, 3B and 3C are made out and collectively represent a serious departure from proper standards of judicial conduct.
196. Particular 3D is the subject of dispute. Magistrate Maloney denies that he raised both hands with each of his index fingers extended but hooked and put one finger on each side of his mouth.

196. Dr Bautovich's account of the incident appears at paragraphs 17 and 18 of her statement set out at [170]. In cross-examination she gave evidence:

Q: You've described in your statement a gesture that the magistrate made with his fingers and his mouth. I think what you meant was that he hooked his two index fingers and stuck it in his mouth and pulled his mouth apart. Is that correct?

A. He went to do that, I think —

Q: "Went to do that." So when you say he went to do it, he got part the way there or what did he actually do?

A. As I've written in the statement, I don't have a full recollection of this. But my impression was that he was making a — an image of, basically, childbirth and — yeah, going to do that with his fingers. I can't remember exactly how far into the action he got.

Q: Can I ask you whether he talked about a comedian called Joan Rivers?

A. I can't remember that.

Q: Did he say something like, Joan Rivers talks about childbirth, she says it's like getting your bottom lip and sticking it over your head.

A. I can't remember that.

Q: Could that have been said?

A. I can't answer that really, no.

Q: Is that because you can't remember if it was or it wasn't?

A. It could have been said, but I can't remember exactly.

Q: And that the gesture that was made was actually a tug on the bottom lip and to pull it up.

A. I don't think so, but I couldn't say for sure.

Q: All right.

A. Either way, it wasn't very relevant to what was at hand.

197. Magistrate Maloney gave evidence in chief as follows:

Q: Do you remember now if you discussed with her the pain involved in childbirth?

A. Yes.

Q: Do you have an actual memory of what you said?

A. No I don't have an actual memory of what I said.

Q: Having heard what she said about a gesture and the pain of childbirth?

A. Yes.

Q: Do you have a belief about what it was that you said at that time?

A. Yes, because I have an anecdote of Joan Rivers.

Q: Just pause there, when you say you have an anecdote, you mean on other occasions you have recounted a Joan Rivers' story?

A. Yes.

Q: Is that right? Well, you'd better tell us who Joan Rivers is?

A. American comedienne.

Q: And what have you said in the past about this topic that Joan Rivers has said?

A. Joan says that the pain's akin to getting your bottom lip and trying to stretch it over your head.

Q: And you just in the witness box moved your hand to your bottom lip, and on—

A. Not so, but just —

Q: Yes. As I understand your position on this topic, you through reconstruction think that if you said or did anything, that it was something like what you just did?

A. Yes.

Q: Did you intend to be offensive in that way?

A: I didn't intend to be offensive, but as the doctor has taken offence, I regret that and I apologise.

198. He also gave evidence:

Q: All right. What about this request that you seemed to have made, and then pressed, that she physically do something herself? Can you tell us what your recollection is about that?

A: I don't recall anything about that.

Q: Did it happen?

A: I — I don't believe it happened.

199. We do not find Magistrate Maloney's evidence reliable on this event. We consider that he did make a gesture at least towards his mouth with his hand to mimic childbirth. Even if his postulate is correct that he was mimicking a pulling of the lower lip over the head from the way he described the gesture, in the circumstances, it was clearly inappropriate and sexualised.

200. This particular is made out and clearly reflects serious misconduct.

201. The disputed matter relating to 3E is the inclusion of "gestures". We do not understand reliance upon inappropriate comments and requests to her to be in contest. We have held that an inappropriate and sexualised gesture was made to Dr Bautovich and accept this particular is also made out.

202. Particular 3F we do not find made out for the reasons given in respect of 2D(iii) and (iv).

203. Particulars 4 and 5 are expressly accepted by Mr Boulten and we are satisfied they are made out.

204. Particular 6 is accepted by Mr Boulten, however, in respect of (i) and (ii) we consider we should adhere to the view we took in respect of 2D(iii) and (iv). In respect of (iii) we accept Mr Condos's evidence that Magistrate

Maloney rubbed Mr Condos's upper abdomen as he passed him on the way out. Mr Condos thought it an invasion of his space. It was an inappropriate action and the particular is made out, however, it was in the absence of patients and after the hearings. It should properly to be regarded as a matter of no great significance.

Breach of undertaking

205. The Conduct Division report of 13 December 1999 referred to an undertaking given by Magistrate Maloney not to be loquacious, not to interrupt solicitors, not to introduce matters reflecting his personal experience, to be more judicial and to allow matters to run their course without interfering. The Division took that undertaking into account in reaching its determination.

206. In the instrument appointing this Conduct Division, the Judicial Commission made a request in the following terms:

The Conduct Division is requested to consider these complaints having regard to undertakings given by Magistrate Maloney to the Conduct Division in respect of his conduct and which are referred to in paragraphs 34 and 37 at pages 46–47 of the Conduct Division Report dated 13 December 1999.

207. The particulars supplied in respect of the Altaranesi and Banovec complaints and the Wallace/Kiloh complaint have each relied upon breaches of that undertaking substantially in the same terms as the particulars generally.

208. Mr Boulten has not objected to regard being taken to the undertaking in this way and has conceded that, in so far as the particulars generally have been made out, so have the allegations of breaches of the undertaking.

209. Magistrate Maloney gave evidence:

Q: When you were before the Conduct Division in 1999 when Justice Dunford chaired the Conduct Division, you gave an undertaking?

A: Mm-hmm.

Q: And the undertaking involved you promising to ensure that your conduct met certain standards?

A: Yes.

Q: You are well aware of the terms of that undertaking?

A: Very much so.

Q: Did you take that undertaking seriously?

A: Most definitely.

Q: In what ways did you consider it as a guide to your performance as a magistrate?

A: I live that undertaking daily to the point where at times anxiety sets in.

Q: In what way?

A: Well, I have to be — that undertaking requires me to be less familiar, less humorous, less loquacious to say the least and to be far more judicial and removed from proceedings, don't interrupt people, let the cross-examination flow and so forth. I've always endeavoured to do that but it's quite obvious to me now that as a result of illness, that I've lost sight of it.

Q: In relation to the Banovec matter, do you accept that there were aspects of your conduct there that weren't consistent with your undertaking?

A: I do.

Q: In relation to the Altaranesi matter?

A: Certainly.

Q: Do you accept the same?

A: Yes, I do.

Similar evidence was given in respect of the Dr Wallace/Kiloh complaint.

210. In these circumstances there is no utility in dealing with the particulars relating to breaches of undertaking in detail. In so far as the particulars further relied upon in respect of the breaches of undertaking are held to have been established we find the breaches of undertaking relating to these particulars also made out.

The screen saver matters

211. Section 31(1) of the Act provides:

31 Extension or partial dismissal of complaint

31(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.

212. Pursuant to that section, the Division determined to treat the Dr Wallace/Kiloh Centre complaint as extended to the screen saver matters. Prior to the hearing, particulars of the extended complaint were provided as follows:

Extension of the Dr Wallace/Kiloh Centre complaint

Pursuant to s 31(1) of the *Judicial Officers Act*, the Dr Wallace complaint is extended to incorporate the following matters

1. On or around 25 February 2002, in the course of attending a seminar held at the Judicial Commission offices at George St, Sydney, the magistrate drew to the attention of Ms Ruth Windeler, the Education Officer of the Judicial Commission an image on his laptop computer of a naked woman on a beach.

Particulars

- A. The magistrate used words to the effect of "Hey Ruth what do you think of the Canadian on my screen saver".
- B. Ruth Windeler was known to the magistrate to have a Canadian background.

C. The image was on the screen of a laptop computer which had been allocated to the magistrate by (the then) Attorney-General's Department.

D. The image filled the screen of the laptop computer.

E. The dominant image in the picture was a naked woman on the beach. The depicted woman had her back towards the camera and the length of the back part of her body was clearly displayed. The woman had no apparent clothing. The naked buttocks of the woman were clearly visible. The woman was of Caucasian appearance with light hair. There was sand and sea in the picture.

2. On or around 25 February 2002, in the course of participating in a training seminar held at the Judicial Commission offices at George St, Sydney, the magistrate drew to the attention of Ms Joy Blunt, the Senior Systems Officer of the Judicial Commission, an image on his laptop computer of a naked woman on a beach.

A. The magistrate used words to the effect of "what do you think of my wallpaper?"

B. The image was on the screen of a laptop computer which had been allocated to the magistrate by (the then) Attorney-General's Department.

C. The image filled the screen of the laptop computer.

D. The image consisted of a picture of a woman lying down on her left side on sand at a beach. The photograph was taken from behind the woman and depicted the entire back length of her body. The photograph was taken at the same height as the woman and from approximately two metres away. The woman's knees were slightly bent and she was looking over her shoulder so that it was possible to see part of her face. She had long blond hair. The woman appeared to be completely naked and her bare bottom was clearly visible. The front part of the woman, apart from her face, was not visible.

3. At the request of the Judicial Commission, the matters set out in paragraphs (1) and (2) were brought to the attention of the magistrate by

the then Chief Magistrate of the Local Court, now the Honourable Justice Derek Price, on 28 October 2003. Justice Price advised the magistrate that the Judicial Commission regarded the matters as serious and that regard would be had to the matters if there was any future complaint of similar behaviour.

4. On 23 December 2009 the magistrate engaged in similar behaviour when he made requests of, gestures towards, and comments to Dr Alison Bauotovich, an expert witness, in the course of a Mental Health Inquiry at the Kiloh Centre, Prince of Wales Hospital as particularised in paragraphs 2A and 3A to 3E of the Dr Wallace complaint.
213. There is no dispute that Magistrate Maloney, Ms Windeler, and Ms Blunt were all present at the Seminar on 25 February 2002, however, there is conflict as to what, if anything, was said and as to what screen saver or wallpaper was upon the screen of Magistrate Maloney's laptop at the time.
214. Ms Windeler is the Education Director of the Judicial Commission. On 25 February 2002 she was present at a seminar session dealing with computer training. Magistrate Maloney was also present with his departmentally provided laptop. During a break in the session Magistrate Maloney, who knew Ms Windeler quite well and knew she was of Canadian origin, spoke to her.
215. Ms Windeler's account of what occurred appears from her statement as follows:

Magistrate Maloney said to me words to the effect of "Hey Ruth what do you think of the Canadian on my screensaver". I have a Canadian accent. I was aware the magistrate knew that I had a Canadian background.

When the magistrate spoke to me I took two or three steps in his direction. As I was moving towards the magistrate he turned his computer around so that the screen was facing me. On the screen was a picture of a naked woman on the beach. The image that I was shown filled the entire screen. The woman was the dominant image in the picture. I recall that the woman was very well-built or shapely, her back was towards the camera and I could clearly see her naked buttocks. I do not recall anything covering her body.

The image was from the back and I do not believe I saw any part of the front of the woman's body. The woman was of Caucasian appearance with light hair. There was sand and sea in the picture.

I do not know if the image was a screensaver or wallpaper or a photo image that had been saved on the computer and "brought up" by the magistrate. I don't recall any icons interfering with the image. At the time I was not very familiar with the difference between screensavers and wallpapers.

I replied to the magistrate words to the effect of "I wouldn't like to say that's a Canadian". As I said this I kept walking. I tried to use my body language and my tone of voice to convey that what he had done was not appropriate. At the time I did not believe that the magistrate was trying to offend me or upset me. The impression that I formed was that he wanted to get a "rise" or a reaction from me in order to gain attention. The conduct was consistent with behaviour I have observed of that magistrate in the past, where he has told jokes or made inappropriate comments in order to get some form of attention.

216. Ms Windeler did not make a formal complaint but did advise the Chief Executive of the Judicial Commission of the event.
217. When cross-examined by Mr Boulten, Ms Windeler was unsure whether the figure was standing up or lying down. She would not agree that there were several women in the picture, nor that they were wearing bikini bottoms. When asked whether the image was different to "iconic Australian art photography of women on beaches" she replied "I thought it was a photo of a naked woman on the beach, a photo like you or I would take any day".
218. Ms Windeler did not agree that the image was one only temporarily on the screen and changing after a very short time.
219. Ms Blunt is the Senior Systems Officer (Training) at the Judicial Commission. On 25 February 2002 she was walking behind magistrates to observe their progress when an event occurred which she detailed in her statement as follows:

As I walked behind the desk of Magistrate Maloney I saw that he had a photograph of a woman who appeared to be naked displayed on his computer screen. The photograph filled the entire screen. The picture was of a woman lying down on her left side on sand at a beach. The photograph was taken from behind the woman and depicted the entire back length of her body. I would estimate the photograph was taken at the same height as the woman and from approximately two metres away. The woman's knees were slightly bent and she was looking over her shoulder so it was possible to see part of her face. She had long blond hair. The woman appeared to be completely naked and her bare bottom was clearly visible. The front part of the woman, apart from her face, was not visible because of the angle of the photograph.

The magistrate turned his head towards me and said words to the effect of "what to you think of my wallpaper?". He said this to me almost at the same time that I walked up behind him and first noticed the image. I laughed and said words to the effect of "Brian I don't think that's the smartest picture to have in this environment".

I know the difference between wallpaper and a screen saver. I believe the photograph was wallpaper and that some icons from the computer were visible on the screen. However, it is possible that the picture was either a screen saver or a picture stored on the computer which had been opened by the magistrate for display on the screen.

I was concerned that the picture was inappropriate for the setting. I was surprised that the magistrate would display such a photo in a training session for magistrates and draw it to my attention, particularly as the group included female magistrates. I got the impression that the magistrate was seeking my approval or endorsement. The magistrate seemed slightly disappointed by my reaction. I do not recall any other exchange with the magistrate during the training session or noticing anything else about his behaviour during that day.

220. When asked by Mr Boulten whether there were other women further into the image Ms Blunt replied:

I was aware of one woman in the foreground and I believe there were other characters in the background of the image but that wasn't my focus at all, so I just really saw the image in the foreground.

She did say that you could see the woman's face "glancing across her shoulder". Ms Blunt said she had no recollection of there being bikini pants on.

221. Ms Blunt affirmed that there was dialogue with Magistrate Maloney.
222. In examination she explained that she saw icons and agreed that you do not have icons visible when a screen saver is on the screen. She said she had only seen one image.
223. The Honourable Justice Derek Price was in October 2003 Chief Magistrate of New South Wales. A complaint against Magistrate Maloney was referred to him as Head of Jurisdiction by the Judicial Commission. After speaking to Magistrate Maloney on 28 October 2003 about that matter he went on:

Brian, I was dismayed by your conduct in showing your screen saver to Ruth Windeler and Joy Blunt. Whilst you might have thought it to be amusing, it was offensive and unbecoming of a judicial officer. Ms Windeler and Ms Blunt do a huge amount for the Court.

Justice Price set out in his statement that Magistrate Maloney replied "The screen saver was not what they said". Justice Price then went on:

The Commission considered all the material placed before it. It is likely that if a similar complaint is made in the future the complaint will not be summarily dismissed but will be referred to the Conduct Division.

Magistrate Maloney then said "I understand".

224. Magistrate Maloney in his statement of December 2010 said:

There was no depiction of nudity in respect of the screensaver. I have no recollection of any conversation with Ruth Windeler as referred to in the statement or any discussion with Joy Blunt where she indicated in any way disapproval of the screensaver.

225. In his supplementary statement of 12 January 2011, Magistrate Maloney said:

I do not recall saying to Ms Blunt the words "what do you think of my wallpaper".

In respect of Ms Windeler, I agree that she speaks with a Canadian accent. I have no recollection of saying to her "Hey Ruth, what do you think of the Canadian on my screen saver.

226. In that statement Magistrate Maloney referred to believing that the screensavers on his computer at the relevant time were six images which he described. One was of "three Brazilian women lying side by side, lower back and thigh". He denied that there were any nude scenes.

227. Magistrate Maloney gave evidence as to how he downloaded the images to his computer. His evidence in chief appeared to accept that the Brazilian women was the most likely image but he did say that the images would rotate through over a period of time.

228. His position had become stronger on the issue of dialogue. He gave the following evidence:

Q: Did you draw the image to the attention of Ms Windeler or Ms Blunt?

A: I certainly did not.

Q: You know they both contend you did?

A: Well, that's their belief. I have my belief of what occurred.

229. In cross-examination Magistrate Maloney gave evidence:

Q: Can I just put this to you, Mr Maloney? Ms Blunt seems to have the view that you called her over, drew her attention to the screensaver. Do you recall that?

A: No. I recall Ms Windeler saying I called her over.

Q: Yes, I'm so sorry, you're quite right. Do you say that that did not happen?

A: It did not happen.

Q: Do you say that at the time Ms Windeler saw an image on your screen that it could not have been a person with a naked bottom?

A: It was not as she describes.

230. He also gave evidence:

Q: Mr Maloney, I put to you that on 25 February 2002 Ms Windeler saw on the screen of your computer an image of a woman that was naked and was as described by her in her statement.

A: I deny that emphatically.

Q: Right. I put to you, as well, that when Ms Blunt saw an image on your screen that it was an image of a naked woman as described by her in her statement.

A: That is incorrect.

Q: You deny that?

A: She did not — she may have seen not a totally naked woman, but as I describe it, if she saw something, it was as I have described it as being on the computer.

Q: And what you say is the correct image is the three Brazilian women, is it?

A: Yes.

231. By the time evidence and addresses finished there was not in evidence any images said to appear in Magistrate Maloney's laptop which had been in the custody of the Judicial Commission since about October 2003. Searches by officers of the Judicial Commission and Magistrate Maloney's advisors, who had been provided with a copy of the computer's hard disc, had produced no results.

232. Following the hearing Magistrate Maloney located on the copy of the hard drive available to him an image of the Brazilian women. An application to

re-open was granted and further evidence was taken and addresses made.

233. Before that occurred more extensive examinations of the computer and its hard drive were made by Mr Murali Sagi, Director of Information and Corporate Services at the Judicial Commission and Matthew Wheeler, a Solutions Architect employed by that Commission.
234. Statements were made and evidence given which covered a good deal of technical material, however, sensibly a joint examination and agreement between Counsel has made it unnecessary for us to go over that ground.
235. It is, we consider, appropriate to approach the issue on the basis that there are relevantly three available wallpaper images upon Magistrate Maloney's computer.
236. One entitled "C:\WINDOWS\webshots.bmp" is an image of the Brazilian women. It is unlikely that this image was on the computer on 25 February 2002 having been downloaded at a later date.
237. One entitled "C:\WINDOWS\WINDOWS_internet_explorer-wallpaper.bmp" is an image of a naked woman lying on a beach. It is likely, although not certain, that that image was available for use as wallpaper on 25 February 2002.
238. One is a jpeg image of the Brazilian women which we are prepared to assume was likely, but not certainly, available for use as wallpaper on 25 February 2002. We appreciate that this formulation goes beyond Mr Gormly's concession.
239. Ms Windeler and Ms Blunt provided statements for the further hearing. Neither was required for cross-examination. Magistrate Maloney did not give further evidence.
240. Ms Windeler in her statement strongly maintained that the Brazilian women image was not the image she had seen. Amongst other things she referred to there being only one woman in that picture and to seeing an entire body

rather than truncated figures. She was clear that the conversation between her and Magistrate Maloney related to a single person.

241. On being shown the image of the naked woman Ms Windeler said:

The image I was shown by Ms Edwards and Ms Maroon is very similar to the image which Mr Maloney showed me at the Judicial Commission on 25 February 2002. It has a number of similarities, these are:

- the dominant image in the photo depicts a naked woman lying on a beach;
- the photo is taken from behind the woman;
- the entire body of the woman can be seen;
- the focus of the image is the woman's naked buttocks;
- the woman has fair hair;
- the woman is lying on her side;
- the woman is lying some distance from the camera;
- the woman is very "shapely";
- it is a bright colour photo of a beach scene;
- the sky, ocean and beach are clearly visible;
- the blue sky and blue ocean are very vivid and dominant in the photo; and
- the photo looks like a snapshot that an ordinary person would take.

I am reluctant to say that I am absolutely certain that this was the image that Mr Maloney showed me on 26 February 2002. The image is certainly extremely similar and may be the same.

242. Ms Blunt said in her statement that she was "absolutely certain" that the image she was shown (the Brazilian women) was "not the same image I saw on 25 February 2002".

243. As to the picture of the naked woman she said:

This image is much more like the image that I remember seeing in February 2002 and could be the same image. If it is not the same image, then it is one which is extremely similar to the one I was shown.

The woman in the picture is blonde and clearly naked like the woman in the image I saw on Mr Maloney's computer. This image also depicts sand and a visible beach scene.

The woman in this image is the same distance from the camera as the woman in the image I saw on Mr Maloney's computer.

This image is also more like a casual photo than the photo that Mr Schmatt showed me, although the woman does look a little posed.

The only possible difference between this image and the image I remember seeing on Mr Maloney's computer in February 2002 is that I thought the woman's head was turned more towards the camera. I also thought that there may have been some figures on the beach in the back ground although I do not have a clear memory of this. It is possible I could have been mistaken about the head being turned and figure being in the distance.

244. Mr Boulten submitted that with one image that to an extent matched the earlier observations by Ms Windeler and Ms Blunt and another that matched the description by Magistrate Maloney the Division should not be satisfied to the requisite standard that the image shown by Magistrate Maloney was the naked lady.
245. This submission, however, sets aside what we regard as overwhelming evidence on this issue. We see no reason to disbelieve Ms Windeler and Ms Blunt who are well supported by the surrounding circumstances. On the other hand Magistrate Maloney's movement from no recollection to forceful denial was less than convincing.
246. Identification almost always raises questions as to differences in perceived features. However, here the two witnesses described a fairly detailed and cohesive picture of a naked woman on a beach and it turns out that there is such an image on the computer.

247. We are satisfied that Magistrate Maloney did show Ms Windeler and Ms Blunt the image of the naked lady and that the dialogue they set out in their statements occurred.
248. We also consider that there was a sexualised element to Magistrate Maloney's conduct on this occasion, just as later, there was such an element in his treatment of Dr Bautovich.
249. We note that Dr O'Dea answered "yes" to the question by Mr Gormly:
- In Mr Maloney's case would you accept that there appears to have been signs of sexualised disinhibition in his conduct on 23 December 2009 and in the screen saver incident?
250. The particulars in the screen saver matters are made out. We discuss later what should be taken from this incident and Magistrate Maloney's approach to it. Our acceptance that the substantial cause of Magistrate Maloney's conduct was his bipolar 2 disorder applies to this complaint.

References

251. In the Conduct Division report of 13 December 1999, it was observed:
- It is true that none of the local practitioners have complained, and Mr Maughan in his evidence stressed how happy the local practitioners were with the performance of the magistrate and his manner of getting through the lists and dealing with cases. This is understandable, but does not excuse conduct which laypersons may view differently to the way it is viewed by legal practitioners. Furthermore one would expect that legal practitioners who are constantly and regularly appearing before the magistrate may feel some inhibition about complaining to the Senior Magistrate about him. We note the testimonials from others in exhibit 2, but what is important is not how a magistrate behaves when senior counsel (e.g. Mr Bellanto QC) are in his court, but how he behaves when ordinary members of the public are in his court.
252. We now have testimonials from Mr Clive Steirn SC and Mr Robert Greenhill SC who speak very highly of Magistrate Maloney's capacity as a magistrate and as to his ability, as Mr Steirn put it, "to run a nice court

where both practitioners and unrepresented litigants are accorded equal respect and courtesy”.

It is relevant to note that both Senior Counsel had been supplied with material as to Magistrate Maloney’s medical condition and treatment and, at least, broad details of present matters.

It is also relevant to note that their joint experience of Magistrate Maloney goes well back before they became Senior Counsel.

253. Her Honour Judge Helen Syme of the District Court was a Deputy Chief Magistrate of the Local Court from 2001 until April 2009 when she was appointed to the District Court, except for a period between August and October 2008 when she was an acting Judge of that Court. From about 2006 to 2009 she was the Deputy Chief Magistrate with, as she put it in her statement, “most of the day-to-day responsibility for case and list management of matters listed for hearing at the Downing Centre Local Court”. She was “also responsible for approving allocation of magistrates to courts and circuits on a relief basis, to cover holiday and sick leave”.
254. Judge Syme had read details of the complaint against Magistrate Maloney, the report of the Conduct Division of 1999, Magistrate Maloney’s statement and psychiatric reports from Drs Neilssen, O’Dea and Phillips.
255. In terms somewhat similar to those used by Magistrate Maughan in 1999, Judge Syme spoke highly of Magistrate Maloney’s work as a magistrate.
256. In her statement she said:

By 2006, when I took over responsibility for listings and magistrate allocation to courts, Magistrate Maloney had qualified himself as a person who could handle a heavy workload, efficiently and without complaint. (Either from him or litigants). I am not aware of any complaints about his behaviour in court over and above those currently before the Commission. From time to time in my position I would receive informal “grumbles” about a particular magistrate being, for example, tardy in the delivery of decisions. No such complaints were made to me about Magistrate Maloney, either about his in court or out of court behaviour.

257. The judge commented on Magistrate Maloney's ability to handle the workload in the busy trial allocation court 5.1. In her evidence she commented that a lack of efficiency in handling such lists soon showed up in an excessive number of adjourned matters. That did not occur with Magistrate Maloney.
258. Asked by Mr Boulten to comment on Magistrate Maloney's workload at the Downing Centre Judge Syme said, amongst other things: "I would say Magistrate Maloney carried out the workload equivalent to, but certainly not less than any other experienced magistrate, but much greater than a lot of inexperienced magistrates ..."
259. Judge Syme gave evidence that in 2008 and 2009 she became concerned as to Magistrate Maloney's mood. She said that he always "had a very good front" yet she observed that he seemed "very sad". She ascribed some, at least, of this change to a very confronting child pornography case he heard and, indeed, instructed that he not be allocated such cases. She also at some stage suggested leave and discussed his welfare with the Chief Magistrate and the other Deputy Chief Magistrate.
260. The "Reference" material in our view demonstrates that Magistrate Maloney is capable for much, perhaps most, of the time of performing judicial duties appropriately.
261. It is clear from the complaints dealt with above that there are times when his conduct, whatever the substantial cause, falls well below the standard expected of a judicial officer.
262. This unfortunate state of affairs is consistent with the views of the psychiatrists as to the episodic nature of the condition from which they all believe Magistrate Maloney suffers.

Medical issues

263. We now turn to a consideration of the medical issues that have arisen in relation to the complaints we are considering and in particular, the views of the psychiatrists who have examined Magistrate Maloney.

264. In his letter to the Judicial Commission of 31 March 1999 regarding the Adair complaint, Magistrate Maloney wrote:

At the time this matter came before me I was suffering from immense emotional stress. I had in the previous two years been involved in my own proceedings at Family Law, although settled by 24 September 1997, I had not had access to my son and daughter. That situation has not changed other than seeing my son on days when he is involved in sport; no block access, nor overnight stays, nor Christmas Days.

From the time I was appointed a magistrate until March 1998 I suffered this stress, with its attendant loss of sleep and poor diet. I had consulted my local medical practitioner and been prescribed medication for depression. I admit that at times this may well have affected the proper fulfilment of my duties.

265. Magistrate Maloney told Dr O'Dea when he saw him on 7 July 2010 that he had not sought "specific psychiatric treatment" for his moods until 2010.
266. After notification of the Wallace complaint Magistrate Maloney, who had lost some eight kilos over six to eight months, consulted Dr Carmody his general practitioner in January 2010 and told him that he believed that his weight loss and depressed mood "and so forth" was a mental problem. Tests excluded physical causes and Magistrate Maloney, after discussing the matter with his solicitor Mr Walsh, asked Dr Carmody for a reference to Dr Nielssen, psychiatrist.
267. The doctor first saw Magistrate Maloney on 18 February 2010. He noted:
- At interview he gave a spontaneous account of the syndrome of depression that had been present for at least a year, and seemed abnormally anxious and pessimistic when compared to his account of his pre-morbid personality, consistent with the presence of a depressive illness.
268. Dr Nielssen diagnosed a major depression and recommended the commencement of treatment with the antidepressant Lexapro. He advised the magistrate to take sick leave because of the effect of symptoms of depression on his work performance and because his work could interfere with recovery.

269. In his report of 10 January 2011 Dr Nielssen noted that he had continued treatment and counselling on a monthly basis. He considered Magistrate Maloney unable to perform his duties as a magistrate until he thought him fit to return to work in July 2010 as he was affected by symptoms of major depression accompanied by marked anxiety.

270. Before making his report of 10 January 2011 Dr Neilssen had available to him the reports of Dr O'Dea of 2 September 2010 and Dr Philips of 13 December 2010. Those reports provided further information as to history and other matters and also a different diagnosis.

271. In his report Dr Neilssen said:

I confirm that I believe Magistrate Maloney has a bipolar mood disorder on the basis of the history of at least one hypomanic episode and several episodes of clinically significant anxiety and depression. However, prior to our initial consultation, this condition had never been formally diagnosed by a mental health expert.

272. Dr Nielssen did not deal in his reports with the question of relationship between the disorder he diagnosed and the behaviour described in the various complaints.

273. The doctor dealt with the need for future management of his condition. He wrote that Magistrate Maloney had recognised the need for treatment and had good insight regarding the nature of his condition and the need for treatment.

274. He considered that the magistrate would recognise the return of symptoms, including those of hypomania and:

would be able to take immediate and appropriate action to seek treatment, by making contact with a treating psychiatrist by mobile telephone or email. His wife is also aware of his condition and would be able to prompt him to seek care. Now that a pattern of treatment has been established, any further episodes of illness should be treated promptly and hence would be more likely to respond to treatment within a matter of weeks.

275. The doctor also wrote:

The usual course of milder forms of bipolar disorder is for discrete episodes of illness followed by recovery to the previous level of function. The future course is difficult to predict. However, the late onset, the comparatively mild episodes of illness, the self limiting nature of the hypomanic episode and the good response to treatment for depression suggests that his prognosis is good. Moreover, there were no factors that might trigger further episodes of illness, such as substance abuse, or any external stresses other than the effect of these proceedings.

I am unable to give a predict [sic] the likelihood of further episodes with any accuracy, either on the basis of my clinical experience or by comparing Magistrate Maloney's condition to studies of populations of people with less severe forms of bipolar disorder. On the basis of the information that is available, in particular the observation that episodes of bipolar disorder can become more frequent in later life in some patients, I believe he is more likely than not to have another episode of mood disorder before the end of his working life. However, I would anticipate that any further episode could be treated promptly with minimal disruption to his capacity to perform his duties as a magistrate.

276. Dr O'Dea, Forensic Psychiatrist, examined Magistrate Maloney on 7 July 2010 and 26 July 2010 at the request of the Conduct Division and concluded:

From Magistrate Maloney's history and presentation during our assessments, I have diagnosed him as suffering from a Bipolar Affective Disorder (Manic Depressive Illness or Bipolar Disorder) with periods of depression and mania (or hypomania, a less severe form of mania without frank psychotic symptoms or a severity requiring hospitalisation) from at least the early 1990s and possibly earlier, that has only recently been formally identified and treated.

It would seem that over the past 12 months, Magistrate Maloney has been suffering a depressive swing in his Bipolar Disorder that is now responding well to treatment. A pattern of periods of depression and periods of mania with intermittent periods of mood stability over time is well recognised in Bipolar Disorder. Indeed episodes of mixed mood states (with components of mania and depression at the same time) and so called "rapid cycling"

between episodes of mania and depression over weeks, days or shorter periods are well described in this condition.

As is conjectured to have occurred in the past in relation to the complaints, significantly elevated or depressed moods are likely to adversely affect Magistrate Maloney's ability to perform his judicial functions and official duties.

277. In a later report dated 2 September 2010, Dr O'Dea dealt with a question as to "your level of certainty as to the diagnosis of bi-polar disorder and clarification of the reasoning underpinning your diagnosis" as follows:

I felt confident of my diagnosis of bipolar disorder that was made on the basis of Magistrate Maloney's history and presentation. He gave a history of periods of self reported depression and a depressive episode diagnosed by his general practitioner and psychiatrist. There were also documented sets of behaviours over time, in relation to the allegations before the Conduct Commission, that were consistent with periods of an elevated affect of mania. In addition, from her interactions with Magistrate Maloney on 23 December 2010, Dr Bautovich raised the concern that Magistrate Maloney might have been hypomanic at the time. This history in combination with his presentation as described above would satisfy the psychiatric diagnostic category of Bipolar Affective Disorder.

278. On the question of the relationship between the condition he diagnosed and the behaviour described in the various complaints, Dr O'Dea commented as follows:

The conduct of Magistrate Maloney in relation to the 6 separate sets of complaints regarding his professional conduct appear to include complaints that he had acted at the time in an inappropriately light hearted and jovial manner, displaying expansive thinking, disinhibited behaviours, overfamiliarity in an otherwise austere setting, poor insight and judgement of which was considered appropriate behaviour under such circumstances and an inability to monitor and modulate his behaviour and interpersonal transactions in these settings, despite warnings from the Judicial Commission.

Whilst there may be a number of potential ways in hindsight of understanding such behaviours, these above sets of behaviours may be best understood in Magistrate Maloney's case as evidence that he was manic at these times. Indeed it is of note that Dr Bautovich raised the possibility of Magistrate Maloney being hypomanic at the time of the Mental Health Inquiry at POWH in December 2009. These above behaviours, particularly when occurring in a cluster and over time, causing significant impairment, as in Magistrate Maloney's case, can be considered typical signs of mania.

279. As to the future, Dr O'Dea observed:

As is conjectured to have occurred in the past in relation to the complaints, significantly elevated or depressed moods are likely to adversely affect Magistrate Maloney's ability to perform his judicial functions and official duties.

However, Bipolar Disorder can and does respond well to specific and structured psychiatric treatment, and I would remain optimistic that with structured and successful treatment of his condition, Magistrate Maloney should be able to continue to perform his judicial functions and official duties. This structured psychiatric treatment could be provided by his general practitioner, Dr Carmody, and his private psychiatrist, Dr Neilssen.

Such a treatment program is likely to involve ongoing review of his medication, including consideration of the addition of mood stabilizing medication and close monitoring of the antidepressant medication with withdrawal of the antidepressant medication as his current depressive episode resolves (to manage the risk of a manic mood swing).

In addition, psychotherapy (including psychoeducation) aimed at assisting Magistrate Maloney to understand and manage his Bipolar Disorder including by promoting insight and better identifying and managing stressors, would form a significant part of the ongoing and long term treatment program. Although insight is often significantly impaired during mood disturbance, particularly a manic episode, it is important to focus on promoting insight whilst the person is euthymic (of stable and normal mood), with the aim of translating that insight into compliance with treatment over the long term and into an ability to monitor their moods accurately and to act

appropriately and effectively when aware of early warning signs of relapse of their Mood Disorder.

280. In the report of 2 September 2010, Dr O'Dea answered the question whether the condition from which Magistrate Maloney suffers is amenable to treatment as follows:

In Magistrate Maloney's circumstances, I would consider that his psychiatric diagnosis of bipolar affective disorder would be considered very amenable to psychiatric treatment and that his prognosis for full recovery and good ongoing control of his moods would be very favourable.

281. The doctor made it clear that ongoing treatment would be required and observed:

As above, a core component of longer term management would be to assist Magistrate Maloney to identify and clarify early warning signs of relapse of mania or depression and to put in place structured monitoring and treatment strategies to swiftly and effectively instigate psychiatric treatment to avert such relapses developing into a full blown episode of mood disorder with resultant significant impairment, and thereby preventing periods of significant incapacity.

282. As to whether Magistrate Maloney would have sufficient insight to appreciate that a period of incapacity was approaching and that he should cease work, the doctor said:

I would be optimistic that with successful treatment, Magistrate Maloney could gain sufficient insight into his illness and the potential problems with incapacity related to his illness, that specific measures could be taken, including sick leave, to adequately and appropriately manage the risk of performing his duties as a judicial officer when incapacitated.

283. Dr Jonathan Phillips, Consultant Psychiatrist, examined Magistrate Maloney on 23 November 2010 at the request of the Conduct Division. Dr Phillips reported on 13 December 2010, that:

The clinical evidence both in terms of Mr Maloney's history, and on the basis of observation by others, suggests strongly that Mr Maloney has suffered an undiagnosed bipolar II disorder which began by 1996–1997 and which has

taken the form at various times of a depressive disorder, a mixed mood disorder, and a hypomanic disorder. There is no clinical evidence, however, that he has suffered from a bipolar I disorder which is characterised by manic symptoms of psychotic intensity, with a breach from reality.

I note that Dr J. O'Dea reached a similar diagnosis when he examined Mr Maloney in mid 2010. Dr O Nielssen considered Mr Maloney to have a major depressive disorder (his then current presentation) at about the same time. I would not be surprised if Dr Nielssen was to revise the diagnosis in the near future.

Mr Maloney meets diagnostic criterion A for bipolar II disorder (history of one or more major depressive episodes); criterion B (history of at least one hypomanic episode); criterion C (absence of psychotic mania); criterion D (mood symptoms in criteria A and B not better accounted for by a schizoaffective disorder, or superimposed on schizophrenia, schizophreniform disorder, delusional disorder or psychotic disorder not otherwise specified); criterion E (symptoms cause significant distress/impairment in social and occupational functioning).

The issue of Mr Maloney's past probable mixed pattern of symptoms warrants mention. DSM IV TR prefers to question the diagnosis of bipolar II disorder if at any time there is a mixed group of symptoms. However the clinical picture in a patient with bipolar II disorder will not uncommonly include episodes between major depression and hypomania where there is a combination of symptoms of each disorder. This will not change the diagnosis.

Stepping back a little, bipolar II disorder is considered to be a biological mood disorder and to have a strong genetic background. Whilst episodes of the disorder will most commonly appear de novo, there will sometimes be a relationship in time between high level external stressors and the onset of the disorder, or a relationship between stress and individual episodes of the disorder. The other feature of bipolar II disorder is that the diagnosis can be delayed, often for many years.

In Mr Maloney's case the presumed first episode of his bipolar II disorder was in 1996–1997, and which followed or was in the context of his acrimonial

[sic] marital breakup. Further, the delay in diagnosis of his disorder has been very long, but not unexceptional.

284. As to another question:

Would you please comment on the substance of the opinion of Dr Bautovich as to the mental condition of Mr Maloney as she observed it during the mental health inquiry at the Kiloh Psychiatric Centre, Prince of Wales Hospital in December 2009 (see attachment (d)(iii)).

Dr Phillips wrote:

Dr Bautovich has given a satisfactory and dispassionate description of Mr Maloney's behaviour at the time of the mental health inquiry at the Kiloh Psychiatric Centre on 23 December 2009, and her professional description suggests very strongly that the magistrate was suffering from a hypomanic state at the time.

285. Dr Phillips considered the relationship between Magistrate Maloney's bipolar II disorder and the complaints raised against him and wrote:

The relationship between Mr Maloney's bipolar I disorder and the incidents detailed in your letter of instruction is interesting. [He had earlier made the point that a person's thinking and behaviour can become substantially disturbed in the context of an untreated mood disorder.]

The complaints made by Mr R Adair and Ms C Willoughby in 1998, whilst dismissed as being minor by the Conduct Division, occurred approximately at a time when Mr Maloney had been troubled by a protracted episode of depression. Whilst it is impossible, in retrospect, to prove that his insensitive and unnecessary remarks at the time were linked with an episode of illness, this is probable.

I note that Mr Maloney's unacceptable behaviour at the time of the Banovec and Altaranesi matters in 2008–2009 are likely to have occurred during a period when he had instability of his mood state. These matters occurred also during a period in his life where he was under extreme time pressure. I do not doubt that Mr Maloney's remarks had been perceived as being insensitive and insulting. I merely make the point that it is probable that his

behaviour at the time occurred in the context of a mixed mood disorder, and that he lacked insight and judgment into his statements.

The issue of Mr Maloney's unacceptable behaviour at the time of the mental health hearing at the Kiloh Psychiatric Centre on 23 December 2009 is both more recent and easier to analyse. There is strong evidence from professional experts that Mr Maloney's behaviour on the day was inappropriate, disinhibited, rather sexualised in type, and entirely gratuitous. The magistrate appeared oblivious to the embarrassment he was causing others. He also went about his tasks on that day in a hurried and inappropriate manner. The various professional persons who submitted complaints have described a person who almost certainly was hypomanic at the time.

The screen saver matters probably reflects a total misjudgement by Mr Maloney regarding what was appropriate material to have as "wallpaper" on his laptop. He made a serious error of judgment in downloading the sexualised image to a computer provided by his employer, and he had been entirely inappropriate in attending a conference with the image on his computer. He appears to have been oblivious to these errors. Whilst the matter cannot be proved, the screen saver matters probably occurred in the context of an upswing in his mood with loss of insight and judgment.

It needs to be highlighted, in relation to the above, that caution is always needed when trying to recreate the past. Retrospective analysis is a flawed pursuit. However, I am struck by the fact that Mr Maloney has had a long and extremely busy career as a magistrate, beginning in 1996 and continuing currently. He has disposed of many thousands of cases, almost all of them not leading to criticism of any type. This causes me to conclude cautiously that the magistrate functions at a professionally acceptable level when he is psychologically well, but he falls below that standard when he is psychologically unwell.

286. In answer to a question put to him before he reported:

Do you consider that there is a relationship between any condition that Mr Maloney suffers, or has suffered, and his behaviour at the time of any of the complaints described in the particulars of complaints (a) for the behaviour referred to in the earlier report at attachment (b)?

Dr Phillips wrote:

On the balance of probabilities, there has been a relationship between Mr Maloney suffering episodes of his bipolar II disorder, both in depressive and hypomanic phases, and the behaviour which led to the complaints.

I warn, however, that retrospective analysis is always difficult.

287. As to the future, Dr Phillips observed:

The treatment of a person with a bipolar II disorder is relatively specialised. The person will require a combination of medication using a modern mood stabilising agent (generally EpilimTM or LamictalTM) and targeted psychological counselling. Medication effectively constrains the person's mood within an acceptable range. Counselling allows the person to come to understand his illness, to appreciate early warning signs and to build strategies to prevent recurrent episodes of abnormal behaviour.

Given appropriate treatment, Mr Maloney should be able to achieve relatively satisfactory stability of mood. He will then be far less likely to offend in the course of his professional duties. He should be able to continue with his professional life, although the Conduct Committee might like to apply conditions: namely, that the magistrate has to attend a psychiatrist for ongoing treatment of his emotional problems, and perhaps also to undergo review at 6 monthly or yearly intervals by a psychiatric expert appointed by the Judicial Commission. I state this noting the paramount importance of protecting the public.

288. As to periods of incapacity after treatment, Dr Phillips said:

Given proper ongoing treatment for bipolar II disorder, Mr Maloney is less likely to suffer further episodes of the disorder.

If Mr Maloney were to suffer further episodes of his disorder, he would need to withdraw from professional life until he again enjoyed a stable mood state.

This might require absence from the workplace for between 2–6 weeks.

289. The three psychiatrists met on 18 January 2011 and thereafter issued a joint meeting report which reflected little disagreement between them.

290. The report noted:

We believe that Mr Maloney most probably suffers from a bipolar 2 disorder, this being a recognisable and diagnosable psychiatric disorder. Bipolar Type 2 disorder is characterised by one or more episodes of major depression and at least one episode of hypomania, that was not severe enough to meet the criteria for the diagnosis of mania.

291. In answer to a question as to the relationship between the magistrate's condition and the behaviour described in the complaints the doctors wrote:

We agree that he has a long standing history of mood instability which has predominantly been depressive in type, but probably at various times has taken at least a mixed form. There was a distinct episode of hypomania in late 2009, at the time of the events that led to the current complaint.

We believe that genetic and environmental (reactive) factors almost certainly contribute to the episodes of his illness.

We accept that a person who experiences symptoms of an episode of either the depressed or hypomanic phase of bipolar 2 disorder can be in a state in which their professional performance is affected adversely. However, we note that properly treated a person with bipolar 2 disorder, when asymptomatic, which is the usual case, is capable of performing professional duties at an entirely competent level.

We agree it is more likely than not that the greater number of periods of abnormal behaviour occurred at times when Mr Maloney was affected by instability of mood arising from his underlying condition.

292. As to the future, the doctors wrote:

We agree that if properly treated a person with bipolar 2 disorder, including Mr Maloney, is relatively unlikely to experience further episodes of illness. If he were to experience further episodes of illness they are more likely to be mild and less incapacitating as a consequence of his ongoing management. However, it is not possible to specify how long a person may require to be absent from official duties as a consequence of an episode of illness. Dr Phillips made the point that treatment will rarely exceed 6 weeks.

293. In answer to the question:

If you consider that there is or has been any impairment of the insight of Mr Maloney into his behaviour as a judicial officer, do you consider that any such impairment can be explained by reference to a psychiatric condition?

The doctors noted:

Dr Nielssen makes the point that Mr Maloney, in the course of therapy, has continued to gain understanding and insight into the link between his psychiatric disorder and his behaviour. This process is likely to continue. We agree that a person, when experiencing an episode of either hypomanic or depressed phase of bipolar 2 disorder, is likely to have reduced insight, or at times even to lose insight. Obviously, a person who is well treated is unlikely to reach either state.

294. The doctors added:

We have considered matters of personality function additionally, but point out that it is very difficult to make comment in this area as Mr Maloney has suffered from a significant DSM IV TR Axis I psychiatric disorder.

295. The three psychiatrists gave evidence, that evidence being taken concurrently. All doctors were sworn, then an agreed agenda of topics was put to the doctors in turn for comment with, generally, each topic completed before the next was taken up. Initial questioning was by the Chairperson and then Counsel examined in an agreed order. The doctors were free to challenge or question each other.

296. As it happened, such few differences as there were between the doctors were matters of emphasis rather than substance.

297. It is unnecessary to go further to the material relating to the identification of the condition from which all the doctors consider Magistrate Maloney suffers, since there is no dispute that it is a bipolar 2 disorder.

298. It is also unnecessary to go to the material relating to the cause of Magistrate Maloney's conduct at the Kiloh Centre. All psychiatrists agree that his behaviour there was substantially caused by his bipolar 2 condition. Further, Mr Gormly made that concession during examination of

the doctors and in address. We consider the concession appropriately made.

299. The position in relation to the other matters complained of is not so clear. Mr Gormly has submitted that the conduct complained of has been substantially caused by misconduct or misbehaviour by the magistrate, albeit there may have been some contribution by his psychiatric state.

300. As appears above the psychiatrists, albeit with caveats, in particular as to the difficulty of retrospective analysis, are of the view that more probably than not the behaviour is the result of the psychiatric condition. They also point to the difficulty of commenting on personality factors in the presence of the established psychiatric condition.

301. It is convenient to examine their evidence to determine whether that view has altered and, if so, in what ways.

302. The first topic dealt with in evidence was introduced by the Chairperson as follows:

The first area that counsel considers should be helpful to us is the question of whether the mental condition that you've diagnosed is the sole cause of each of all of the complaints. That obviously means of the conduct or the behaviour that has led to the complaints.

303. Asked if he had anything to add to the written reports Dr Nielssen said:

Yes. It's very difficult, your Honour, to make a retrospective diagnosis of a person's mental state. Certainly, the complaint of 23 December 2009, I believe, the conduct on that occasion was almost entirely due to the effect of an episode of the mental condition that we've diagnosed. And we have the benefit of two doctors who've made observations that seem to be consistent with that. Well, that's my interpretation. As far as the earlier episodes are concerned, I think it's quite probable that — that — that some symptoms of his condition were — were — affected his — his conduct, but it's very hard to say that with certainty after the passage of time.

304. Dr O'Dea said:

Nothing really further that I would add than to say that it would appear that the conduct, particularly in terms of the complaint of December 2009, is very consistent with and understandable by Magistrate Maloney's mental state and illness at the time. And from my understanding of the previous complaints, all of them would be consistent with a mental state of mania or hypomania at the time. But I would share Dr Nielssen's view that it can be very difficult to look at things retrospectively and to be definitive that it was the sole explanation for the behaviour. But, certainly, I think that there would be good reason to suggest that his mental state and illness may have significantly contributed to his behaviour in a number of those instances.

305. Dr Phillips said:

Your Honour, on my analysis, I believe it's more likely than not that the various periods of disturbed behaviour occurred at a time of disturbed mental state; particularly the presence of a mood disorder, which, in my view, has varied from time to time, and has included depression — a mixed state of depression of hypomania and a manic episode. The only additional point I'd want to make is that we are talking about a — a categorical psychiatric disorder or a psychiatric disorders that none of us have, to this point in time, made any comment about personality issues. And I think it's necessary to say that it's very hard in — in retrospect to determine the importance of a person's personality and the way they functioned, and more so when the — when there is a primary psychiatric illness, which all three of us believe is of very considerable importance.

306. Mr Gormly asked Dr O'Dea:

may we take it ... that you are of the opinion that there is doubt about whether the diagnosed bipolar condition is an explanation for all the conduct that is not 23 December 2009, that is the screen saver, Mr Altaranesi and Mr Banovec?

Dr O'Dea replied:

I'm not sure I understand the question. But if I understand it correctly, my response would be that there is — when asked if his bipolar disorder accounted fully for all of the behaviours prior to the mental health hearing in December, I would feel less confident than — of the December hearing

simply because of issues related to the fact that those other matters were some time ago in the past, and there'd been no clear independent documented evidence of the time of his mental state. But I would say that, whilst I have less confidence, I still have confidence in the assumption that the behaviours in relation to the various complaints prior to December 2009 is consistent with and could be explained by his mood at the time; being manic or hypo manic.

307. In respect of the screen saver matters the following evidence was given by Dr O'Dea:

There's nothing, per se, that would convince somebody that it was related to a manic episode or mania as opposed to personality. But in keeping with the overall flavour of his behaviours through the various complaints, I think, a very reasonable way of understanding his behaviour in relation to the screensaver incidents is that at the time his moods were unstable and that he was perhaps disinhibited and over familiar and not exercising judgment to a degree that was — would be expected of him, and that one way of understanding that would be in relation to instabilities in his moods at the time.

308. Mr Gormly then asked:

This is my last question to you on this topic. Do you consider that if there were not a bipolar condition — and one disregards 23 December 2009 because it seems plainly that it is the result of a bipolar condition — would you accept the proposition that the screensaver, the Altaranesi matter, and the Banovec matter, could all be explained on some other bases?

Dr O'Dea replied:

With due respect, of course, I'd have to caveat it by — by saying, I don't think I could, as a psychiatrist, ignore the mental health hearing on December 2009. But I would, even in the absence of information regarding that episode in 2009, still consider the — the behaviours in all of the other incidences that you referred to, could be related to elevated mood and mania.

309. Mr Gormly then examined Dr Phillips as follows:

Dr Phillips, I want you to understand in the questions I've asked so far because I want to follow them with similar questions to you that I am not putting in issue that 23 December 2009 was a series of events for which there is any explanation other than a bipolar condition in a manic phase; that's an accepted proposition. The question is whether any component of that, or whether any of the other incidents can be explained by something other than a bipolar condition. Do you have a comment to make about that?

DR PHILLIPS: It's important to tease apart a categorical diagnosis of bipolar 2; it's a DSM IV diagnosis, psychiatric diagnosis and personality issues. Personality issues are always to be considered when evaluating human behaviour. There is a problem in this particular case, in that the history, as I took it, is overwhelmingly the history of a person with an unstable mood disorder. But, having said that, I can't rule out the possibility that there may have been personality issues which, acting alone, are in conjunction with a bipolar mood disorder, could have added to or even caused the abnormalities of behaviour that occurred.

GORMLY: Can I put to you a comment; two aspects of the Altaranesi and the Banovec for your comment? In the Altaranesi matter you will have heard that the magistrate pursued a path of endeavouring to achieve some kind of agreement from Mr Altaranesi to get a settlement of some kind and get his acceptance of a proposition. But, in the process, there was a prolonged series of comments which provoked laughter from the audience. When I say "the audience", I mean the members of the public sitting in the Court. You have been briefed with the material from the Willoughby matter and you will perhaps recall that the making of jocular comments and the endeavours to be comic in the courtroom were the subject of examination back in 1999. . In the Banovec matter, although one also sees the comic component being used so that people are laughing, may I also ask you to assume that when the matter is first introduced to the magistrate, he spends some 20 to 25 minutes apparently carefully reading the file; absorbing what is a relevantly complex history, and then making use of that history to ensure or to follow a path of argument with Mr Banovec. The question that I would ask you to consider is that in the instances of comedic behaviour in Banovec and Altaranesi, in the pursuit of a particular line to achieve an end and in a lapse of a lengthy period of time during which there is an apparently careful reading, that all of those things are not explained by a bipolar condition in its

florid statement [sic] but are rather explained either by a personality component or misconduct. Would you accept that proposition?

DR PHILLIPS: I don't think I can accept the proposition in its totality. If one puts aside the 20-minute reading time, for the moment, I think the rest of the magistrate's behaviour in those matters and particularly taking note of the tape recording we've just heard, could be explained entirely on the basis of hypo manic illness. The issue of the reading time, in which you put it to me, that he spends 20 to 25 minutes in close reading of material, makes the matter more complex. I think it'd be fair to say that usually, and I emphasise usually, not always, a person who is hypo manic will tend to read rapidly and superficially and form a conclusion or move forward on the basis of that. On the other hand, a person with a mixed mood disturbance may well struggle for a considerable period of time with apparent attention to the task trying to assimilate and understand the material. So I don't wish to sit on a fence but I'm still of the view that the behaviour, largely, in those matters, could be explained on the basis of a psychiatric diagnosis; that is, a bipolar 2 disorder, probably hypomanic type. But the reading time does worry me.

GORMLY: What about the comic component, a sustained comic component, that at the expense of a litigant, for example, that is otherwise completely inconsistent with the judicial role; that is, that it's continuing over a period.

DR PHILLIPS: Yes. Well, obviously, I accept that the — the comments made by the magistrate were, firstly, inappropriate, and, secondly, comic. And, on my understanding, that's not the behaviour of a judicial officer. Behaviour of that type can be explained entirely satisfactorily on the basis of a bipolar disorder, hypo manic episode or a manic episode can be explained entirely on the basis of that. If behaviour of this type is based in a disturbance of personality function and I'm not — and it's possible that it is, then it should be — it would be — it would be — it would be simply demonstrated that this was the usual behaviour of the magistrate because personality function dictates the way we operate day in day out, week in week out. And if the magistrate acted in this way on a consistent basis in many cases over a period of time; ie, he was inappropriate and comic, then I would be looking very hard at a personality disorder. On the other hand, if it episodic [sic] we have to much more careful.

310. Dr Phillips said that his view was not really different if the comic component was being comic at the expense of other people over a prolonged period.

311. Dr O'Dea gave evidence as follows:

First of all, in relation to the comic component, I think one of the difficulties is isolating that from the overall picture of his conduct in that circumstance and in many others. Because, obviously, when one is making jokes and making them at the expense of others, that could be equally understood as pernicious or evidence of disinhibition. When you look at it in isolation like that, you are not able to make any further judgment. But then if you look at it in the overall context of that set of behaviours and all the other ones before us in which there are other components apparently evident that are very consistent with mania, then, it would be better understood part of the — beg your pardon — as explained by the person's mood instabilities rather than straight forward personality ...

312. Mr Boulten on this topic questioned Dr Neilssen as follows:

Dr Nielssen, given what your colleagues have said about personality, have you got an opinion about any of the issues that are subject of consideration caused by or stemmed from a personality disorder or any other personality issue?

To which Dr Nielssen replied:

I concur with my two colleagues, that it's if a person's conduct is due to an underlying personality trait, then it will be there all the time and witnessed in an episodic manner [sic]. Secondly, I agree that the behaviour is consistent with the presence of hyper mania. Not the extreme form of mania where a person is holding false beliefs and can't keep still and can't keep quiet but a period of elevated mood with loss of inhibition and loss of judgment and I agree, the tendency to make disrespectful remarks in that state but I thought what was on the tape was consistent with the presence of hypomania.

It should be mentioned that when he refers to "the tape" Dr Neilssen was referring to the tape relating to the Altaranesi hearing.

It should also be mentioned that Counsel are agreed that whether it be a transcript error or an inadvertent omission the first sentence should be read as if the word “not” appeared before witnessed.

313. We are of the view that this evidence does not alter the impression gathered from the doctors' reports that they all concur that more probably than not the conduct complained of was substantially caused by the magistrate's bipolar disorder.
314. What is clear is that the doctors all consider that the various aspects of misconduct could be substantially caused by the bipolar condition. They all consider that Magistrate Maloney has suffered from this condition, which is a continuing one, from before the first complaint. We find it difficult to determine a rational reasoning process to, as it were, extract any one or more of the events from the overall picture of an untreated – relevantly – and ongoing illness.
315. Mr Gormly sought in address to provide that basis and we will deal with his submissions later.
316. We should first deal with the difficulty occasioned by the wording of the first topic which referred to “sole cause”. In fairness, it should be mentioned that the Division had agreed to the suggested topics before the concurrent evidence was taken.
317. In address, Mr Gormly accepted that for misconduct to be established it was necessary to show — on the *Briginshaw* standard — that more probably than not the offending behaviour was substantially caused by the misconduct (*Briginshaw v Briginshaw* (1938) 60 CLR 336). The doctors' views, considered in that way, sufficiently appear from the evidence.
318. Mr Gormly did not put in issue that Magistrate Maloney was suffering on undiagnosed bipolar condition over the relevant years. He expressly did not suggest that the bipolar condition played no role in the Altaranesi or Banovec complaints, however he did put:

That really brings me then to the medical issue. The question is, to what extent does the medical condition play a role in explaining the various areas

of complaint. May we start with Altaranesi and Banovec, and I do this fairly briefly. If the medical condition played a role in Altaranesi and Banovec, what it does is perhaps to render the conduct or the behaviour less morally reprehensible, so to speak, less reprehensible in the sense of misconduct, but it raises the issue of capacity or ability. My submission about Altaranesi and Banovec is that one really, looking at Mr Maloney's history, at his working method, at his personal philosophy for running hearings and at his tone of voice and his method of dealing with Mr Altaranesi, one is dealing there with misconduct, rather than with a bipolar manic episode.

And further:

but there was a calm measured considered playing to the audience in Altaranesi. There was not any sign of a frantic or disordered behaviour on his part. There was no sign of disorganisation. His not knowing that the other file was there is not an act of disorganisation, that's the problem for a busy magistrate. We make no criticism of that, that could happen. When he was endeavouring to persuade Mr Altaranesi to give an undertaking it was a fairly considered process. He would say something, get a reply, say something more, get the laugh, get a reply, a process would move on.

In my submission, that process is not consistent — is not consistent with a bipolar condition, it is consistent with misbehaviour.

319. Having listened to the Altaranesi tape on a number of occasions we do not share the view that it reveals calm, measured and considered conduct.
320. However, it is unnecessary to rely upon our view. Dr Nielssen, the treating psychiatrist, heard the tape played during the giving of concurrent evidence. He said:

I thought what was on the tape was consistent with the presence of hypomania.

321. Dr Phillips, giving evidence in answer to a question dealing with comedic behaviour in Banovec and Altaranesi, said:

If one puts aside the 20 minute reading time for the present, I think the rest of the magistrate's behaviour in that matter and particularly taking note of the

tape recording we've just heard could be explained entirely on the basis of hypomanic illness.

Clearly Dr Phillips shares Dr Nielssen's view as to what the tape reveals.

322. Dr O'Dea did not comment on the tape. However, in the course of argument, Mr Gormly did acknowledge that he had specifically said that the bipolar condition could explain the behaviour in Altaranesi and that the comedic component is consistent with disinhibition that's brought about by a manic episode.

323. In so far as Mr Gormly relied upon the magistrate's history, this submission has an element of circularity. It is conceded that the magistrate suffered from bipolar disorder throughout the relevant period. To rely upon any particular event complained of during that period as material supportive of misconduct on another occasion would require that it be shown that the event relied upon was itself not substantially caused by the 'bipolar condition. On this ground alone we do not consider that consideration of Magistrate Maloney's history advances Mr Gormly's submission. Further, it is relevant to note that Dr Phillips said when discussing possible personality factors:

There is a problem in this particular case, in that the history, as I took it, is overwhelmingly the history of a person with an unstable mood disorder.

It should be observed that the doctor had been provided with extensive material as to the present complaints and past complaints.

324. It may be that Magistrate Maloney's view as to the desirability of informality in proceedings and encouragement of settlements sits somewhat uncomfortably with best judicial practise, but, that is not misconduct. The behaviour which has led to complaint goes well beyond informality and encouragement of settlement.

325. Mr Gormly submitted that:

ultimately none of the doctors... are able to say that the Banovec or the Altaranesi matters were caused by one, rather than the other, or the degree to which one contributed or the other contributed ...

it's a matter of fact to be determined by the Tribunal.

Mr Gormly was speaking of the bipolar condition on the one hand and misbehaviour, in the sense of misconduct, on the other.

326. We do not agree that the doctors "are not able to say". As we have discussed above, we accept that their ultimate view is that more probably than not the matters complained of are substantially caused by the bipolar condition.
327. All the psychiatrists, particularly Dr Phillips, are well qualified. It is apparent from their reports and evidence that they have given careful attention to the issues put to them and we consider that we should accept their views on the issue.
328. Mr Gormly did put an additional submission in the Banovec matter. He put that the period of 18 minutes and 30 seconds Magistrate Maloney spent reading the file, the attention he paid to it and the use of the material to achieve a particular end "without once allowing the litigant to make a proper submission" is consistent with a substantial contribution from an act of misbehaviour". He relied upon what was heard on listening to the tape of that hearing.
329. As to the period, it may be that Magistrate Maloney read and digested it carefully as Mr Gormly put, however, Dr Phillips in the passage above at [312] expressly considered this and remained of the view that the behaviour could be explained on the basis of a psychiatric diagnosis; that is, a bipolar 2 disorder, probably hypomanic in type.
330. Dr Phillips did give evidence that usually a person who is hypomanic will tend to read rapidly and superficially and form a conclusion or move forward on that. He did, however, emphasise that that is not always so.
331. Whatever the position about the reading, the transcript and the tape show the magistrate repeatedly cutting off Mr Banovec in a way which seems very consistent with an inability to await a reply before rushing on.
332. We accept the doctors' views on this incident also.

333. In relation to the screen saver matters, Mr Gormly pointed to the absence of evidence at the time to suggest that Magistrate Maloney was in a manic episode.

334. Dr O'Dea expressly accepted that situation but pointed out, we thought convincingly, the need to have regard to the overall situation. This led him to conclude that one way of understanding that conduct would be in relation to instabilities in his moods at the time.

335. Mr Gormly submitted, as to the screen saver matters:

If anything, he was in more of a depressive phase, as we understand it, at that time. My submission about that is that it's a difficult matter to assess because of the psychiatric evidence, but if one were looking at this on its own, without the psychiatric evidence, it would simply be an act of misbehaviour. In the final submission that I make, it may not ultimately be of such significance.

336. We accept Dr O'Dea's view, supported as it is by Dr Phillips and Dr Nielssen, on this aspect.

337. These considerations lead to the conclusion that misconduct has not been established upon the basis that the misbehaviour complained of has been substantially caused by the condition of bipolar 2 suffered by Magistrate Maloney.

338. It should be noted that the complaint of breach of undertaking has also not been made out because the matters established are not, in the presence of the bipolar disease, such as to be breaches of the undertaking.

339. The basis upon which the complaints of misconduct have been rejected squarely raises the issue of "incapacity".

Incapacity

340. Mr Boulten put in his submission:

This inquiry as Mr Gormly said, started with some complaints about behaviour, but it's my submission that now everything has settled, in reality this really becomes an issue for the Division to determine capacity.

341. That submission should be accepted. Mr Boulton also submitted “that the evidence about capacity is strongly in favour of the submission that the magistrate is fit for office as a magistrate”.

342. It is to this issue that we now turn.

343. Incapacity exists whenever a physical or mental impairment significantly interferes with the capacity of a judicial officer to perform judicial functions or duties. (See: *In re O’Bier* 833 A.2d 950 (Delaware Court on the Judiciary 2003.)

344. The relevant capacity is not to be determined by the immediate present but rather with regard to a variable period into the future to be measured in years rather than days, weeks or months.

345. In *Stewart v Secretary of State for Scotland* 1998 SC (HL) 81 Lord Jauncey of Tullichettle said:

I do not find it necessary, nor would it be useful, to attempt an exhaustive definition of the meaning of “inability.” Suffice to say that mere lack of efficiency or competence per se is very unlikely to measure up to inability. As Lord Coulsfield said in the Inner House (*Stewart v Secretary of State for Scotland* 1996 S.L.T. 1203 at 1213E): “... what has to be shown is that he is not really capable of performing the proper function of a judge at all”.

346. The determination of whether Magistrate Maloney is incapacitated in the relevant way is a matter to be determined by the Conduct Division taking into account not only the medical and other evidence but also the Division’s knowledge of what a judicial officer is required to do and the conditions under which it must be done. (See *Bruce v Cole* (1998) 45 NSWLR 163.)

347. It is convenient to first examine the medical evidence on this aspect

348. The doctors’ views on this issue, as they appear from their reports, will be found as follows:

Dr Nielssen paragraphs [271]–[275]

Dr O’Dea paragraphs [276]–[282]

Dr Phillips paragraphs [283]–[288]

349. The views of the doctors in their joint report appear at [290]–[294].

350. They also wrote:

Dr Nielssen has made the point that Mr Maloney has not had either symptoms of depression or the return of symptoms of hypomania since responding to treatment for depression, and that his mood state is currently stable. He holds that the magistrate is fit currently to perform the duties of a judicial officer. Dr O'Dea and Dr Phillips have no reason to question this.

And:

Dr Nielssen, who treats Mr Maloney, is of the view that the magistrate had regained capacity for work by July 2010, and is not affected by symptoms that might impair his capacity to perform his duties as a judicial officer.

Dr O'Dea and Dr Phillips are happy to accept the view of the treating doctor.

351. All doctors agreed in evidence that Magistrate Maloney would require lifelong treatment. Dr Phillips dealt with the position should he be unsupervised and untreated as follows:

If the magistrate or any other person in this position could not be supervised properly and remained untreated the situation would be gloomy in the extreme, I would expect worsening in every respect. If the judicial officer could not be supervised but was in effective long-term therapy and had good therapeutic rapport with his treating psychiatrist, then the situation would be much improved. The third proposition is one of supervision and that's the one I think that Dr O'Dea and I favour because it adds a margin of safety and overview that cannot be achieved in any other setting.

352. It is to be remembered that in his report Dr Phillips observed:

although the Conduct Division might like to apply conditions: namely, that the magistrate has to attend a psychiatrist for ongoing treatment of his emotional problems, and perhaps also to undergo review at 6 monthly or yearly intervals by a psychiatric expert appointed by the Judicial Commission. I state this noting the paramount importance of protecting the public.

353. Dr Phillips answered a question by Mr Boulten as to a possible system of supervision as follows:

I have a very long association with the Medical Board as an assessing doctor within the health programme. The parameters of the health programme are extremely simple and could be translated rapidly and easily to the legal profession. Essentially if a person is found to be — I'm not sure if I like the word, but impaired or potentially impaired by a mental illness of any sort, that that person be constrained by certain orders and the orders are very simple; that the person has a treating doctor and attends the treating doctor at the interval suggested by the treating doctor and accepts the treatment that the doctor prescribes and that includes both medication and talking psychotherapy, and that second condition which applies in bipolar disorder is that the use of the mood stabilising agent be properly monitored and that means a regular blood test. The Medical Board has an additional component, there is a treating doctor and there is an assessing doctor who is looking not only in clearer view as it were, at the condition of the impaired practitioner, but also looking at the way that person is performing. I think that's a very valuable additional bit, but it's my view that that's more a safeguard than a necessity. I think the real issue is the contract that is established and mandated between the impaired practitioner of whatever discipline and the treating doctor. The programme has been in existence for many years and is extremely successful and certainly it's something that I've always thought as being not adequately noted by other professional groups.

354. Dr Nielssen had previously responded on the same topic as follows:

Well, I have also a number of patients — a number of doctors under my care who are under the supervision of the Medical Board and the key part of their supervision is continued treatment. But the other component is, I guess, a supervision of professional performance in some cases. That may be one element that might be able to be introduced because I would not be in a position to comment on the actual performance of the duties of a magistrate, only on the absence of symptoms of mental illness that might affect that performance.

355. Dr Neilssen dealt with the treatment regime he contemplated as follows:

Well, it's a commitment to long-term treatment and if for some reason I'm not available, for example I get another job, I would of course refer him to a senior colleague, but its meetings at approximately four weekly intervals which seems an appropriate interval for a professional person who's generally well, treatment with a mood stabilising medication is a prophylaxis against further elevation and depressed mood to a lesser extent, and probably withdrawal of antidepressant medication over time, but the really long-term monitoring and prophylactic treatment, prophylactic medication is the main part of the treatment plan.

356. When asked if he contemplated an indefinite program he replied:

Yes, I would recommend indefinite supervision, because the risk of further episodes is lifelong but it may be less frequent supervision in time when it becomes clear that there's long periods of remaining well, but I'd still imagine meeting at least every three months, if that were the case, but I'm not foreseeing reducing the frequency of meetings for some time.

357. Dr O'Dea on the issue of supervision said:

I would simply add that one other thing that is involved with the impaired medical practitioners of whom I, like Dr Phillips and Dr Nielssen have a number of patients, is that in addition to the treating psychiatrist and the psychiatrist who makes regular reassessments, that there is a further body of the Medical Board that will review the progress on a regular basis, and whilst there may not be a mechanism for that within the legal fraternity, it certainly may alleviate some concerns that other people may have if there's some external body that's regularly reviewing the progress of the treatment and the participant's engagement in that treatment.

358. Dr Phillips then commented:

I agree with Dr O'Dea entirely. The only additional comment I'd like to make your Honour is to stress very strongly that the treatment of a person with a bipolar disorder is lifelong treatment. There can be no other way to look at it because it is a genetically determined disorder with episodic fluctuations in mood state and that age does not assist.

359. In relation to the topic of future episodes, to which we shall come, Dr Phillips did observe:

If a person suffers from a bipolar illness more often than not the episodes are going to be depressive in type rather than hypomanic. A person who slumps into a depressive phase usually does so reasonably slowly and will maintain insight and there are not high risks in that situation. Generally the person in an established therapy will contact their psychiatrist and say "I'm in trouble, can I see you" and an assessment will be made, an adjustment will be made to the medication or frequency of attendances and the person will work on or will be taken judiciously out of practice at an appropriate time. The situation is more worrying with hypomania and particularly with mania, where the episodes are rarer and are likely to appear more rapidly. However, it's my experience that in my clientele, and I think my colleagues will probably support me in this, that once an established treatment rapport is there, and once a person is properly treated, and once the person has increasing insight and I don't think there's ever such a thing as total and full insight, that person again will speak up at an appropriately early stage and adjustments can be made again to medication, frequency of therapy and other matters. If a person needs to be taken out of their work situation, which occurs, I'd like to think that medical matters are more prominent than the professional difficulties that are caused. My view is that from time to time a person does need to be rapidly taken out of practice and we do it and it causes some disruption but it's certainly not the end of the world.

360. It is convenient to say that there is no way of so acting in respect of a judicial officer.

361. The doctors dealt, during examination, with the likelihood of further episodes and their severity.

362. Dr Nielssen said:

Well, I concur with Dr Phillips' comments that it's a lifelong illness and that there is a risk of further episodes. It's very difficult to say how great the risk is, when the next episode might come, whether it will be elevated or depressed mood, depends a little bit on life events and physical health. But certainly continuous treatment would reduce that risk and also if episodes were to occur, if they were treated promptly they should not become disabling or disruptive and should respond to treatment reasonably quickly if they're treated early.

He also observed:

Well, there are some patients who become more unstable in their bipolar disorder in later decades. It's just very hard to predict, to project from the experience of other patients and from research to a person who has really had quite a mild condition compared to perhaps to many of the patients we see admitted involuntarily to hospital for example, so really it's difficult to predict from that experience and research to this individual.

363. Dr O'Dea observed:

Well, I would agree with Dr Nielssen's evidence, but I would add in addition to that that bipolar disorder, particularly bipolar 2 or the less severe bipolar disorder that Magistrate Maloney has been diagnosed with is probably one of the most treatable psychiatric conditions and is very treatable and very responsive to treatment, and that there are many treatment options available for people that will I guess give a much greater potential for relapses to be few, far between and minor. And the other thing I would add is that often people who are bipolar have frequent relapses, are people with other, as we call it comorbid conditions, particularly drug and alcohol problems, unemployment, unstable life patterns and of course Magistrate Maloney does not have a history of drug and alcohol problems or of the other disadvantaged problems, and that would all point I think in his case to a great deal of optimism regarding his potential to really benefit from this treatment programme which Dr Nielssen has pointed out is really something that's only just begun for him and so I would add that to what Dr Nielssen's evidence was.

364. Dr Phillips said:

Your Honour, the trajectory of illness in a person with a bipolar 2 disorder is very uncertain. I take Dr Nielssen's point that on occasions untreated, the frequency of illnesses will increase and perhaps the extent of the illness will worsen. On the other hand those of us with clinical experience in this area, and we all three of us do have, there are people whose illness improves with time, and that's a positive factor. The science literature suggests very strongly that the moment a proper treatment programme is put in place, the risk of future illness diminishes in its frequency and even when an illness develops in terms of illness intensity. So I agree with Dr O'Dea's view that in

many ways bipolar 2 disorder presents an initial challenge for treatment, that is making the diagnosis and urging the person to start treatment, but once treatment is initiated and once there is compliance, generally people with a bipolar disorder do very well, and much better than the treatment of people with various other psychiatric disorders.

365. Dr O'Dea made the point that the increase in frequency and severity may be typical of the condition untreated but he observed that with the onset of effective treatment the severity and frequency of further episodes is markedly reduced. He added:

Of course we can't say that it goes to zero but markedly reduces and therefore I think that the prognosis treated is much better than the prognosis untreated.

366. Mr Gormly asked:

Now, I ask this question, with increasing age and without the discipline of some form of compulsory future supervision, and that is not available for judicial officers unlike the medical legal system, I suggest that the risk of episodes in the future is not one about which one could confidently say there would be few. Would you agree with that Dr Phillips?

Dr Phillips replied:

I do...

The doctor then continued in the terms set out in paragraph [356].

367. Mr Gormly put to Dr Nielssen the following question:

Dr Nielssen, in your report at paragraph 6, that is your second report, 10 January 2011, you appear to have formed the view as the treating doctor, that it's difficult to predict the likelihood of future episodes with accuracy that episodes are more likely to increase with age, and that more likely than not, there will be at least one more episode before the end of his working life. Do you see that?

DR NIELSSEN: Yes.

MR GORMLY: Doctor, can I suggest that that is in fact a correct and accurate and reasonable assessment of the likelihood of future episodes from your analysis of Mr Maloney?

The Doctor replied:

Look, it's a sort of an educated guess, and certainly the risk of an episode of depression is high enough to say that it's more than a 50/50 proposition.

368. Dr Nielssen agreed that some additional structure would "be better for more abundant caution". However, he went on:

Well, I again agree with my colleagues that if there was some additional structure, that is better for more abundant caution. But having said that, this condition is typically not disabling, people fully recover between episodes and can function perfectly well, and there's many, many professional people in all professions, not just medicine, who have this condition and work quite well except during the periods in which they're receiving treatment — receiving treatment for an acute episode.

369. Dr Nielssen agreed that that was an assessment dealing with the patient's functioning but said that a doctor would consider, for example, a person's fitness to drive a car or "in the case of one of my patients who was an airline pilot who really had to retire" in terms of the effect of the patient's work on other people.

370. When asked by Mr Gormly whether he would be concerned about the capacity of a judicial officer with a bipolar condition to, for example, impose sentences when they're in a manic phase, Dr Nielssen replied that he did not foresee that as being a situation likely to arise because he foresaw treatment as timely and effective.

371. The doctor did see that there might be a gap, which he characterised as small, between the onset of a manic episode and it being picked up, however, he would not foresee that the illness would be so disabling that "one couldn't carry out one's duties effectively".

372. Mr Gormly asked:

do you agree that the risk with the future for Mr Maloney's treatment is that a gap might form between the time a manic episode starts and the time he is able to become sufficiently aware of it to go and get treatment?

Dr Nielssen replied:

Yes, well, that would assist for any patient, both in the penny dropping as to why they're not sleeping and then being able to find — you know, locate their doctor, although I can usually be contacted at any time by mobile phone. — I can usually be contacted any time by mobile phone but if the question was that there's a risk there might be a delay between the onset, recognition and treatment, then the answer is yes, there might be that risk.

373. Mr Gormly asked:

The onset starts with a feeling of wellbeing that it would increase the risk that time is going to pass before the call for treatment is triggered, particularly if he is unsupervised, correct?

Dr Nielssen replied:

Well, it might be that the increased wellbeing is very welcome and that he didn't want treatment which is again quite a common situation with people with bipolar disorder. I've got no reason to believe that that's the case with Mr Maloney who is very anxious about becoming well.

Mr Gormly asked:

So days or weeks could possibly pass before a pathway to treatment is triggered?

Dr Nielssen replied:

It could, or he could get treatment immediately. It's available.

374. The following evidence was also given:

MR GORMLY: If treatment is entirely left up to Mr Maloney in the future, that is he cannot be externally supervised for whatever reason, and he cannot be placed under some regime of reporting or compulsory examinations or blood tests and it's entirely left to him, would you agree that that would raise a real risk as to whether he might after or during manic episodes, slide backwards?

DR NIELSSEN: I mean if the key words are real risk, yes it is a real risk that a person may have a manic episode and not notice it certainly immediately, but again amongst the many patients under my care, they do frequently make contact with me and say that they're not sleeping and they feel they're going up and "What should I do with my medication?" and that kind of thing.

375. Dr Nielssen thought that if Magistrate Maloney ceased work it would be damaging to his medical condition.

376. Dr Neilssen did not agree that there had been denial about Magistrate Maloney's previous episodes of illness, however, he did agree that Magistrate Maloney did not remember events the subject of complaint as brought up in the statements. The doctor agreed that Magistrate Maloney at various times sought to justify the screen saver matters and that in relation to the Banovec and Altaranesi matters he proffered explanations seeking to justify himself saying "I like to run a friendly court": or "I like to put litigants at ease".

377. Mr Gormly asked:

Would you agree that that tendency is one which might well inhibit his ability to voluntarily pursue treatment in the long run if there is no external supervision?

Dr Nielssen replied:

No, I haven't noticed any objection to continuing treatment and I don't see that his retrospective interpretation of those events, which he accepts is his subjective point of view, has any effect on his willingness to accept my opinion and the opinion of the other doctors and my treatment recommendations.

378. Doctor Nielssen agreed that the existence of this Conduct Division hearing is an incentive to Magistrate Maloney to comply with his treatment up to the present time and that after that the incentive will go once the hearing and inquiry are concluded.

379. Mr Gormly asked:

If there is a component of denial or some difficulty in achieving insight into his own conduct, particularly if there are personality — unidentified personality components underlying it all, the incentive to pursue a process of voluntary treatment while he is a judicial officer will go, do you not agree?

The doctor replied:

Well, it will be less pressing but I tend to see mental illness a bit like a condition like diabetes, where the person takes responsibility for managing their own care and taking the advice of the doctor in between consultations, and I haven't noticed any tendency to deny the presence of a disorder or any apparent intention to discontinue treatment.

380. Mr Boulten asked:

Mr Gormly's question about what will happen when this hearing is determined and how that might be a disincentive to health, do you have any opinion about he might be able to get on with his life when this is all over? Is it going to be easier or worse for you as his doctor and for him to deal with his health?

The doctor replied:

Well, no I think the resolution of these matters will obviously improve Mr Maloney's health, it will alleviate a considerable anxiety and depression I hope, but I have sensed for him that he's also very anxious about any further episodes that might cause him to come to the attention of a commission such as this, and that he is very anxious not to lose self awareness and self control and very anxious about having another episode of illness.

381. Mr Boulten asked:

Do you think the threat of further proceedings is really necessary to keep him on the treatment plan?

Dr Nielssen replied:

Well, I don't believe so not based on having got to know him over a year or so of treatment. I've noticed a quite good recognition of past symptom patterns and quite a good commitment to further care.

382. On the assumption that it was planned that Magistrate Maloney would cease work if a manic episode commenced the Chairman asked, in summary, of the doctors as to how rapidly that could be done, what would be the position if he were part heard in the middle of a case for, say, two weeks or a month and what would be the likelihood of the magistrate's position being affected by perceived peer pressure if he were to leave work in the middle of the day and leave other magistrates "in the lurch".

383. Dr Nielssen replied:

Well again it has been a feature I think of Mr Maloney's previous work patterns that he's maintained a very high work ethic, but I think really now he understands and we have to say his health comes first and also his capacity to carry out his duties at the best level also is of great importance. We've agreed in our discussions that future episodes are likely to be short-lived and hopefully any perhaps part-heard matters could be returned to before too long, but it's just a risk we have. We don't know for a fact what the future course of the illness will be and whether there will be further episodes now the treatment's undertaken. It's very hard to tell you exactly how disruptive his mental condition might be to his capacity to work.

384. Dr O'Dea replied:

Your Honour, I would make reference to the many medical practitioners including medical specialists who are diagnosed with a bipolar disorder, and continuing their professional duties and make reference to Mr Gormly's concerns obviously that what we're looking at here is not only the impact upon the individual but for example in a surgeon's case or an anaesthetist's case or any other person in the medical profession's case, if they become unwell and their judgment becomes impaired, that it may threaten the life of their patients. But these things are able to be managed because of the nature of bipolar disorder and the nature of the treatment programme and the nature of any potential relapse which is that usually these are not rapid and severe relapses, that usually the first early phases of a relapse are mild and may become identifiable to the individual or their very close family members, but not impact upon their work, because that would often be seen as something that would happen further down the track when it's more severe, and that with a proper treatment programme in which people have regular

access — patients have regular access to their treating psychiatrists and relatives have regular access to treating psychiatrists, these episodes are usually identified and treated in the very early phases before they get to an extent where they are impacting upon a person's professional activity, and of course I go back to the fact that we've got the model of doctors who are in these programmes who do very well, and don't end up in between visits to their psychiatrists, blowing up into an acute phase of a mania and having to for argument's sake, relieve themselves from a trial through the mid afternoon leaving their colleagues in the lurch. So I would point to that kind of model and the nature of the long-term management of this condition to address those concerns.

385. Dr Phillips gave the answer set out in [359] above. We think it helpful to repeat his comment:

from time to time a person does need to be rapidly taken out of practice and we do it and it causes some disruption but it's certainly not the end of the world.

Discussion

386. We have accepted at [18] Mr Boulten's submission that the critical issue that has emerged from the examination of the complaints and the hearings is Magistrate Maloney's capacity to perform the duties of a judicial officer in view of his bipolar 2 disorder.
387. Mr Boulten went on to submit "that the evidence about capacity is strongly in favour of the submission that the magistrate is fit for office as a magistrate". In the context of the judicial duties of a magistrate and the conditions under which those duties are to be performed we do not accept this submission.
388. Set out at [350] the doctors agreed in their joint report that Magistrate Maloney's mood state is **currently** stable and that he is fit **currently** to perform the duties of a judicial officer not being affected by symptoms that might affect his capacity to perform such duties. The emphasis is ours.
389. Judicial office is a continuing one and we are concerned not only with the present but with the reasonably foreseeable future.

390. Magistrate Maloney suffers from bipolar 2 disorder which will be lifelong. The condition will require continuous treatment and supervision.
391. Dr Phillips observed at [351]: "If the Magistrate or any other person in this position could not be supervised properly and remained untreated the situation could be gloomy in the extreme, I would expect worsening in every respect."
392. We do not understand the other doctors to disagree with that view. If Magistrate Maloney is not correctly treated he will suffer hypomanic attacks and other changes of mood with increasing frequency and of increasing intensity.
393. We consider that in such a situation Magistrate Maloney, being subject to such a future, would be clearly incapacitated for his judicial duties. What can occur in such attacks is well illustrated by the complaints before us.
394. Magistrate Maloney is presently being duly treated. The question arises whether that state of affairs will continue.
395. Dr Nielssen, while being cross-examined by Mr Gormly as to a feeling of wellbeing at the onset of a manic episode, did say at [373] that not wanting treatment is quite a common situation with people with bipolar disorder. He added: "I've got no reason to believe that that's the case with Mr Maloney who is very anxious about becoming well".
396. We accept Mr Gormly's submission that Magistrate Maloney showed before us, particularly but not only, over the screen saver matters, a considerable capacity for denial and self-justification and, we would add, self-deception. We consider there to be a real risk that at some stage Magistrate Maloney will have feelings of wellbeing and give up the regime of treatment which he presently undergoes.
397. Even when correctly treated, Magistrate Maloney will probably suffer hypomanic attacks, however, the number of such attacks cannot be forecast. They will be less intense than they would have been were they untreated.

398. A feature of the doctors' evidence is the difficulty of forecasting what is likely to occur apart from the certainty that the bipolar 2 disorder is lifelong and will require continuous treatment and supervision. Dr Phillips said at [364] "... the trajectory of illness in a person with a bipolar 2 disorder is very uncertain". Dr Nielssen in his report of 10 January 2011 said:

I am unable to predict the likelihood of further episodes with any accuracy, either on the basis of my clinical experience or by comparing Magistrate Maloney's condition to studies of populations of people with less severe forms of bipolar disorder.

399. Dr Nielssen also said in evidence at [362]:

It's very difficult to say how great the risk is, when the next episode might come, whether it will be elevated or depressed mood, depends a little bit on life events and physical health.

He added that continuous treatment would reduce the risk but said, also, that there are some patients who become more unstable in their bipolar disorder in later decades.

400. Dr Nielssen also said in evidence at [383]:

We don't know for a fact what the future course of the illness will be and whether there will be further episodes now the treatment's undertaken. It's very hard to tell exactly how disruptive his mental condition might be to his capacity to work.

401. Dr O'Dea at [363] agreed with Dr Phillips but added that bipolar 2 is very treatable and responsive to treatment which "give(s) a much greater potential for relapses to be few, far between and minor". He also commented on the helpful circumstance that Magistrate Maloney did not have a history of drug and alcohol problems, or other disadvantaged problems.

402. If Magistrate Maloney does suffer a hypomanic attack he will need to cease work for a time up to 6 weeks.

403. Ceasing work before conduct occurs, which would be misbehaviour except for the presence of the bipolar 2 disorder, depends upon Magistrate

Maloney, or perhaps a relative or friend, recognising the precursors of an attack and Magistrate Maloney's willingness to take appropriate action.

404. For the reasons we have discussed above at [396] we think there is a real risk that Magistrate Maloney would not take, or at least would delay, such action.

405. It was put that Mrs. Maloney would be able to alert Magistrate Maloney to a pending problem. However, Dr Nielssen has not yet seen Mrs. Maloney — he understood because of child-minding commitments — and she was not present at the hearing — we are told for the same reason. We are unable to form a view as to how likely it is that she could successfully carry out this role and, in any event, she would not be in the court where Magistrate Maloney presides.

406. Dr Nielssen agreed with Mr Gormly that a sense of wellbeing may lead to a gap between the onset of a manic attack and the seeking of treatment. During that gap it could be expected that the Magistrate would still be sitting. Dr Nielssen agreed that days or weeks could possibly pass before a pathway to treatment is triggered. He added "or he could get treatment immediately it's available." and commented "I can usually be contacted any time by mobile phone".

407. We consider that there is substance in Mr Gormly's submission in relation to the "gap". He said:

if he falls within the gap, he falls within that period between the end of a stable period and realising or having someone tap him on the shoulder to say that he is in a manic episode, he may well have, particularly in the local court where the turnover is so great and it's so publicly exposed, he may have dealt with many cases before that occurred. In my submission, while ever that's the case, Mr Maloney falls within that description of a person who is not able to hold the office of a judicial officer.

408. It is to be borne in mind that if Magistrate Maloney failed to recognise or acknowledge the end of a stable period, steps to prevent him sitting are likely to be difficult and could involve significant time.

409. The Chief Magistrate can under s 40(1)(a) of the Act suspend a Magistrate once a complaint has been made but it by no means follows that inappropriate conduct will be followed by a complaint or that a complaint, if made, may not be delayed. Such a power is to be exercised with caution, particularly if the Magistrate contests the complaint.
410. The Chief Magistrate can under s 39B of the Act request the Judicial Commission to investigate a matter concerning impairment of a magistrate but such a request is not a complaint.
411. The Chief Magistrate as a head of jurisdiction has administrative powers as to where and when a magistrate sits, however, principles of judicial independence require that that power be exercised upon proper grounds and caution will be required if the magistrate contends that he is in a stable condition, particularly if supported by his psychiatrist.
412. It is unnecessary to examine all the possible situations to appreciate that considerable time may pass between the end of a stable state and effective action to prevent the Magistrate from sitting should he wish to continue doing so.
413. Some understanding of the doctors' views of the future can be gathered from the steps they consider should be taken to support a person in the position Magistrate Maloney is in so far as his mental health is concerned.
414. In the passage from his report set out at [287], Dr Phillips, after observing that Magistrate Maloney should be able to continue his professional duties, continued:
- although the Conduct Committee might like to apply conditions: namely, that the magistrate has to attend a psychiatrist for ongoing treatment of his emotional problems, and perhaps also to undergo review at 6 monthly or yearly intervals by a psychiatric expert appointed by the Judicial Commission. I state this noting the paramount importance of protecting the public.
415. It is relevant to note that the Complaints jurisdiction of the Judicial Commission is a protective jurisdiction concerned with the protection of the

public and the system of justice. Neither the Conduct Division nor the Judicial Commission has power to “apply conditions” such as Dr Phillips suggests.

416. The passage from Dr Phillips’ evidence set out at [353] demonstrates the type of conditions imposed in respect of the medical profession. It is to be observed that a condition applies “in bipolar disorder (is) that the use of the mood stabilising agent be properly monitored and that means a regular blood test”.
417. The need for such tests and other monitoring processes suggest to us to that non-compliance is not infrequent. Again the imposition of such a protective test is not available in respect of a judicial officer.
418. At [354] Dr Nielssen refers to the supervision of professional performance in some cases. He goes on:

That may be one element that might be able to be introduced because I would not be in a position to comment on the actual performance of the duties of a magistrate, only on the absence of symptoms of mental illness that might affect that performance.

419. This is again a condition that cannot be imposed on a judicial officer.
420. Dr O’Dea in a passage set out at [357] in respect of medical practitioners, after referring to the treating psychiatrist and the psychiatrist who makes regular assessments, observed that a further body of the Medical Board will review progress on a regular basis. He went on:

and whilst there may not be a mechanism for that within the legal fraternity, it certainly may alleviate some concerns that other people may have if there’s some external body that’s regularly reviewing the progress of the treatment and the participant’s engagement in that treatment.

No such body is available in respect of a judicial officer. It is difficult to see how there could be one having regard, amongst other things, to the principles of judicial independence.

421. We consider that some of the more optimistic comments of the doctors need to be considered in the light of the precautions and conditions that they consider are at least highly desirable if Magistrate Maloney is to continue sitting as a Magistrate.
422. Dr Phillips did not appear to distinguish the situation of Magistrate Maloney from that which might arise where a person does need to be rapidly taken out of practice "and we do it". Should such a situation arise in respect of Magistrate Maloney there would be no authority to take such action.
423. After referring to ability to work except during periods of treatment for an acute episode Dr Nielssen said that, in making an assessment, consideration would be given to the effect of a patient's health on other people. He said at [369] that a doctor would consider, for example, a person's fitness to drive a car or "in the case of one of my patients who was an airline pilot who really had to retire".
424. The harm that could be done by an airline pilot's mental condition might be more obvious and striking, however, the harm that could be done to litigants and respect for the judiciary can also be very damaging. At the risk of taking the analogy too far it may be observed that a magistrate has no co-pilot.
425. We are of the view that if Magistrate Maloney continues as a magistrate there is a very real risk that he will suffer hypomanic attacks or other mood changes which will result in events such as those reflected in the complaints we have considered.
426. We consider that the likelihood of such attacks or changes taken together with their probable consequences constitute an unacceptable risk which would have to be taken for Magistrate Maloney to continue as a magistrate.
427. We find that Magistrate Maloney is and will remain incapacitated for the performance of the office of Magistrate. We are of the opinion that that incapacity could justify parliamentary consideration of the removal of Magistrate Maloney from office on the ground of proved incapacity.

428. There are two further matters with which we should deal.
429. First, Mr Boulten in his address accepted that the complaints made were at least partly substantiated and submitted that the proper course of action for the Conduct Division is to refer the complaints to the Chief Magistrate pursuant to s 28(1)(b) of the Act.
430. He did not, in terms, refer to the power of the Conduct Division to make recommendations to the Chief Magistrate as to what steps might be taken to deal with the complaints under s 28(3).
431. Mr Boulten did, however, lead evidence from Magistrate Maloney as to his willingness to take mood stabilising drugs if prescribed by Dr Nielssen, something which had not yet occurred, to submit to blood tests and to authorise his doctors to communicate with the head of jurisdiction on a regular basis. Mr Boulten also established from Dr Phillips and Dr O'Dea their willingness to assist as psychiatric observers.
432. In the absence of a submission on the point, we think it sufficient to say that we do not consider that any practical scheme, consistent with the principles of judicial independence, could be devised that could properly be made the subject of such a recommendation.
433. In any event our finding that the matters dealt with by us could justify parliamentary consideration of the removal of Magistrate Maloney from office excludes the operation of s 28(1)(b) and (3).
434. And second, Mr Gormly has submitted that, quite apart from the view we may take of Magistrate Maloney's present and future incapacity resulting from his bipolar 2 disorder and the risks attached to it, he is unfit to be a magistrate because of characteristics demonstrated as being continuing, despite the fact he is said to be in a stable state.
435. He puts as live factors sexual disinhibition, forgetting, putting forward other stories and, in particular relating to the screen saver matters at both hearings, an inability to be objective and to accurately and responsibly handle questions of fact. He also refers to Magistrate Maloney's lack of insight which he puts continues at a high level.

436. We consider there to be some force in these submissions and others which essentially develop the same theme. However there is no psychiatric evidence to support this approach and, indeed, the psychiatric evidence is to the contrary.

437. We do not consider that it has been established that Magistrate Maloney is incapacitated for the reasons put by Mr Gormly as distinct from the incapacity which we have held established.

Findings

438.

- (a) So much of the Altaranesi complaint as alleges that Magistrate Maloney referred to Mr Altaranesi as a bastard is dismissed. The remainder of the complaint is substantiated in so far as it relates to the ability of the Magistrate but not insofar as it relates to the behaviour of the Magistrate.
- (b) So much of the Banovec complaint as is particularised in 1(c) and 1(d) is dismissed. The remainder of the complaint is substantiated in so far as it relates to the ability of the Magistrate but not insofar as it relates to the behaviour of the Magistrate.
- (c) So much of the Dr Wallace/Kiloh Centre complaint as is particularised in 1A (iv), (v) and (vi), 1B, 2C, 2D(ii), (iii) and (iv), 3F and 6(i) and (ii) is dismissed. The remainder of the complaint is substantiated in so far as it relates to the ability of the Magistrate but not insofar as it relates to the behaviour of the Magistrate.
- (d) The screen saver complaint is substantiated in so far as it relates to the ability of the Magistrate but not insofar as it relates to the behaviour of the Magistrate.
- (e) The Conduct Division finds that Magistrate Maloney breached the undertaking given by him in 1999 as set out in this report, however, note that the breaches were substantially caused by his bipolar 2 disorder.

- (f) The Conduct Division finds that Magistrate Maloney is and will remain incapacitated for the performance of judicial duties by his bipolar 2 disorder.
- (g) The Conduct Division makes findings of fact as set out in this report.
- (h) The Conduct Division is of the opinion that the matters referred to in this report could justify Parliamentary consideration of the removal of Magistrate Maloney from office on the ground of proved incapacity.

The Honourable Michael Campbell QC

Chairperson

Her Honour Deputy Chief Magistrate Mottley

Ms M Jabour