Report of Inquiry

Judicial Commission of NSW
Conduct Division

in relation to Magistrate Dominique Burns

21 December 2018

IN THE JUDICIAL COMMISION

OF NEW SOUTH WALES

CONDUCT DIVISION

The Honourable Justice Payne

The Honourable Judge Dive

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Summary of conclusions

1 The Conduct Division is satisfied that the Complaint is substantiated in all the respects described in this report. The Conduct Division is of the opinion that this matter could justify parliamentary consideration of the removal of the judicial officer from office.

2 The matters proved against Magistrate Burns are serious instances of misbehaviour and reflect Magistrate Burns' present and likely future incapacity to exercise the functions of a judicial officer.

3 The power conferred by the NSW Constitution upon the Parliament to remove a judicial officer on the relevant grounds is in no way punitive. The proceedings in the Conduct Division are not disciplinary. The jurisdiction is entirely protective.

4 In describing the jurisdiction as protective we mean that the proceedings are designed to protect both the public from judicial officers who are guilty of misbehaviour rendering them unfit for office, or suffering from incapacity to discharge the duties of office and protective of the judiciary from unwarranted intrusions into judicial independence.

5 The Conduct Division has investigated a detailed Complaint which was particularised as relating to conduct occurring between June 2016 and February 2017.

6 The Conduct Division has concluded that the Complaint is sustained in relation to 16 of the 17 separate particularised instances addressed by the Complaint.

7 The threshold for the formation of the relevant opinion by the Conduct Division is that Parliament could consider removal of a judicial officer, not that it should. The Conduct Division considers that the sustained Complaint could justify parliamentary consideration of the removal of the magistrate from office.

8 Critical to the judicial function is affording a fair hearing to all litigants. Ensuring a fair hearing for all litigants enhances respect for the judicial decision making process and the administration of the law.

9 As detailed in this report, the Conduct Division finds that her Honour's conduct in remanding persons in custody of her own motion when she had no power or proper purpose to do so and in encouraging detention applications where neither party had adverted to the prospect of detention demonstrates both misbehaviour and incapacity.

10 The conduct proven is all the more serious in circumstances established here where the person taken into custody was not provided with an opportunity to make submissions.

11 The judicial officer's conduct in seeking to influence police prosecutors to lay additional charges against accused persons appearing before her demonstrates misbehaviour and incapacity. A judicial officer seeking to become involved in police charging decisions strikes at the heart of judicial independence.

12 The Conduct Division also finds that the judicial officer's practice of denying appeals bail in chambers was a manifest denial of procedural fairness. Parties had not been notified that such a procedure would be adopted and were not afforded an opportunity to be heard. Cumulatively, such conduct lacked the primary judicial requirement of ability and desire to hear both sides and demonstrated both misbehaviour and incapacity.

13 The Conduct Division finds that the judicial officer's mental illness was a contributing factor to the conduct that was the subject of the Complaint. The Conduct Division finds that the illness is now in remission. The Conduct Division also finds that the judicial officer's conduct was not solely or predominantly caused by her Honour's psychiatric or psychological condition.

14 The Conduct Division finds that a significant factor bearing upon the question of the judicial officer's present and likely future incapacity is the judicial officer's current attitude to her conduct the subject of the Complaint. In this respect, her various responses, and most particularly the judicial officer's oral evidence, are of concern.

15 At the present time where the judicial officer's mental illness is in remission, her evidence to the Conduct Division made clear that in a number of respects addressed in this report her Honour continues to believe that aspects of her behaviour the subject of the Complaint were justified and she would in the future act in the same way. Regrettably, in a number of important respects detailed in this report, the Conduct Division does not accept the evidence given by the judicial officer.

16 The Conduct Division finds that the judicial officer's workload, work hours and sitting hours were not unreasonable. There is no evidence that her Honour's workload was "crushing", inhumane, unsafe or akin to a "tsunami" of work as it was described in submissions on behalf of the judicial officer.

17 As the judicial officer's legal representatives sought to make the management of the Local Court of NSW, and especially the Port Macquarie circuit, an issue during the hearing before the Conduct Division, it is appropriate to record the conclusion of the Conduct Division that while the Port Macquarie circuit was a busy one, it is satisfied that reliable and timely management information was collected, collated and acted upon by the Chief Magistrate in the management of the Local Court, including the Port Macquarie circuit, during the relevant period.

18 The findings of misconduct and incapacity, together with the evidence of the judicial officer about critical issues, given at a time when her Honour's mental illness was in remission, leads the Conduct Division to conclude that the matter could justify parliamentary consideration of the removal of the judicial officer from office.

The Complaint

19 On 3 March 2017, pursuant to s 15 of the *Judicial Officers Act 1986* (NSW) ("the Act"), Ms Annmarie Lumsden, the Acting Deputy Chief Executive Officer of Legal Aid NSW, complained to the Judicial Commission of NSW ("the Commission") about a matter that concerned the ability or behaviour of Magistrate Dominique Burns, a judicial officer within the meaning of the Act.

20 Part 6 of the Act sets out the procedures to be followed when such a complaint is made. Section 18 of the Act provides that the Commission is to conduct a preliminary examination of the complaint, and may initiate such inquiries as it thinks appropriate. Thereafter, the options available to the Commission are as follows. First, if the Commission is of the opinion that one or more of the conditions set out in s 20(1) is met, it may summarily dismiss the complaint. Secondly, the Commission may, if the compliant is not

summarily dismissed, refer the complaint pursuant to s 21(1) of the Act to the Conduct Division constituted under s 22. Thirdly, under s 21(2) where a complaint is not summarily dismissed under s 20, but the Commission thinks that, although the complaint appears to be wholly or partly substantiated, it does not justify the attention of the Conduct Division, it may instead refer the complaint to the relevant head of jurisdiction.

21 On 18 October 2017, the Commission determined that the Complaint should not be summarily dismissed and that it should be referred to the Conduct Division pursuant to s 21(1) of the Act.

The functions of the Conduct Division

22 Divisions 3 and 4 of Pt 6 of the Act contain provisions regulating the exercise of the functions of the Conduct Division.

23 The following provisions of the Act are relevant:

> "**13 The Conduct Division**
>
> (1) There shall be a Conduct Division of the Commission.
>
> (2) The Conduct Division shall have and may exercise the functions conferred or imposed on it by or under this or any other Act.
>
> (3) The functions of the Conduct Division may be exercised by 3 persons in accordance with Part 6, and not otherwise.
>
> (4) Schedule 3 has effect with respect to the procedure of the Conduct Division.
>
> **14 Functions of the Conduct Division**
>
> The functions of the Conduct Division are to examine and deal with complaints referred to it under Part 6 and formal requests referred to it under Part 6A.
>
> **15 Complaints**
>
> (1) Any person may complain to the Commission about a matter that concerns or may concern the ability or behaviour of a judicial officer.
>
> (2) The Commission shall not deal with a complaint (otherwise than to summarily dismiss it under section 20) unless it appears to the Commission that:

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

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

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

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

(b) a matter arising before the commencement of this Act,

unless it appears to the Commission that the matter, if substantiated, could justify parliamentary consideration of the removal of the officer from office.

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

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

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

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

...

20 Summary dismissal of complaints

(1) The Commission shall summarily dismiss the complaint if it is of the opinion that, whether or not it appears to be substantiated:

(a) the complaint is one that it is required not to deal with,

(b) the complaint is frivolous, vexatious or not in good faith,

(c) the subject-matter of the complaint is trivial,

(d) the matter complained about occurred at too remote a time to justify further consideration,

(e) in relation to the matter complained about, there is or was available a satisfactory means of redress or of dealing with the complaint or the subject-matter of the complaint,

(f) without limiting paragraph (e), the complaint relates to the exercise of a judicial or other function that is or was subject to adequate appeal or review rights,

(g) the person complained about is no longer a judicial officer, or

(h) having regard to all the circumstances of the case, further consideration of the complaint would be or is unnecessary or unjustifiable.

(2) In deciding whether or not to summarily dismiss a complaint, the Commission may have regard to such matters as it thinks fit.

21 Reference of complaint to Conduct Division or head of jurisdiction

(1) A complaint made to the Commission in accordance with this Act shall, if it is not summarily dismissed, be referred to the Conduct Division.

(2) The Commission may however refer a complaint to the relevant head of jurisdiction if the Commission thinks that, although the complaint appears to be wholly or partly substantiated, it does not justify the attention of the Conduct Division.

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

22 Constitution of Conduct Division

(1) The Commission shall appoint a panel of 3 persons to be members of the Conduct Division for the purpose of exercising the functions of the Division in relation to a complaint referred to the Division.

(2) Of the panel of 3 persons so appointed:

(a) 2 are to be judicial officers (but one may be a retired judicial officer), and

(b) one is to be a community representative, being a person of high standing in the community nominated by Parliament in accordance with Schedule 2A.

(3) One of the judicial officers shall be appointed by the Commission as Chairperson of the Conduct Division.

(4) It does not matter that any or all of the members of the Conduct Division are not members of the Commission.

(5) More than one panel may be constituted, and sit, at any time to deal with different complaints.

(6) One panel may deal with 2 or more complaints, if the Commission considers it appropriate in the circumstances.

23 Examination of complaint by Conduct Division

(1) The Conduct Division shall conduct an examination of a complaint referred to it.

(2) In conducting the examination, the Conduct Division may initiate such investigations into the subject-matter of the complaint as it thinks appropriate.

(3) The examination or investigations shall, as far as practicable, take place in private.

24 Hearings by Conduct Division

(1) The Conduct Division may hold hearings in connection with the complaint.

(2) A hearing may be held in public or in private, as the Conduct Division may determine.

(3), (4) (Repealed)

(5) If a hearing or part of a hearing is to take place in private, the Conduct Division may give directions as to the persons who may be present.

(6) At a hearing:

(a) the judicial officer complained about may be represented by an Australian legal practitioner, and
(b) if, by reason of the existence of special circumstances, the Conduct Division consents to any other person being represented by an Australian legal practitioner—the person may be so represented.

(7) At a hearing:

(a) counsel assisting the Conduct Division,
(b) any person authorised by the Division to appear before it at the hearing, or
(c) any Australian legal practitioner representing a person at the hearing pursuant to subsection (6),

may, so far as the Division thinks appropriate, examine or cross-examine any witness on any matter that the Division considers relevant.

25 Powers of Conduct Division concerning evidence

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

(a) the Conduct Division and the Chairperson have the functions, protections and immunities conferred by the *Royal Commissions Act 1923* on commissioners and the chairman of a commission appointed under that Act, and
(b) that Act, with any necessary adaptations, applies to any witness summoned by or appearing before the Division in the

same way as it applies to a witness summoned by or appearing before a commissioner under that Act.

(2) Subsection (1) applies to and in respect of the Conduct Division and the Chairperson whether or not the Chairperson is a Judge of the Supreme Court.

(3) For the purposes of subsection (1), a reference in that subsection to the *Royal Commissions Act 1923* does not include a reference to section 13, 15 (1) or 17 (4) of that Act.

(4) (Repealed)

26 Dismissal of complaint by Conduct Division

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

(a) the complaint should be dismissed on any of the grounds on which the Commission may summarily dismiss complaints, or
(b) the complaint has not been substantiated.

(2) If the Conduct Division dismisses a complaint it must give a report to the Commission setting out the Division's conclusions.

(3) The Commission must give a copy of the report to the judicial officer concerned.

(4) The Commission may give a copy of the report (or a summary of the report) to the complainant unless the Conduct Division has notified the Commission in writing that this should not occur.

...

28 Substantiation of complaint

(1) If the Conduct Division decides that a complaint is wholly or partly substantiated:

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

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

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

(4) A copy of a report under subsection (2) must also be given to the Commission.

(5) The Commission must give a copy of the report to the judicial officer concerned.

(6) The Commission may give a copy of the report (or a summary of the report) to the complainant unless the Conduct Division has notified the Commission in writing that this should not occur.

29 Reports to Governor

(1) If the Conduct Division decides that a complaint is wholly or partly substantiated and forms an opinion that the matter could justify parliamentary consideration of the removal of the judicial officer from office, it must present to the Governor a report setting out the Division's findings of fact and that opinion.

(2) (Repealed)

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

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

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

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

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

(7) (Repealed)

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

...

31 Extension or partial dismissal of complaint

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

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

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

...

36 Release of information

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

(2) A person who makes a publication in contravention of a direction under this section is guilty of an offence punishable, upon conviction, by a fine not exceeding 100 penalty units or imprisonment for a period not exceeding one year, or both.

...

41 Removal of judicial officers

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

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

The NSW Constitution

24 Section 53 of the *Constitution Act 1902* (NSW) is a critical provision. It states:

"**53 Removal from judicial office**

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

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

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

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

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

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

26 The power conferred upon the Parliament to remove a judicial officer on the relevant grounds is in no way punitive. The proceedings in the Conduct Division are not disciplinary. The jurisdiction is entirely protective. This means that the proceedings are designed to protect both the public from judicial officers who are guilty of misbehaving rendering them unfit for office, or suffering from incapacity to discharge the duties of office and the judiciary from unwarranted intrusions into judicial independence.

The Conduct Division

27 In December 2017, the Commission constituted a panel of three members for the purposes of exercising the functions of the Conduct Division in relation to the Complaint; Justice Payne of the NSW Court of Appeal, Judge Dive of the District Court and Mr K Moroney AO.

28 The Crown Solicitor was appointed to assist the Conduct Division in performing its functions. Ms K Stern SC, Ms K Edwards and Ms L Coleman were appointed as counsel assisting the Conduct Division. Mr A Moses SC, Mr J Sheller and Ms S Chordia were retained to represent the judicial officer, instructed by Greg Walsh & Co, solicitors.

29 The Conduct Division was provided with information and material concerning the Complaint throughout December 2017 and January 2018. Pursuant to s 23 of the Act, on the basis of that material, it commenced an examination of the Complaint.

30 Between February and October 2018, the Crown Solicitor and counsel assisting the Conduct Division gathered the evidentiary material including

recordings of proceedings, transcripts, training materials and statements of evidence. That material is described in Annexure A (Index of evidence).

31 In order to afford the judicial officer procedural fairness, the Crown Solicitor and counsel assisting the Conduct Division particularised each of the 17 cases comprising the ultimate complaint (which we describe in this report as "the Complaint"), specifying with precision what was alleged to be the proper characterisation of each instance of conduct under consideration. The Complaint, as particularised, is Annexure B to this report. References to the Complaint in this report are to this document.

32 On 8 June 2018, pursuant to s 24 of the Act, the Conduct Division decided to hold a hearing in connection with the Complaint. Directions were made for the service of evidence and other steps to be taken in preparation for the hearing.

33 On 8 October 2018, pursuant to s 24(2) of the Act, the Conduct Division determined that the hearing would be held in public. On 9 November 2018, the Court of Appeal dismissed an application made by the judicial officer to quash that decision: *AB v Judicial Commission of NSW (Conduct Division)* [2018] NSWCA 264.

34 On 19 November 2018, the opening day of the hearing, the Conduct Division made directions pursuant to s 36 of the Act preventing or restricting publication of some of the evidence given before the Conduct Division or of matters contained in documents lodged in the Conduct Division. For the purposes of this report the pseudonyms given by the Conduct Division to each of the defendants in the criminal cases the subject of the Complaint have been used.

35 The evidence comprised statements of the following witnesses:

(1) Legal Aid solicitors (Ms Crofts, Ms Karim, Ms Le, Ms Maranga, Mr Marriott and Mr Renard);

(2) private solicitors (Mr Firth, Ms Kelly, Ms McMahon);

(3) police and police prosecutors (Sergeant France, Sergeant Griffin and Superintendent Fehon);

(4) court officers (Ms Anderson, Mr Langstaff);

(5) current and former judicial officers (District Court Judge Ellis, Magistrate Still, District Court Judge O'Brien, Deputy Chief Magistrate Mottley, Magistrate Evans OAM, Magistrate Williams, Chief Magistrate his Honour Judge Henson);

(6) medical reports of Dr Nielssen and Dr Eagle and their joint report.

36 Sixteen witnesses gave oral evidence. The witnesses were judicial officers Chief Magistrate Henson, Deputy Chief Magistrate Mottley, Judge O'Brien, Legal Aid solicitors Ms Crofts, Ms McMahon, Ms Maranga, Mr Marriott, Mr Renard, Ms Le, Ms Karim, police prosecutors Sergeant Griffin and Sergeant France, Registrars Ms Anderson and Mr Langstaff, the psychiatrists Dr Nielssen and Dr Eagle jointly, and the judicial officer.

37 Voluminous documentary evidence was also tendered during the hearing, and the documents were marked as exhibits as shown in the index of evidence in Annexure A. The evidence also included both amended agreed transcripts and sound recordings of proceedings before the judicial officer. The Conduct Division hearing was completed on 28 November 2018.

38 The first task of the Conduct Division is to determine whether or not the Complaint is wholly or partly substantiated. If it is not substantiated, the Conduct Division is obliged to dismiss the Complaint or part thereof: s 26(b) of the Act. The Conduct Division is also obliged to dismiss a complaint if it is of the opinion that it should be dismissed on any of the grounds specified in s 20, upon which the Commission may summarily dismiss a complaint. In

closing submissions, Senior Counsel for the judicial officer submitted the Conduct Division should adopt this course.

39 Sections 28 and 29 of the Act, which are set out above, are of importance. In essence, they provide that where the Conduct Division finds that a complaint is wholly or partly substantiated, but forms the opinion that (notwithstanding that the complaint is substantiated) the matter does not justify parliamentary consideration of the removal of the judicial officer from office, and should therefore be referred back to the relevant head of jurisdiction, it must send a report to that person, setting out its conclusions, which may include recommendations as to what steps might be taken to deal with the complaint. This is the principal course that Senior Counsel for the judicial officer submitted in opening and closing submissions the Conduct Division should adopt.

40 Secondly, having found the complaint substantiated, if the Conduct Division forms the further opinion that the matter could justify parliamentary consideration of the removal of the judicial officer from office, it must present to the Governor a report setting out its findings of fact and that opinion, and provide a copy of that report to the Minister, here the Attorney General, the Commission and the judicial officer. This is the course that counsel assisting submitted the Conduct Division should adopt.

41 The Act does not specify in what circumstances a complaint may be found to be substantiated.

42 The references in ss 28 and 29 to "parliamentary consideration of removal of the judicial officer...from office" are references to the very limited circumstances in, and the equally limited bases upon, which a judicial officer may be removed from office. These ultimately derive from s 53 of the *Constitution Act*, which is set out above.

43 As provided by s 41(2) of the Act, the provisions concerning removal of a judicial officer contained in s 41(1) are additional to the Constitutional

provision. That means that s 53 of the *Constitution Act* cannot be engaged unless and until a Conduct Division of the Judicial Commission has made a finding, under s 28 of the Act, that the matter could justify parliamentary consideration of the removal of the judicial officer from office.

44 In accordance with ss 28 and 29 of the Act, if the Conduct Division was to find the present Complaint wholly or partially substantiated, it would then be necessary for it to consider further whether or not the circumstances are such as to warrant consideration by Parliament of an address to the Governor, seeking removal of the judicial officer from office, on the basis of either or both of proved misbehaviour or incapacity. Thus, the Act distinguishes between substantiation of a complaint, and a finding that the circumstances are such as to warrant parliamentary consideration of the exercise of the powers conferred by s 53 of the *Constitution Act*.

45 The effect of s 29 of the Act in combination with s 53 of the *Constitution Act* is that the question the Conduct Division must determine is whether, on the basis of the facts found, the circumstances are capable of establishing misbehaviour or incapacity (or both) warranting or justifying removal from office. In considering that question the Conduct Division bears in mind what was stated in *The Honourable Justice Vince Bruce v The Honourable Terence Cole* (1998) 45 NSWLR 163 at 166E, that:

> "The independence of the judiciary is, to a very substantial degree, dependent upon the maintenance of a system in which the removal of a judicial officer from office is an absolutely extraordinary occurrence."

The Complaint

46 The conduct the subject of the Complaint involves 17 separate defendants in cases heard by the judicial officer between 22 June 2016 and 23 February 2017. The matters the subject of the Complaint fall into the following categories:

(1) matters of Messrs A, B, G and I involve the alleged misuse of the judicial officer's powers to remand accused persons in custody, between August 2016 and February 2017;

(2) matters of Messrs A, B, C, D, E, F, G, H, I and K involve the alleged failure to accord procedural fairness to accused persons before either detaining or continuing to detain those persons in custody, between August 2016 and February 2017;

(3) matters of Mr P, Ms Q and Mr R involve allegedly encouraging, inviting or otherwise seeking to influence the police prosecutor to take steps to cause further criminal charges to be laid against particular accused persons, between August and December 2016;

(4) matters of Messrs C, D, E, F, G, H and K involve allegedly determining appeals bail applications in chambers rather than in open court without notifying any of the relevant parties that that would be done, a practice adopted at least between September 2016 and February 2017;

(5) the matter of Mr N involves allegedly conducting the hearing in a manner which gave the appearance of suggesting that bail would be granted if Mr N's plea of not guilty was changed to a plea of guilty, and subsequently accepting a plea of guilty in circumstances where it was or ought to have been apparent that Mr N was pleading guilty only in order to be granted bail (October 2016);

(6) matters of Messrs J, K, L and Ms M involve allegedly imposing sentences that exceeded the maximum penalty for the relevant offences, between June and December 2016.

The s 28 determination

47 The Conduct Division is required to determine, under s 28 of the Act, whether or not the complaint, if sustained in whole or in part, *could* justify parliamentary consideration of the removal of the judicial officer from office.

Section 53 of the *Constitution Act* permits removal of a judicial officer on only two grounds – proved misbehaviour or proved incapacity. Neither term is defined either in the *Constitution Act* or in the Act. Thus, whether the matter justifies parliamentary consideration of removal from office depends, first, upon whether or not the conduct under consideration:

(1) amounts to misbehaviour; or

(2) evidences incapacity; or

(3) constitutes both.

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

(1) has misbehaviour and/or incapacity been proved?

(2) if so, is the misbehaviour and/or incapacity of sufficient gravity for the Parliament to seek removal of the judicial officer from office by the Governor?

49 There is nothing in ss 28, 29 or 41 of the Act which establishes that the function of deciding whether misbehaviour or incapacity is proved has been delegated to the Conduct Division. What the Conduct Division is required to do is decide whether the matter could justify parliamentary consideration of the removal of a judicial officer.

50 In the limited number of cases which have been referred to a Conduct Division, the Conduct Division has itself determined misbehaviour or incapacity: see, for example, Report of the Conduct Division to the Governor regarding complaints against The Hon Justice Vince Bruce, 15 May 1998, in which each member of the Conduct Division found either misbehaviour, or incapacity, or both, proved. No challenge was made to that decision making process in the application for judicial review of the decision contained in that

report: *Bruce v Cole* (1998) 45 NSWLR 163. These decisions were summarised in the Report of an Inquiry by a Conduct Division of the Judicial Commission of NSW in relation to Magistrate Jennifer Betts, 21 April 2011 (the "Betts Report"), where the Division comprised by Simpson J, D H Lloyd QC and K Moroney AO made findings of both misbehaviour and incapacity.

51 It was common ground in addressing this Complaint that it was appropriate that the Conduct Division should express its own views about these questions, while noting that the ultimate decision is a matter for the Parliament.

52 The object and purpose of the Act is to protect and promote public confidence in the judiciary and the administration of justice in NSW and to maintain standards within the judiciary. The Conduct Division rejects the submission by Senior Counsel for the judicial officer that the same conduct is not capable of demonstrating both misbehaviour *and* incapacity. There is nothing in the subject matter, scope and purpose of the Act which gives rise to any such limitation.

53 In forming an opinion pursuant to s 28(1)(a) of the Act, the principles in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-2 (per Dixon J) apply to the extent that the gravity of the consequences that will flow from the opinion must inform the Conduct Division's consideration of the evidence: *Bruce v Cole* at 167 per Spigelman CJ.

54 The threshold for the formation of the relevant opinion by the Conduct Division is that Parliament *could* consider removal, not that it *should*: *Bruce v Cole* at 184 per Spigelman CJ (Mason P, Sheller and Powell JJA agreeing). It is sufficient that the Conduct Division forms an opinion that there is a "real risk" of a particular scenario happening in the future: *Maloney v The Honourable Michael Campbell QC & Ors* [2011] NSWSC 470 at [104] per Hoeben J.

Misbehaviour

55 Neither the *Constitution Act* nor the Act defines the term "misbehaviour". In the Betts Report, the Conduct Division considered that the term ought to be given its ordinary meaning; namely, "to behave badly", "bad behaviour, improper conduct", "to behave badly or wrongly; to conduct oneself improperly". The Conduct Division accepts the joint submission of the parties that it should approach the meaning of "misbehaviour" in the same way.

56 Senior Counsel for the judicial officer also submitted that the views of the Hon Justice James Thomas AM in *Judicial Ethics in Australia* (3rd ed, 2009, LexisNexis) were relevant. In that work, at 4.6 his Honour observes:

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

57 The Conduct Division also relies upon the Australasian Institute of Judicial Administration Incorporated's *Guide to Judicial Conduct* (2nd ed, 2009) which is published for the Council of Chief Justices of Australia, a copy of which is provided to all newly appointed Local Court Magistrates during their training and was provided to the judicial officer.

58 The *Guide to Judicial Conduct* states at 4.1 that it is important for judicial officers "to maintain a standard of behaviour in court that is consistent with the status of judicial office and does not diminish the confidence of litigants in particular, and the public in general, in the ability, the integrity, the impartiality and the independence of the judge".

59 The *Guide to Judicial Conduct* at p 3 states three basic principles against which judicial conduct should be measured. They are:

> "Impartiality;
> Judicial independence; and

Integrity and personal behaviour."

60 Three main objectives of the principles are:

> "To uphold confidence in the administration of justice;
> To enhance public respect for the institution of the judiciary;
> To protect the reputation of individual judicial officers and of the judiciary."

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

> "**4 CONDUCT IN COURT**
>
> **4.1 Conduct of hearings**
> It is important for judges to maintain a standard of behaviour in court that is consistent with the status of judicial office and does not diminish the confidence of litigants in particular, and the public in general, in the ability, the integrity, the impartiality and the independence of the judge...
>
> ...the entitlement of everyone who comes to court – litigants and witnesses alike – to be treated in a way that respects their dignity should be constantly borne in mind...
>
> A judge must be firm but fair in the maintenance of decorum, and above all evenhanded in the conduct of the trial...
>
> **4.2 Participation in the trial**
> ...A judge must be careful not to descend into the arena and thereby appear to be taking sides or to have reached a premature conclusion."

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

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

> "...any behaviour of [the judge] constitutes such behaviour as, either of itself or in conjunction with any other behaviour, warrants his removal from office as a Judge..." (*Parliamentary (Judges) Commission of Inquiry Act 1988* (Qld), s 4)

64 It is apparent that no equivalent of s 41 of the Act or s 53 of the *Constitution Act* applied in the Commission of Inquiry. Queensland Supreme Court judges, by two separate Acts of Parliament (the *Supreme Court Act 1867* (Qld), s 9, and the *Constitution Act 1867-1978* (Qld), ss 15 and 16) held office "during good behaviour".

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

> "1.5.5 ...whatever other powers exist to remove judges, the Legislative Assembly may exercise its power to address the Crown for the removal of a judge on the ground of misbehaviour."

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

> "1.5.9 ...before an opinion can be reached that behaviour of a Judge of a Supreme Court warrants his removal from office, the behaviour must be such that, having regard to all the relevant surrounding circumstances, no right thinking member of the community could regard the fact of its having taken place as being consistent with the continued proper performance by the judge of judicial duties, and hence with the holding of judicial office. Put another way, if the behaviour is such that, in the circumstances, the judge would, in the eyes of right thinking members of the community, no longer be fit to continue to remain a judge, then the judge has fallen below the standard demanded of members of the judiciary.
>
> 1.5.10 The members of the Commission [of Inquiry] therefore are required to apply community standards in their task of forming an opinion as to whether any behaviour of [the judge] warrants his removal from office as a Judge of the Supreme Court. The Commission [of Inquiry] recognises and accepts that the community requires the standards of behaviour of the judiciary to be set and maintained at a very high level indeed. Judges themselves, as well as the community, expect that the standard of behaviour of members of the judiciary should be a very high one. On the other hand, to adopt too stringent a standard, or too pharisaical an approach, would imperil the independence of the judiciary, which would be eroded if a judge might too readily be removed from office. Moreover, there may be judicial misbehaviour which ought not be condoned, and indeed may be deserving of censure, even severe censure, but which would not warrant the removal of a judge from office. Questions of degree may be involved, and minds may differ in making what is in effect a moral and social judgment on such a matter.
>
> ...

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

67 The Betts Report on this topic also observed (at [157]) that:

> "There are, of course, grades and variations of misbehaviour. Whether demonstrated misbehaviour warrants parliamentary consideration of removal of a judicial officer from office depends upon the gravity of the misbehaviour, and, in some cases at least, the extent (if any) to which conduct of the kind is repeated. A single instance of even serious misbehaviour may not reach the necessary threshold; on the other hand, repeated instances of less serious misbehaviour may do so. The Conduct Division is of the view that the misbehaviour here in question does reach the requisite level of gravity."

68 The Conduct Division, as presently constituted, agrees with the observations drawn from the Betts Report.

Incapacity

69 Neither the *Constitution Act* nor the Act defines the term "incapacity". In *Bruce v Cole*, Spigelman CJ stated (at 183, 187) that the concept directs attention towards a judicial officer's capacity to discharge his or her duties.

70 In the Betts Report, the Conduct Division stated that s 53 of the *Constitution Act* refers to "incapacity to discharge the duties of judicial office in a manner that accords with recognised standards of judicial propriety" (at [158]), which standards "include affording a fair hearing to all litigants, avoiding offensive remarks and bullying, and maintaining, in the court room, the decorum that enhances respect for the judicial decision-making process, and, accordingly, the resultant decisions, and, in general, the administration of law" (at [158]). The Conduct Division accepts the submission of Senior Counsel for the judicial officer that the test described in the Betts Report should guide the Conduct Division here. In the present case, the most relevant aspect of "incapacity", as defined in the Betts Report, is the extent to which the judicial officer has been shown not to afford a fair hearing to all litigants.

71 It was common ground before us that incapacity refers to both present *and* future incapacity: Betts Report at [165].

72 It follows from our acceptance of the test for "incapacity" in the Betts Report that the Conduct Division considers that incapacity within the meaning of s 53 extends beyond physical and/or mental impairment caused by an identifiable disorder. In the view of the Conduct Division, which accords with the view expressed in the Betts Report, "incapacity" means incapacity to discharge the duties of judicial office in a manner that accords with recognised standards of judicial propriety. As we have said, these standards include, critically, affording a fair hearing to all litigants. Ensuring a fair hearing for all litigants enhances respect for the judicial decision making process and the administration of the law.

73 Failure by a judicial officer to afford a fair hearing to all litigants will inevitably cause litigants and observers to lose faith in, and respect for, the decision making process and bring the administration of justice into disrepute.

74 We adopt the consideration of this question by the Conduct Division in the Betts Report, which addressed *Stewart v Secretary of State for Scotland* (HL, 22 January 1998) in which the House of Lords considered the meaning of the word "inability" in s 12 of the *Sheriff Courts (Scotland) Act 1971* (UK). That section enabled the removal of a sheriff (a judicial officer) from office "by reason of inability, neglect of duty or misbehaviour". Lord Jauncey of Tullichette, who spoke for all members of the House of Lords, said:

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

75 There is, in the opinion of the Conduct Division, no relevant distinction between the word "inability" and the word "incapacity". The Conduct Division

as presently constituted considers the ruling in *Stewart* to be of significant guidance, as did the Conduct Division in the Betts Report.

76 An essential quality of a judicial officer is an appreciation of what constitutes proper judicial conduct and what does not. The absence of that quality is apt to signify incapacity to discharge judicial functions. The absence of that quality does not imply, as a necessary concomitant, that every proceeding in which the judicial officer is involved is affected, or that every decision made by that judicial officer is flawed, or even questionable.

77 The issue for determination by the Conduct Division is whether it has been shown that the Magistrate lacks the capacity to carry out her judicial functions. It is important also to remember that the issue is "present and future incapacity". Past incapacity, if proved, is relevant only insofar as it casts light on present and future incapacity.

78 Three questions immediately present themselves. First, is there an explanation for all or any instances of proved misbehaviour and/or incapacity? If so, does that explanation bear upon the Magistrate's present or future capacity to discharge the duties of her office? Finally, does the Magistrate's attitude to her conduct on the occasions where misconduct and/or incapacity has been proved give any indication of her capacity in the future to discharge her judicial functions appropriately?

79 As will become apparent, the Conduct Division accepts that the medical evidence in this case provides some explanation for the conduct that gave rise to the Complaint. The questions posed in paragraph [78], however, remain to be answered.

80 As we have earlier said, the same conduct may be taken into account in determining the questions of misconduct and incapacity which, in the view of the Conduct Division, are capable of overlapping. For example, the conduct of denying procedural fairness may be capable of constituting misbehaviour.

It may, depending on the precise facts established, also demonstrate incapacity.

Knowledge and wilful blindness

81 In order to determine the questions posed by the Act it is necessary for detailed findings to made by the Conduct Division about each of the matters particularised in the Complaint. Much of the particularised Complaint was admitted by the judicial officer. In each case, however, knowledge and wilful blindness of various matters was not admitted by the judicial officer.

82 In oral opening, counsel assisting particularised "wilful blindness" in the Complaint as meaning the following:

> "...by "wilful blindness" we mean that Magistrate Burns knew that she was ignorant or uncertain of her power, and made no inquiries to resolve that ignorance or uncertainty."

83 The term "wilful blindness" as a species of knowledge has an important place in the criminal law. It is true, as Senior Counsel for the judicial officer submitted, that for the purposes of the criminal law in the context of the elements of murder, the High Court said in *The Queen v Crabbe* (1985) 156 CLR at 464 at 470:

> "Finally, there is the question whether the jury should have been directed on the question of wilful blindness. When a person deliberately refrains from making inquiries because he prefers not to have the result, when he wilfully shuts his eyes for fear that he may learn the truth, he may for some purposes be treated as having the knowledge which he deliberately abstained from acquiring."

84 In the present statutory context, conduct may be engaged in with states of knowledge varying from actual knowledge at one end of the spectrum to mere carelessness at the other. The characterisation of conduct by a judicial officer on that spectrum may have an important role to play in categorising the seriousness of such conduct.

85 In the present case, as long as the sense in which the term is being used is clearly understood, there is no unfairness to the judicial officer in the Conduct Division adopting the meaning of "wilful blindness" particularised by Senior Counsel assisting in her opening address.

The judicial officer's psychiatric or psychological condition

86 A principal theme of the submissions made by Senior Counsel for the judicial officer was that the judicial officer's psychiatric or psychological condition is such as to negative any demonstrated incapacity. On 14 March 2017, the judicial officer commenced a period of sick leave from the Local Court. On 19 June 2017, pursuant to s 40 of the Act, the judicial officer was suspended from duty in the Local Court by the Chief Magistrate.

87 Senior Counsel for the judicial officer submitted that, "Where there is only a finding of past incapacity, and not misbehaviour, there is no proper basis for the formation of an opinion by the Conduct Division that the judicial officer could be removed." The Conduct Division accepts that this submission correctly states the law.

88 Senior Counsel for the judicial officer submitted that the relevant question about any proved incapacity was whether it was caused "solely" or "predominantly" by a psychiatric or psychological condition. If it was, and by the time of the report that condition has been addressed, the Conduct Division must find that the incapacity is not of the kind which could justify removal of the judicial officer from office. That submission stated the law as explained in *Bruce v Cole* at 175-6, 191 (per Spigelman CJ). The Conduct Division also accepts that this submission correctly states the law.

89 Senior Counsel for the judicial officer submitted that it is undisputed in the medical evidence that the workload of the judicial officer caused her Honour to suffer work related stress which in turn impacted her conduct and performance. The opinions of Drs Eagle and Nielssen that the judicial officer's symptoms emerged around mid-2016 are based entirely on the

judicial officer's subsequent account to that effect, which account finds no reflection in the contemporaneous medical records.

90 There is no doubt that the judicial officer was suffering from a mental illness in January 2017. The Conduct Division accepts the evidence of Drs Eagle and Nielssen that the illness is now in remission. It is not possible, having regard to all the evidence including that given by the judicial officer, to identify with certainty when the judicial officer first experienced symptoms of her mental illness and how severe those symptoms were at that time.

91 A mental health check, which all Magistrates are encouraged to undergo and which is funded by the Local Court, found in June 2016 that the judicial officer was not suffering any mental health issues. The first record of any issue of stress being raised with the judicial officer's general practitioner occurs on 8 December 2016. In that note there is a reference to "stressful job – is likely to get relief in another 12 months". The first record of the judicial officer seeking and receiving assistance for mental health issues from her general practitioner is from 19 January 2017.

92 The conduct that is particularised in the matters of Mr A, Mr B, Mr J, Mr K, Mr L, Mr O, Mr P and Mr R all occurred before the judicial officer raised any concern with her doctor that she was, or might have been, experiencing symptoms of anxiety or depression. In respect of those matters which occurred subsequently, the judicial officer's conduct in the matters of Ms M and Ms Q was misbehaviour of the same character as earlier demonstrated in the matters of Mr J, Mr K and Mr L and the matters of Mr P and Mr R, respectively.

93 The Conduct Division accepts that there is no bright line for the onset of mental health problems and it is likely that those problems developed over time and that her Honour's symptoms emerged some time in 2016 and increased in intensity up to January 2017. For that reason the Conduct Division accepts the evidence of Drs Eagle and Nielssen in their joint report that "mental illness was a contributing factor to the conduct that was the

subject of the complaints". The Conduct Division also accepts their joint evidence that the judicial officer's negative world view associated with her severely depressed mood "may also have affected her view of the offending behaviour she was required to address in her role as a judicial officer." That is, the Conduct Division accepts that mental illness played a part in the conduct the subject of the Complaint.

94 The Conduct Division also accepts that in matters related to driving offences, the judicial officer may possibly have been affected by what Dr Eagle described as "cognitive distortions or a negative subconscious psychological response to those before her who had engaged in apparently serious driving misconduct" as a result of the Magistrate's specific phobia and anxiety in relation to driving.[1]

95 We wish to make it clear that a judicial officer who experiences anxiety or depression remains capable of acting in accordance with proper standards of judicial behaviour and of discharging the duties of office. Nothing in this report should be understood as casting doubt on that proposition. On the evidence before us, however, the Conduct Division finds that the judicial officer's conduct was not solely or predominantly caused by her Honour's psychiatric or psychological condition. There are a number of reasons for this conclusion.

96 First, the evidence of Drs Eagle and Nielssen does not support a conclusion that the judicial officer's conduct was "solely or predominantly caused" by her Honour's psychiatric or psychological condition. To the contrary, their joint opinion was that mental illness was *a* contributing factor to the conduct.

97 Secondly, as Hayne J pointed out in *Tame v New South* Wales (2002) 211 CLR 317; [2002] HCA 35; at [293]-[294], psychiatrists, no matter how eminent, are trained to diagnose a condition but not attribute its cause to an event. The

[1] The Conduct Division accepts the evidence of Dr Eagle that the judicial officer's pre-existing anxiety disorder from a motor vehicle accident may have resulted in cognitive distortions or negative psychological response to those before her who had engaged in apparently serious driving misconduct.

Conduct Division is tasked in this case with attributing the cause or causes to the conduct. As Hayne J explained:

> "Once it is recognised that capacity to participate in ordinary activities is, not surprisingly, an important consideration for a psychiatrist treating a patient, and that the psychiatrist, again not surprisingly, is concerned to deal with the patient according to that patient's history and presentation rather than by reference to some objective inquiry into the truth of that history and presentation, it is clear that there truly is an "imperfect fit" between the questions of ultimate concern to the law and those of concern to the clinician. The psychiatrist treating a patient is concerned to look backwards only for the purpose of identifying present and future treatment. In particular, determining the cause of an existing condition is important to the discipline of psychiatry only for the light it sheds on future treatment. But for a legal system which assigns responsibility only if there is fault, the focus on cause is critical to that task of assigning responsibility."

98 Thirdly, at the present time where the judicial officer's mental illness is in remission, her evidence made clear that in a number of respects addressed in detail below her Honour continues to believe that aspects of her behaviour the subject of the Complaint were justified and she would in the future act in the same way. We will return to this issue when addressing the question of present and future incapacity.

99 Fourthly, the allegations of misconduct the subject of the Complaint all related to the adverse effect on the interests of an accused person. While it is possible that decisions favourable to an accused are less likely to generate a complaint, in no case was the error allegedly made by her Honour in favour of the accused. In her evidence before the Conduct Division and the submissions made on her behalf, the judicial officer continually emphasised the seriousness of the criminal records of the persons the subject of the Complaint. It is fundamental that a judicial officer should afford procedural fairness to all appearing before them, including people with the most significant criminal records. It is also fundamental that people are imprisoned only in accordance with the law. Unfortunately, the Conduct Division has concluded that even now her Honour does not properly appreciate these central requirements of judicial office.

100 Fifthly, the judicial officer's response to the Complaint was in many respects to exaggerate the issues about her workload and mental state, and the extent to which she had raised those issues, especially as regards conversations she alleged she had with Deputy Chief Magistrate Mottley and Deputy Chief Magistrate O'Brien. This evidence given by the judicial officer about separate conversations with each of the Deputy Chief Magistrates, which regrettably the Conduct Division finds it must reject, was given at a time when her Honour's mental illness was in remission. That evidence reflects poorly on the judicial officer's credit and casts some doubt upon the extent to which she has accurately described the role of her illness in her decision making.

101 Finally, and paying due regard to the confidence of her treating psychiatrist Dr Nielssen and the judicial officer that any recurrence of her symptoms will be treated effectively, the Conduct Division finds there is a real risk of both a relapse in the judicial officer's condition and a recurrence of the conduct giving rise to the Complaint. That is because:

(1) the joint report of Drs Eagle and Nielssen explains that "any person who has had an episode of severe mood disorder carries an increased likelihood of a further episode of the disorder";

(2) there is no reason to expect, let alone guarantee, that the judicial officer's workload would be reduced upon resuming her duties;

(3) there is no expectation or guarantee that the stress to which the judicial officer is exposed will be diminished; and

(4) there is no guarantee that any relapse in the judicial officer's condition will be identified and successfully treated before leading to further instances of misconduct.

The judicial officer's workload

102 Another important aspect of the submissions made by Senior Counsel for the judicial officer related to her Honour's workload. It was not in dispute that the

Port Macquarie circuit was a busy circuit throughout the judicial officer's tenure there from January 2016 to March 2017. It was also not in dispute that the judicial officer was a relatively new magistrate and that she found the nature and volume of the work to be taxing. However, there is no evidence that her Honour's workload was "crushing", inhumane, unsafe or akin to a "tsunami" of work as it was described in submissions. Further, the Conduct Division rejects the submission that the judicial officer received insufficient support from the Chief Magistrate's Office.

103 There is no evidence that the judicial officer told anyone, in person or on the telephone, that she was finding her workload unmanageable throughout 2016. The judicial officer's oral evidence that she told DCM Mottley at dinner or during her visit in July 2016 that she was "very stressed and very overwhelmed" was later changed to "stressed and struggling". Critically, the judicial officer's account in oral evidence of her conversation with DCM Mottley is contrary to her detailed written statement which was made at a time when the judicial officer was not suffering for any mental illness. That statement made it clear that her Honour did not recall any conversation with DCM Mottley in July 2016 with respect to work. This oral evidence to the contrary given by the judicial officer forms a pattern of overstatement by the judicial officer in her oral evidence about the extent to which in 2016 she raised concerns about her workload at the time. The Conduct Division also rejects the judicial officer's account of her conversation with Deputy Chief O'Brien in February 2017 where she alleges that she told his Honour that she did not think that she could "hold on" for another 12 months. If such a thing had ever been said by the judicial officer, the Conduct Division accepts Judge O'Brien's evidence that he would immediately have spoken to the Chief Magistrate about the matter. His Honour did not.

104 Another significant feature of the relationship between the workload of the judicial officer and the conduct the subject of the Complaint is that the conduct alleged to constitute misbehaviour and incapacity, in virtually every respect, did not save the judicial officer work or time (the exceptions are deciding appeals bail applications in chambers and "memorising" or guessing the

maximum penalties for offences). The remaining, and most serious conduct, particularly the misuse of detention powers and requesting that further charges be laid, in fact prolonged the judicial officer's court days and added to her workload.

105 As to the reliance by the judicial officer upon statistics in support of the characterisation of her workload, the evidence of Chief Magistrate Henson demonstrates the unreliability of that exercise. The numbers relied upon by the judicial officer do not allow any meaningful assessment of the workload of any single magistrate. There is no objective way of assessing the complexity of sentence matters at Port Macquarie as compared to sentence matters heard at any other Local Court and thus no way of assessing the suggestion that the matters heard by the judicial officer were routinely more complex than those dealt with in other courts.

106 Senior Counsel for the judicial officer submitted that the Magistrate experienced "an extremely high volume of work that was unrelenting", and that she "endured excessive working hours which included extended Court sitting times, with little time for respite". It was also submitted that the Chief Magistrate, or in the alternative, the State of NSW, should have ensured there were sufficient resources and systems to monitor caseloads, and ensure the caseloads of all magistrates were not excessive so as to cause any impact upon the health, or performance of duty, of the judicial officer.

107 The Conduct Division accepts that the judicial officer was relatively new to her role on the Bench, having previously sat in a multi-court complex at Burwood for about eleven months. Five magistrates sit at Burwood, so there was opportunity for close support by colleagues. A country circuit is very different to a city role, and the work much more varied. The previous magistrate at the Port Macquarie circuit died suddenly in September 2015, so there was no handover of the circuit, and indeed a small number of cases (estimated to be three in total), which were part-heard before the previous magistrate, had to be recommenced.

108 In her new circuit, the judicial officer was required to preside at Port Macquarie and Kempsey, together with some limited sittings at Wauchope. The judicial officer generally sat at Kempsey on Mondays and Tuesdays, and then at Port Macquarie for the rest of the week.

109 A country circuit magistrate in the judicial officer's position is responsible for the day-to-day organisation of her sittings, determining adjournments and managing the Court diary. The Chief Magistrate, however, is responsible for managing the state-wide allocation of resources in the Local Courts, and must approve even small changes to the rostered sittings within a circuit.

110 There is no doubt that the Local Court of NSW was under pressure in 2016 and 2017, as the total number of magistrates had been reduced by the Government of the day while the jurisdiction and work of the Court continued to increase.

111 The management of the Local Courts by the Chief Magistrate encompasses the allocation of assistance to individual Local Court circuits. The evidence is that approximately ten weeks of assistance was provided to the Port Macquarie Circuit during the time the judicial officer was allocated to the Port Macquarie Circuit.

112 A week of assistance involves another magistrate, often from Sydney, sitting in another court room, hearing cases which are ready to proceed. Commonly, the additional magistrate undertakes the general Circuit work, so they do not become part-heard in defended matters, thereby requiring a return trip to the circuit to complete the matter.

113 The allocation of assistance to circuits is determined by the Chief Magistrate based on the information provided to his office in the monthly return, being management information statistics provided by all magistrates across the State. The Conduct Division accepts the evidence of the Chief Magistrate that there are three key determinants which assist his Office to gauge whether individual circuits need assistance, if it is possible to provide it:

(1) the clearance rate, that is, the comparison between the number of new cases coming before the court and the number of cases completed that month;

(2) the average sitting hours for the month; and

(3) the length of delay for the hearing of a matter which is defended, and the hearing date.

114 The Conduct Division accepts the evidence of the Chief Magistrate that:

> "we constantly monitor the caseloads of every court ...to determine the need for assistance, to determine whether the delays are becoming too long and determine whether the magistrates are sitting too long, too often."

115 The judicial officer showed commendable interest in the management of her circuit and on 16 March 2016 sent an e-mail to the Chief Magistrate and the two Deputy Chief Magistrates, DCM Mottley and (now) Judge O'Brien.

116 In that e-mail her Honour sought assistance for 2-3 weeks from a "single high-output Magistrate" to sit in May 2016. In her e-mail, she set out some comparisons with five different Sydney Local Courts, and focussed her concerns upon the number of pending matters in her general lists across the Circuit, which she calculated as 1,247. The judicial officer also raised concerns about the workload:

> "I am aware of the staff at Port Macquarie have been forfeiting large amounts of flexitime recently, and I am sitting well after 4 on most days. Even at the current rate of output, we are still not able to achieve more than the input. I am also gravely concerned that the quality of my decisions will be compromised simply through tiredness and stress. It is also putting enormous stress on the staff here, who are incredibly hardworking and efficient.
>
> If we are able to clear or at least have the backlog under control, I am confident with the other assistance in hearings I am receiving we will be able to manage the large numbers coming through."

117 Deputy Chief Magistrate Mottley replied to Magistrate Burns on 18 March 2016, asking Magistrate Burns not to become overwhelmed by the amount of

work that was currently on hand, and referring to the "very healthy clearance ratio" in the statistics for 2015 and 2016. Deputy Chief Magistrate Mottley's e-mail went on to provide some quite detailed management advice, and rejected the suggestion of a large scale call-over of pending matters. The Conduct Division accepts Deputy Chief Magistrate Mottley's evidence before us that the judicial officer's suggestion in this e-mail was impractical.

118 Despite rejection of this suggestion, the judicial officer, via the Registrar, Mr Langstaff, sought and obtained considerable assistance over the following months. The Port Macquarie circuit received seven weeks of assistance in 2016 and ten weeks in 2017.

119 Deputy Chief Magistrate Mottley herself provided a week of assistance to the Port Macquarie circuit in July 2016. DCM Mottley gave evidence of the circuit being busy and that it was taxing in terms of volume. She also told the Conduct Division that the matters listed before her were complex.

120 An examination of the evidence about the workload at the Port Macquarie circuit at the relevant time shows the following.

121 First, the Department of Justice statistics which were Exhibit 5 before the Conduct Division show that the total outstanding cases for the three courts on the Port Macquarie circuit was 1,135 at the end of January 2016, and 1,146 at the end of February 2016. Those figures are of the same magnitude as the figure of 1,247 put forward by the judicial officer. To the extent that there was confusion in the evidence about this issue it may be explained by the fact that Senior Counsel for the judicial officer asked questions of the Chief Magistrate which focussed on the pending workload at Port Macquarie alone, and not on the pending workload for the three courts in the Port Macquarie circuit.

122 Secondly, the Chief Magistrate provided evidence that the average number of outstanding cases for the Port Macquarie circuit each month during 2016 was 1,074. The Chief Magistrate also provided the figures for some comparable

country circuits, which showed the average monthly pending caseload for the Lismore circuit was 1,159 and for the Coffs Harbour circuit 1,032.

123 Thirdly, as to the clearance rate, Deputy Chief Magistrate Mottley gave evidence as to the calculation of that rate:

> "...The most reliable and accurate information that we get about the management and the copings skills of the circuit is through the clearance ratios....."
> "Very simply it is cases in and cases out so, for example, you would have 100 new matters listed in the course of a month and you would finalise 100 matters and so you would have a clearance ratio of 100 per cent because the matters coming in equate to the matters that are being finalised."

124 The evidence of the Chief Magistrate demonstrated the clearance rates across 2016 at the three courts within the Port Macquarie circuit:

(1) at Kempsey, the monthly clearance rate ranged between 61.17% to 116.20%, with a yearly clearance rate of 95.02%;

(2) at Port Macquarie, the range was 53.18% to 136.19%, with an annual clearance rate of 90.22%; and

(3) the monthly Wauchope figures are less relevant, due to the limited sittings, however the annual rate was 130.82%.

125 The Chief Magistrate, in his evidence, was clearly satisfied with the level of work being completed in the Port Macquarie circuit demonstrated by the clearance rates. The Conduct Division accepts that this state of satisfaction was warranted.

126 Fourthly, as to sitting hours, the Port Macquarie circuit courts, like all Local Courts across the State, plan to sit regular and consistent hours. Exhibit G before the Conduct Division set out the sitting times of the court on the days when there was a case subject to the Complaint against the judicial officer. That document also provides some helpful information about the structure of the working day. Clearly, the starting time during the period under review was

9.30am, with a short morning break of about 20 minutes, one hour for lunch, and then through to no later than 4pm if possible. The circuit thus has a planned sitting day of 5 hours 10 minutes. The Conduct Division concludes on the evidence that the sittings of the court at the Port Macquarie circuit were regular and disciplined at the relevant time. In general terms, those planned times apply to both list days, where many short matters are listed, and the defended and sentence days, when sometimes only one, but usually several, cases are listed.

127 The Chief Magistrate gave evidence as to the reliance placed upon the monthly statistical returns, including the average sitting hours each month. Those returns, for the first ten months of 2016 in relation to the Port Macquarie circuit courts, are in evidence. Those statistics would, of course, take into account periods when the judicial officer was on leave (and replaced by another magistrate), and periods when the sitting of two courts concurrently on the one day would need to be recorded. They are nevertheless useful as a guide.

128 The evidence from the monthly returns shows remarkably consistent average sitting times in the Port Macquarie circuit across the first ten months of 2016:

(1) at Port Macquarie, the monthly average sitting times each day range from 3.65 hours to 6 hours;

(2) at Kempsey, the average sitting times range from 2.75 hours to 6 hours; and

(3) at Wauchope, which is much less relevant, the range is 1.5 hours to 6.5 hours.

129 An average sitting time is not recorded for every month on the table in evidence. Taking those months where an average sitting time is recorded, the average for all three courts across the first ten months of 2016 was 4.77 hours. If Wauchope is excluded, lest the small number of sitting days at that

centre sways the average, the average sitting time for the major centres of Port Macquarie and Kempsey is 4.99 hours.

130 The evidence before the Conduct Division focussed on the list days, which are the days which produced the cases particularised in the Complaint and were when the judicial officer felt under pressure to complete the list. Some of those days are indeed longer than usual court days, but by no means all.

131 All the witnesses agree that the circuit was a busy one, and the management information discussed above confirms that. The list days were clearly a challenge for the judicial officer and would provide a busy day for any magistrate.

132 The Chief Magistrate does not seek or collect any information as to the time magistrates spend at the court house. This issue was raised in the Conduct Division by the judicial officer herself, whereby in a number of documents in evidence she raises the issue of her starting time to emphasise the workload she was experiencing. The judicial officer, at various times and in different circumstances, suggested she would be in her chambers by 7.00am to 7.30am each day. Her evidence was that this was necessary for her to deal with the workload of her courts. The objective evidence, which is the swipe card access data contained in Exhibit F, suggests that the judicial officer attended the Port Macquarie Court house very early indeed on the days she had to go with the court staff on to Kempsey - frequently even before 7am. The swipe card data also shows that, in general, attendance at the Port Macquarie Court house (when the Court was sitting there) was usually later than 7.30am, and often quite a lot later. The Conduct Division has not analysed the swipe card data closely, however, as it is potentially unreliable or at least incomplete for the reasons given by junior counsel for the judicial officer and in any event is of limited assistance regarding the issues to be determined. It may be concluded that the judicial officer certainly arrived well before any sittings were to commence.

133 On the issue of the judicial officer's workload the Conduct Division draws the following conclusions:

(1) the Port Macquarie circuit was a busy circuit, but it was not in any way exceptionally busy compared to other country circuits;

(2) the efforts made by the judicial officer to manage the Port Macquarie circuit, together with the significant level of assistance provided, resulted in the circuit achieving and maintaining a constant and satisfactory turnover of cases during her period at Port Macquarie;

(3) the sitting times of the judicial officer were not excessive or unreasonable; and

(4) the work hours of the judicial officer were not excessive or unreasonable.

134 As the judicial officer's legal representatives sought to make the management of the Local Court of NSW, and especially the Port Macquarie circuit, an issue during the hearing before the Conduct Division, it is appropriate to record the conclusion of the Conduct Division that it is satisfied that reliable and timely management information was collected, collated and acted upon by the Chief Magistrate in the management of the Local Court, including the Port Macquarie circuit, during the relevant period. The Conduct Division rejects the criticism of the Chief Magistrate as being insufficiently responsive to a letter from former Magistrate Evans which was tendered in evidence. Magistrate Evans' complaints in that letter, for example, about the quality of the roads in parts of northern NSW, were obviously outside the responsibilities of the Chief Magistrate. No criticism of the Chief Magistrate is warranted based on this letter.

135 Some of the evidence before the Conduct Division was impliedly critical of the practice of sending judicial officers, after a minimum period of 9-12 months in the Sydney metropolitan area, for a two year period to courts in country areas.

The Conduct Division does not accept that this criticism is warranted. Advertisements for appointment to judicial officer make it abundantly clear that all newly appointed judicial officers may be required, after a 9-12 month period in a metropolitan court, to spend two years in a country area. Before being appointed to the Port Macquarie circuit following a successful application, the judicial officer had the opportunity to sit with more experienced judicial officers and to observe various list courts at both the Downing Centre and Central Local Court. The judicial officer ultimately spent 11 months sitting at busy Local Courts in Sydney before commencing country service. Management of the placement of judicial officers is a matter for the Chief Magistrate under the *Local Court Act 2007* (NSW). The Conduct Division does not accept the criticism of the practice of judicial officers being required to serve two years outside Sydney reasonably early in their careers is warranted either generally or in this case.

136 To the extent that criticism was sought to be made by Senior Counsel for the judicial officer of the resources made available to the Local Court by government, that is not a matter under the Act for the Conduct Division.

Character evidence supportive of the judicial officer

137 Statements were tendered before the Conduct Division supportive of the judicial officer which we have taken into account.

138 Superintendent Fehon, stationed in the Mid North Coast Police District, stated that the judicial officer was respected by officers within the police command in relation to Court matters. Superintendent Fehon has not heard of any negative remarks in relation to the Magistrate's conduct from members and staff of the police district.

139 Retired Magistrate Evans OAM stated that although he knew the judicial officer to be inexperienced when he met her (prior to her becoming a magistrate), she was always meticulously prepared in court and he never had any concerns about her capacity. He was surprised when the judicial officer was appointed to the circuit, given the workload and complexities involved. Mr

Evans believes that the volume and complexity of the work involved in the circuit would have been sufficient to extend the most senior of Magistrates.

140 Magistrate Williams stated that each time the judicial officer appeared before him as a barrister, she was always well prepared and had a firm grasp of legal principles. Magistrate Williams formed the view that Magistrate Burns was a competent advocate, who was polite and respectful to the court, other practitioners and court staff. When the judicial officer was first appointed and sat at Burwood, she would join Magistrate Williams and others in the staff room. He observed that she happily shared in the workload and often sought guidance and opinions on issues that confronted her. She always spoke politely and professionally about parties and representatives appearing before her.

Findings about allegations of misconduct and incapacity

141 The findings of the Conduct Division about the particularised Complaint are set out below. In addressing each aspect of the particularised Complaint we have been guided by the principles we have set out above.

Conclusions of the Conduct Division about the matter of Mr A

142 Mr A was issued with a "field court attendance notice" to attend Court on 24 August 2016 in relation to three offences under the *Road Transport Act 2013* (NSW). Critically, a "field court attendance notice" is a method of bringing a person to court which does not involve the *Bail Act* or any other restriction on liberty.

143 On 24 August 2016, Mr A attended Port Macquarie Local Court with his mother and his Legal Aid solicitor. Without hearing any submissions from Mr A's lawyer, the judicial officer ordered Mr A into custody, where he remained for over three hours. Sergeant France, the police prosecutor involved in Mr A's matter on 24 August 2016, made no detention application and had no intention of applying for a refusal of Mr A's bail because he appeared before the Court on a field court attendance notice.

144 The judicial officer did not ask for or receive any submissions about detaining Mr A from either the police prosecutor or Mr A's lawyer. Upon resumption of Mr A's matter after lunch, there was no mention of bail. The matter was adjourned and a pre-sentence report ordered.

145 The judicial officer admits that she ordered that Mr A be taken into custody in circumstances where:

(1) she had no power to do so;

(2) Mr A was at liberty and not subject to bail conditions;

(3) the prosecution had not made a detention application;

(4) the parties had not made submissions on bail;

(5) she had not complied with ss 17 and 19 of the *Bail Act*;

(6) Mr A had not been given reasonable notice of any detention application and the judicial officer had not dispensed with the giving of such notice;

(7) she did not record reasons for refusing bail or remanding Mr A in custody;

(8) she released Mr A from custody on the same day without imposing bail conditions or identifying any relevant change in circumstances;

(9) she ought to have known that she had no power to adopt this course (although does not admit knowledge or wilful blindness); and

(10) she ought to have known that she ought to have heard from the parties before remanding Mr A in custody (although does not admit knowledge or wilful blindness).

146 The judicial officer does not admit that there was no proper purpose for remanding Mr A in custody. She gave evidence that she honestly but erroneously believed she could deal with Mr A under the *Bail Act*, s 92.

147 The Conduct Division finds that the judicial officer ordered that Mr A be taken into custody in circumstances where the judicial officer had no power to make such an order and without having heard from the parties on the question of bail. The Conduct Division finds that Mr A was remanded in custody in circumstances where there was no proper purpose for that remand, that the judicial officer failed to comply with the requirements of the *Bail Act* and that the judicial officer knew that she ought to have heard from the parties before remanding Mr A in custody.

148 The Conduct Division finds that it is clear that Mr A and his representative were not given any opportunity for submissions to be made about detention, that there was no application for detention, that no bail concern or unacceptable risk was identified and there was no proper purpose in detention being ordered.

149 The Conduct Division finds that this was a clear instance of misconduct. No bail determination was made, and certainly no bail conditions required, when Mr A was simply released in the afternoon having been detained in the morning. This behaviour by the judicial officer indicates to the Conduct Division a lack of proper purpose for the remand of Mr A into custody.

150 The judicial officer's evidence before the Conduct Division was that she honestly believed she had power to deal with Mr A under s 92 of the *Bail Act*. That provision had no relevance because Mr A had attended court on a Field court attendance notice and s 92 expressly only applies to "a person granted bail for an offence".

151 The judicial officer stated in evidence before the Conduct Division that her purpose in detaining Mr A in custody was to convey to him or to "reinforce" the gravity of his conduct. That purpose does not represent a permissible basis

upon which to detain an individual under ss 17 to 19 or any other provision of the *Bail Act*.

152 Regrettably, the Conduct Division has come to the view that it is not able to accept the evidence of her Honour that she was relying on s 92 of the *Bail Act* when she detained Mr A (and as will become apparent, Messrs B, G and I). This is for the following reasons.

153 First, the transcript makes clear that the judicial officer did not refer to s 92 of the *Bail Act* when she detained Mr A. The Magistrate was later challenged about the statutory basis of her power to order detention by legal practitioners in the matters of Messrs I and G and she did not refer to s 92 of the *Bail Act*.

154 Secondly, the judicial officer agreed in evidence that even a cursory glance at s 92 of the *Bail Act* would have made it clear that it had no application to people on field or future court attendance notices. The judicial officer could not explain in her evidence why she had no interest in Mr A's obvious status as attending court on a field court attendance notice despite her Honour clearly paying detailed attention to the criminal history of Mr A.

155 Thirdly, the judicial officer accepts that she was not trained to use s 92 of the *Bail Act* to detain people and did not rely on or refer to any training, Bench Book provision, decision of a court or contemporaneous advice which caused her to use this provision while she was at Port Macquarie.

156 Fourthly, the judicial officer was aware of the terms of the *Bail Act* and had attended separate training on its provisions in addition to the considerable pre-Bench and ongoing training on bail and procedural fairness she had received.

157 Fifthly, in her detailed response to the Judicial Commission in April 2017, the judicial officer made no reference to s 92 of the *Bail Act* in relation to the matters of Mr A, Mr B, Mr G or Mr I but did refer to other *Bail Act* provisions. Had her Honour been relying upon s 92 of the *Bail Act* at the time of the

relevant hearing, it is inconceivable that she would not specifically have referred to this in her response to the Judicial Commission in April 2017. The absence of any such reliance at that point in time demonstrates that the judicial officer was not in fact relying upon s 92 of the *Bail Act* at the time when she detained any of those individuals but has instead subsequently turned her mind to that provision of the *Bail Act* and reconstructed its application at the relevant time.

158 There is another important issue. That is, in response to the Complaint, and with the benefit of a lengthy time of reflection and in circumstances where any mental health issues suffered by the judicial officer are in remission, her Honour's explanation for her conduct is that she was seeking to convey to Mr A the gravity of his offending. Her Honour also said in evidence that if Mr A had attended Court on bail she would have regarded it as appropriate to detain him in the cells as she did to emphasise to him the gravity of his offending.

159 The Conduct Division finds that s 92 of the *Bail Act* does not provide judicial officers with any power to detain accused persons on bail in gaol cells, particularly overnight, to convey the gravity of their offending. It is beyond argument that the section does not provide power to a judicial officer to do so without notice or without hearing submissions from legal representatives of the parties.

160 The contention by the judicial officer before us that she still regards the use of s 92 of the *Bail Act* to detain an accused to emphasise the gravity of his or her offending and that s 92 empowers her to do so demonstrates a current and serious lack of knowledge of the operation of detention powers and about the requirements of procedural fairness.

161 The judicial officer has, without any education, training, research or advice to this effect, created a third category of detention under the *Bail Act*, given her Honour's unequivocal oral evidence that remanding an individual in custody pursuant to s 92 amounts to neither a detention application nor a refusal of

bail. That course could not be described as necessary for the administration of justice or for the proper discharge of her statutory functions or powers, such as to enliven any actual or implied statutory or common law power of detention.

162 The judicial officer's current view about the unconstrained operation of a s 92 detention power is inconsistent with the existence and operation of the *Bail Act*, particularly ss 8-11, 17-18, 20, 53(1)(b) and s 50(5), provisions which regulate the applications which can be made for detention and by whom, the provision of reasonable notice and the circumstances which must be considered by a court prior to detention. Notably, s 20 provides a right of release to an accused person on bail where there is no unacceptable risk (accepted to be the case in the matter of Mr A) and s 53(1)(b) of the Act expressly precludes a court from refusing bail of its own motion.

163 The judicial officer's current approach to s 92 of the *Bail Act* would circumvent all of the statutory safeguards imposed by Parliament to protect individual liberty.

164 Her Honour's view that s 92 of the *Bail Act* allows detention in a gaol cell for reasons found outside the *Bail Act* is not correct. The authority relied upon before the Conduct Division, *R v Peehi* (1997) 41 NSWLR 476, provides no such thing.

165 The view pressed on the Conduct Division by the judicial officer is not reflected in the terms of s 92 as explained by Refshauge J in *R v Charles* [2016] ACTSC 177 at [67] that "the provision does not specify that, upon the person being in the custody of the court, any bail is revoked". It is also inconsistent with Court of Appeal authority in *Barr (a pseudonym) v Director of Public Prosecutions (NSW)* [2018] NSWCA 47 (at [82] per Leeming JA, [92]-[93] per MacCallum J and [130] N Adams J agreeing). In referring to this decision we do not suggest that her Honour was aware of that recent decision. It is clear, however, that her Honour's view of the operation of s 92

of the *Bail Act* is inconsistent with authority and not supported by any academic writing or training.

166 The Conduct Division also rejects the judicial officer's evidence that she detained Mr A by reason of his "demeanour". The transcript of the proceedings does not disclose any reference by her Honour to the demeanour or body language of Mr A. Mr A's lawyer was not called to answer any questions about Mr A's demeanour or conduct. Nor did her Honour refer to demeanour as a justification or relevant motivation in her responses to the Judicial Commission in April and October 2017 or in her subsequent witness statements that were prepared for the course of this hearing. The judicial officer accepted in her first response to the Judicial Commission that she had no independent recollection of the matter.

167 In any event, the Conduct Division finds that remanding a person on bail into a goal cell under the *Bail Act* because of their "demeanour" would be a significant abuse of power, particularly where such action is taken without providing any opportunity for the person or their lawyer to address the judicial officer on the alleged offending demeanour.

168 It is of considerable concern that the Magistrate gave evidence which suggested that she considered that this would be an appropriate exercise of power if Mr A was on bail rather than a field court attendance notice.

169 The Conduct Division finds the Complaint as particularised in relation to Mr A to be sustained.

170 The Conduct Division finds that the conduct towards Mr A is one of the more serious instances of misconduct. It is noted that it occurred in August 2016 before any recorded symptom of depression and on a court day that ended at 3.30pm. Regrettably, by reason of the evidence of the judicial officer, the Conduct Division finds there is a real risk that the conduct in the matter of Mr A would be repeated by her Honour in the same circumstances if the person were on bail.

171 The Conduct Division also finds that the Magistrate's evidence in relation to Mr A, and the asserted proper basis for detaining Mr A in custody to "reinforce" the gravity of his offending, demonstrates current and likely future incapacity on the part of the judicial officer.

Conclusions of the Conduct Division about the matter of Mr B

172 On 12 October 2016, Mr B attended Port Macquarie Local Court on two court attendance notices (one was a field court attendance notice and the other was mailed to him) in relation to two drive whilst disqualified offences. He was not on bail. No detention application was ever made by the police prosecutor about Mr B.

173 Mr B appeared for himself before the judicial officer on that day and entered pleas of guilty. Without hearing from the police prosecutor or Mr B, the judicial officer placed Mr B in the cells at the Port Macquarie Local Court.

174 Ms McMahon, a private solicitor assisting Legal Aid on 12 October, was then allocated to Mr B's matter.

175 Magistrate Burns asked to see Ms McMahon and the police prosecutor privately. They met in a corridor outside the Magistrate's chambers. A conversation took place about which the Conduct Division harbours serious concerns.

176 Later that day Mr B was brought up from the cells and bail was granted by the judicial officer for the purpose of obtaining a pre-sentence report.

177 The judicial officer admits, and the Conduct Division finds, that her Honour remanded Mr B in custody in circumstances where:

(1) she had no power to do so;

(2) Mr B was at liberty and not subject to bail conditions;

(3) the prosecution had not made a detention application;

(4) the parties had not made submissions on bail;

(5) she had not complied with ss 17 and 19 of the *Bail Act*;

(6) she granted Mr B conditional bail on the same day without identifying any relevant change in circumstances from the time Mr B was remanded in custody;

(7) she did not identify any lawful grounds under the *Bail Act* or otherwise for remanding Mr B in custody;

(8) her intention in remanding Mr B was to convey a proper understanding of the gravity of his criminal conduct, and she advised the legal representatives outside of Court of this intention;

(9) she did not consider ss 17, 18 and 19 of the *Bail Act* before remanding Mr B;

(10) Mr B was remanded without notice or any detention application;

(11) she did not record the reasons for remanding Mr B in custody;

(12) she ought to have known that she had no power to adopt this course; and

(13) she ought to have known that she ought to have heard from the parties before remanding Mr B in custody.

178 The Conduct Division also finds that Mr B appeared on 12 October 2016 on a future court attendance notice and field court attendance notice and that the police prosecutor, Sgt Griffin, did not make a detention application on that day and had no intention of doing so.

179 On 12 October 2016, Ms McMahon was at the Port Macquarie Local Court assisting Legal Aid on a duty day. After Mr B had been placed in the cells, Ms Karim from the Legal Aid Commission passed the file to her.

180 The judicial officer called Ms McMahon and Sergeant Griffin into the private corridor outside her chambers. The most reliable version of that conversation was given by Sgt Griffin, which the Conduct Division accepts. In that conversation Magistrate Burns said words to the effect of, "Just to let you both know, I've put [Mr B] in the dock to give him a bit of a scare".

181 The Conduct Division finds, based on Ms McMahon's evidence (including her contemporaneous note) that Mr B was 18 years old and had never previously been in custody. The Conduct Division accepts that he was frightened, teary and shaken by being placed in the cells.

182 The Conduct Division rejects the submission made by Senior Counsel for the judicial officer that by reason of Mr B's criminal record it should be concluded that he was not a vulnerable person. The *Bail Act* is not a tool to frighten people or punish offenders. It is fundamental to the proper operation of our system of criminal justice that judicial officers do not use the very significant powers of detention they have other than for the purposes they were intended to serve.

183 The Conduct Division finds that on 12 October 2016 the judicial officer remanded Mr B in custody in circumstances where she had no power to do so, without having heard from the parties on the question of bail, for an improper purpose and failed to comply with the *Bail Act* and that the judicial officer knew that she ought to have heard from the parties before remanding Mr B in custody. There was no power under the *Bail Act* for the judicial officer to detain Mr B of her own motion and no detention application was ever made.

184 The Conduct Division finds that the judicial officer's account given in evidence before us at a time when her illness was in remission, namely that she detained Mr B in custody on an interim basis for the purpose of conveying to

him the gravity of his criminal conduct, is an improper purpose for remanding an accused in custody.

185 The Conduct Division regards the judicial officer's conduct in relation to Mr B most seriously. The judicial officer, in her evidence before us, stated that to bring the attention of the offender to the gravity of their conduct is a proper purpose of detention under the *Bail Act*.

186 As was the case with Mr A, the judicial officer stated in evidence that she honestly but erroneously believed that she could detain Mr B under s 92 of the *Bail Act* without a detention application being made and without hearing from either party. For the same reasons as in relation to Mr A, the Conduct Division has come to the conclusion that the judicial officer's explanation must be rejected.

187 The Conduct Division accepts the submission of Senior Counsel assisting the Conduct Division that the judicial officer's evidence that she could detain Mr B under s 92 of the *Bail Act* is plainly wrong and the judicial officer knew this.

188 The judicial officer gave evidence that she did not consider that Mr B's matter involved a detention application; rather, she believed that he was in the "custody of the Court", being the language used in s 92 of the *Bail Act* and that, therefore, no detention application was necessary before remanding Mr B to gaol. She agreed that Mr B (and Mr A) was in court on a court attendance notice and not on bail but believed that Mr B was in the custody of the Court from when the matter was called until it was finalised.

189 Even now, having had a considerable time to reflect on the issue and in circumstances where any mental illness suffered by the judicial officer is in remission, her Honour gave evidence that her exercise of power was valuable to convey the seriousness of Mr B's offending to him. Her Honour maintained that position in oral evidence on the final day of the hearing:

> "Q: It's the purposes, Magistrate Burns, sitting here now do you tell the Conduct Division that you believe that that is a proper purpose for you to exercise the power to detain someone physically in a cell?
>
> A: If he is in the – if they are in the custody of the Court and if I believe that it is going to be something that will benefit both the defendant and the community in the acceptance of the gravity of their behaviour, and the gravity of their offending then I think it can be a salient tool to use if they are already in the custody of the Court."

190 We have described the proper operation of s 92 of the *Bail Act* above at [152]-[165]. The reasons given by the judicial officer in evidence before us do not represent a permissible purpose under the *Bail Act* for detaining someone in custody.

191 The Conduct Division finds that her Honour's actions in the case of Mr B were a serious abuse of power and involved the unlawful detention of an 18 year old accused. The impropriety of the conduct was compounded by her Honour explaining her actions in a private conversation off the Bench with legal practitioners, a step she had been specifically warned against in pre-Bench training.

192 The Conduct Division finds that there is no evidence to support the judicial officer's evidence that she was motivated to talk to the practitioners off the Bench by a desire to put at ease the mind of Mr B's mother. Her Honour made no reference to Mr B's mother in her first response to the Judicial Commission in April 2017 and stated that she had no independent recollection of the matter. There is no mention of Mr B's mother being present in Court in the transcript of the proceedings on 24 August 2016, nor did Mr B's representatives provide any evidence to suggest that Mr B's mother was present during those proceedings.

193 The Conduct Division concludes that the evidence given by the judicial officer about Mr B and her present understanding of her detention powers displays a troubling and continuing lack of insight into, and understanding of, the nature and scope of her powers to detain individuals in custody of her own motion, particularly without any notice.

194 The apparent withdrawal by the judicial officer on the final day of the hearing of her earlier concession that procedural fairness was necessary before remanding a person on bail to the cells was even more troubling.

195 This evidence was given in circumstances where it is common ground that Magistrate Burns' mental illness is in remission. Her Honour was on clear notice that this topic would be examined in evidence.

196 The Conduct Division finds that the conduct towards Mr B is a serious instance of misconduct. As with Mr A, by reason of the evidence of the judicial officer, the Conduct Division finds there is a real risk that the conduct in the matter of Mr B would be repeated by her Honour in the same circumstances if the person were on bail.

197 The Conduct Division also finds that the Magistrate's evidence in relation to Mr B, and the asserted proper basis for detaining Mr B in custody to "reinforce" the gravity of his offending, demonstrates current and likely future incapacity on the part of the judicial officer.

Conclusions of the Conduct Division about the matter of Mr C

198 On 22 December 2016, the judicial officer refused Mr C's application for appeals bail in chambers without notifying the parties of this course of action and in so doing denied Mr C procedural fairness. This is admitted by the judicial officer.

199 Mr Firth, a private solicitor, was assisting the Legal Aid Commission at the Port Macquarie Local Court on 22 December 2016. Mr C's matter was listed on that day for an appeals bail application. Mr Firth appeared and the transcript records the following exchange:

> "FIRTH: I've been given the matters – if it's an appropriate time your Honour, I've been given the matter of [Mr C]. The court officer's just –
>
> HER HONOUR: Severity, bail?
>
> FIRTH: Yes your Honour, there's a surety –

HER HONOUR: Yes, I dealt with it in chambers.

FIRTH: Okay your Honour, there's a surety here that's – Mr Chris Burns, whose here to provide $1,000 surety to put up.

HER HONOUR: Been dealt with in chambers and refused.

FIRTH: Okay so all right, thank you your Honour.

HER HONOUR: Thank you."

200 The Conduct Division accepts Mr Firth's evidence that he mentioned Mr C's matter despite knowing that the question of appeals bail had been dealt with in chambers because he wanted to record on the transcript that he sought to apply for appeals bail and that he had a surety present in the Court complex.

201 The Conduct Division finds that it was procedurally unfair that Mr Firth was not given an opportunity to be heard. The Conduct Division finds that procedural fairness is something of which any competent judicial officer would have been aware. While the judicial officer admits that she ought to have known to give Mr C an opportunity to be heard before refusing appeals bail, she denies knowledge or wilful blindness of this fact. She says she had an honestly formed view that Mr C had no prospects of success in his application.

202 The judicial officer's principal response on this issue was to state that she gave directions to the Registrar to list in Court any bail applications where a hearing was sought or the sentence imposed was of six months or less duration. The Conduct Division does not accept that any such direction was given. This is for the following reasons.

203 First, statements from Registry staff do not corroborate this allegation. Secondly, there is no written record of any such procedure and the evidence of what took place with Mr C is quite inconsistent with any such practice. If, in truth, there had been a direction to staff from the judicial officer that any contested bail matters be listed in open court, her Honour's reaction to Mr Firth's application in open court for appeals bail is inexplicable. Thirdly, if the judicial officer *had* given a specific instruction to the Registry that anyone who

sought a bail hearing be given a hearing, this exchange with Mr Firth would immediately have made it clear that something had gone wrong. When Mr Firth came into court it was clear to the judicial officer that Mr C was someone who wanted a bail application to be determined in court and who had been denied that opportunity. The judicial officer took no steps to remedy a situation which, on her evidence, was completely contrary to a direction she had given Registry staff.

204 The Conduct Division finds that the conduct towards Mr C amounts to misconduct. The Conduct Division also finds that the judicial officer's evidence in relation to Mr C and the asserted procedure to determine appeals bail she claims to have established, demonstrates incapacity on the part of the judicial officer.

205 The Conduct Division finds that a willingness to hear from both sides before making a decision affecting rights is perhaps the most fundamental characteristic of a judicial officer. This is a matter the Conduct Division will return to in addressing the question of whether the judicial officer lacks present and future capacity to exercise her functions as a judicial officer.

Conclusions of the Conduct Division about the matter of Mr D

206 On 11 January 2017, Mr D was sentenced by the judicial officer to an aggregate term of 4 years imprisonment with a non-parole period of 3 years. Mr D appealed his sentence and applied for appeals bail.

207 Ms Anderson, the Deputy Registrar on the Port Macquarie Circuit, processed Mr D's District Court severity appeal on 19 January 2017. The Notice of Appeal states "kindly list the matter for a bail application pending the hearing of the appeal". The appeals bail application was listed to be heard at Port Macquarie Local Court on 25 January 2017.

208 On 24 January 2017, the judicial officer refused Mr D's application in chambers without hearing from him or his lawyers.

209 Ms Maranga of the Legal Aid Commission was told, probably by telephone, that Mr D's Local Court appeals bail application was refused in chambers. She was not given reasons for the refusal and did not receive any written notification of the outcome. If given the opportunity, Ms Maranga would have made submissions on Mr D's appeals bail application, specifically concerning a relative in Tamworth who was prepared to have Mr D live with them (Mr D had previously been homeless).

210 The judicial officer admits that she refused Mr D's application for appeals bail in chambers on 24 January 2017 without notifying the parties of this course of action and in doing so she denied Mr D procedural fairness in several respects. The judicial officer admits that she ought to have known to give Mr D an opportunity to be heard before refusing his application, but denies knowledge or wilful blindness of this fact.

211 The Conduct Division finds that the Notice of Appeal for Mr D's matter contains a clear request in the following terms: "kindly list the matter for a bail application pending the hearing of the appeal". Notwithstanding this, the matter was determined in chambers.

212 The Conduct Division finds that the conduct towards Mr D amounts to misconduct. The Conduct Division also finds that the judicial officer's evidence in relation to Mr D, and the asserted procedure to determine appeals she claims to have established, demonstrates incapacity on the part of the judicial officer.

Conclusions of the Conduct Division about the matter of Mr E

213 Ms Maranga appeared for Mr E seeking appeals bail. She made a specific notation on Mr E's appeal form requesting that the matter be listed for a bail hearing. Mr E's appeals bail application was listed on 25 January 2017. A s 77 *Crimes (Administration of Sentences) Act 1999* order for Mr E to attend Port Macquarie Local Court via AVL on 25 January 2017 at 9:30am was made.

214 On 25 January 2017, Ms Maranga made enquiries with the Port Macquarie Local Court and discovered that Mr E's matter was not in the list. She attended the Registry counter, where a conversation to the following effect took place:

> "Ms Maranga: What is happening with the matter of [Mr E] that was supposed to be listed for an appeals bail today? It's not on the list.
>
> Staff member: It was determined in Chambers.
>
> Ms Maranga: What was the outcome?
>
> Staff member: Bail was refused."

215 The judicial officer admits and the Conduct Division finds that on 24 January 2017, her Honour refused Mr E's application for appeals bail in chambers without notifying the parties of this course of action and in so doing denied Mr E procedural fairness in two respects. The judicial officer accepts that Mr E's Notice of Appeal included a request for a listing for a bail application, but is uncertain whether she saw the request.

216 The judicial officer admits that she ought to have known to give Mr E an opportunity to be heard before refusing his application, but denies knowledge or wilful blindness of this fact. The judicial officer admits that she failed to record reasons for refusing bail and did not ensure Mr E was given a written notice of refusal of bail, contrary to the *Bail Act*, ss 38(1) and 34.

217 In evidence before the Conduct Division, the judicial officer was shown the Notice of Appeal to the District Court in respect of Mr E's appeal. She gave evidence that if she had seen the words at the bottom of the document, which she had signed, stating "kindly list the matter for an application for bail", she would have had the matter listed in court. She does not know how she missed those words. She denies that she was determining appeals bail in chambers even if she knew that the individual wanted their matter listed in court.

218 The Conduct Division does not accept the evidence of the judicial officer on this subject. The clear and consistent evidence of the court staff is that there was no direction that contested appeals bail applications be listed in open court. The only discussion about the issue was with Mr Langstaff in late February 2017. More significantly, the judicial officer's account of having given such a direction is inconsistent with her conduct in the matters of Messrs C, D, E, F and G, where she determined applications in chambers notwithstanding that each of the accused had expressly requested or otherwise been allocated an appeals bail hearing. As we have found in the case of Mr C, the matter was specifically brought to the judicial officer's attention by Mr Firth in December 2016. If there had been any such direction given by her Honour, her Honour's actions in that matter were inexplicable. She was being told, in terms, that Mr C wished to make an appeals bail application in open court. Her Honour declined to hear it. In doing so she did not refer to any instruction or practice she believed had been followed.

219 Finally on this subject, the Conduct Division rejects the suggestion that there is any reliable evidence of any practice let alone an "entrenched practice" at Port Macquarie with respect to appeals bail applications prior to the time of the judicial officer's appointment to the circuit. No lawyer or judicial officer gave evidence of a practice at Port Macquarie of determining contested appeal bail applications in chambers before Magistrate Burns arrived. Further:

(1) DCM Mottley had never heard of such a practice despite her years of experience and her own visits to Port Macquarie;

(2) Mr Firth, an experienced local practitioner, had not experienced any such practice. He stated that Magistrate Hodgson would *grant* bail in chambers or deal with matters in chambers by consent but would hear contested applications in court. Mr Firth was not required for cross-examination;

(3) Ms Crofts of the Legal Aid Commission gave evidence that Magistrate Hodgson had not dealt with contested bail applications in chambers in any of her matters since December 2014;

(4) no Legal Aid lawyer said they had experienced or been told of any such a practice;

(5) Deputy Registrar Anderson was not aware of any practice of determining contested bail applications in chambers in Kempsey before Magistrate Burns was appointed or after she was appointed;

(6) Sergeant France appeared before Magistrate Hodgson but did not give any evidence about his appeals bail practices.

220 To the extent Mr Langstaff referred to such a practice, it was qualified by his statement that:

> "I do not have detailed knowledge of appeals bail practice and procedure because I am not directly involved in processing applications..."

221 Mr Langstaff's knowledge was limited to a practice of hearing *uncontested* bail cases in chambers.

222 The Conduct Division finds that the conduct towards Mr E amounts to misconduct. The Conduct Division also finds that the Magistrate's evidence in relation to Mr E, and the asserted procedure to determine appeals bail she claims to have established, demonstrates incapacity on the part of the judicial officer.

Conclusions of the Conduct Division about the matter of Mr F

223 On 1 February 2017, Mr F attended the Port Macquarie Local Court having been at liberty and on conditional bail since mid-2015. He was sentenced to a term of imprisonment. Mr Firth, who appeared for Mr F, immediately filed a Notice of Appeal at the Registry counter, and a request for an appeals bail

hearing. The notice of appeal contains the notation "request for bail, list 2/2/17".

224 On 2 February 2017, Mr Firth attended Port Macquarie Local Court for the bail hearing. He was told by a staff member that Mr F's bail application had been dealt with by the Magistrate in chambers.

225 Mr Firth was given no opportunity to be heard in court, notwithstanding that he had submissions to make and had an expectation that he would have the opportunity to make submissions in court if it was proposed to refuse bail. He intended to raise the issue of Mr F's mental health and believed Mr F had a very good chance of being granted bail.

226 Mr Firth was upset, angry and surprised that Mr F's bail application was refused. He said words to the Registry staff to the effect of "I've come up here, it's a waste of time" and "in my opinion, it is procedurally unfair".

227 Mr Firth did not receive any written notification of the refusal of Mr F's appeals bail application or any reasons for the decision. To the best of his knowledge, Mr F did not receive the same.

228 A Summary of Reasons for Bail Decision of Court form completed by Magistrate Burns dated 2 February 2017 notes that bail is refused, giving the following reasons for refusal:

> "Not eligible or suitable to any alternative, [illegible] only avenue."

229 The judicial officer admits and the Conduct Division finds that her Honour refused Mr F's application for appeals bail in chambers without notifying the parties of this course of action and in so doing denied Mr F procedural fairness in two respects.

230 The judicial officer admits that she ought to have known to give Mr F an opportunity to be heard before refusing his application, but denies knowledge or wilful blindness of this fact.

231 The judicial officer contends that she determined that she could refuse to hear Mr F's bail application pursuant to s 73(1)(b) of the *Bail Act* because it had no reasonable prospects of success. However, her Honour continued to determine the application in chambers and completed a Summary of Reasons for Bail Decision of Court form.

232 The Conduct Division finds that the judicial officer's conduct towards Mr F amounts to misconduct.

233 The Conduct Division also finds that the judicial officer's evidence in relation to Mr F, and the asserted procedure to determine appeals bail she claims to have established, demonstrates incapacity on the part of the judicial officer.

234 The Conduct Division finds that the reliance now by the judicial officer on s 73 of the *Bail Act* to excuse her Honour's decision, at a time when any mental illness she suffered from is in remission, is evidence of current and likely future incapacity.

235 Section 73 of the *Bail Act* does not permit a bail application to be determined in chambers without providing a party with the opportunity to be heard.

236 As we have said, perhaps the most important feature of our criminal justice system is that the judicial officer presiding should make a decision after hearing from both parties. To the extent that the judicial officer continues to rely on s 73 of the *Bail Act* as justifying, even retrospectively, the decision she made not to hear from the parties about bail in the matter of Mr F, this is a demonstration of current and likely future incapacity.

Conclusions of the Conduct Division about the matter of Mr G

237 On 14 December 2016, Mr Marriott, a solicitor with the Legal Aid Commission, appeared as a duty lawyer at Port Macquarie Local Court before Magistrate Burns. Mr G, who had been charged with one count of "dishonestly obtain financial advantage or cause disadvantage by deception" contrary to the *Crimes Act 1900* (NSW), s 192E(1)(b), approached Mr Marriott for advice.

The allegation was that Mr G had cashed out a poker machine ticket belonging to another individual worth $167.39. Mr Marriott provided Mr G with legal advice and took instructions from him.

238 Mr Marriott mentioned Mr G's matter in court and entered a plea of guilty on Mr G's behalf. He subsequently asked Mr G to sit at the back of the court. Magistrate Burns then stated words to the effect of "No, Mr [G] is to stay right behind you". Mr G's matter was then stood down for five minutes. When Mr Marriott re-mentioned the matter, Magistrate Burns asked the Police Prosecutor, Sgt France, if he was making a bail revocation application, to which he responded that he was. Magistrate Burns then revoked Mr G's bail without hearing from Mr Marriott and adjourned the matter for sentence on 25 January 2017. Mr G was sobbing as he was led away.

239 An e-mail from Ms Crofts to the Port Macquarie Local Court dated 16 December 2016 states:

> "...Legal Aid appears for [Mr G] in this matter, which is next listed at the Port Macquarie Local Court on 25th January 2017. The Police Prosecutor is also appearing in this matter.
>
> I am instructed ask that this matter be re-listed to the list on Wednesday 21st December 2016 in order for [Mr G] to make a release application. I attach an Application for Grant of Bail form..."

240 On 21 December 2016, bail was "restored" by the judicial officer apparently and erroneously relying on s 43 of the *Crimes (Sentencing Procedure) Act* and the matter was adjourned to 25 January 2017. On 25 January 2017, Mr G was sentenced to imprisonment.

241 On 30 January 2017, Mr Marriot lodged an appeal to the District Court in Mr G's matter. The appeal notice included a specific request to "apply for appeals bail on Wednesday 1 February at Port Macquarie Local Court".

242 On 30 January 2017, Mr Marriott wrote to Mr Langstaff:

> "Hello

Please find enclosed the Notice of Appeal in the matter of [Mr G].

This matter was heard last Wednesday 25 January and [Mr G] is now in custody.

I can indicate that I wish to apply for appeals bail on Wednesday 1 February at Port Macquarie Local Court."

243 Registrar Langstaff replied on 2 February 2017 and wrote:

"Dear Andrew

Magistrate Burns elected to deal with the bail application in chambers.

Bail has been refused and the appeal will be listed at the District Court on 6/3/17."

244 On 2 February 2017, Magistrate Burns refused Mr G's bail application in chambers. On the same date, Mr Langstaff informed Mr Marriot via e-mail. Although the JusticeLink records show that Mr G's bail was refused on 3 February 2017, Registry staff must not have entered the 2 February decision until the following day.

245 On about 1 February 2017, Mr Langstaff spoke to Magistrate Burns about when Court staff should list appeals bail applications in open court. He asked Magistrate Burns words to the effect of, "Should appeals bail applications be listed in open court if the defendant is on bail prior to sentencing?" The Magistrate replied "no, not necessarily" and said that she would usually determine appeals bail in chambers where there were appeals against lengthy custodial sentences. Mr Langstaff understood from the conversation that Magistrate Burns wanted to see the appeals bail applications relating to lengthy sentences in chambers first to decide whether or not she would list them in court, but that her intention was to deal with most of the applications in chambers.

246 On 2 February 2017, during a staff meeting, Mr Langstaff conveyed what the judicial officer had said to his staff. He believes that he told them that if an applicant was on bail prior to sentence and it was a short sentence then the matter should be listed in court. He used words to the effect of, "Magistrate

Burns will decide in chambers whether or not to list matters where there is a lengthy custodial sentence".

247 On 3 February 2017, Ms Crofts sent an e-mail to Mr Langstaff:

> "Thank you for your email below about [Mr G having his appeals bail application refused in chambers].
>
> As we discussed yesterday, I am not familiar with the Local Court Practice Note or statutory power that gives a Magistrate the authority to deal with a contested bail application in Chambers, without hearing from the prosecution or the defence.
>
> Could you please advise?"

248 On 3 February 2017, Mr Langstaff replied:

> "Magistrate Burns has indicated that she will consider any requests to have individuals appeal matters heard in Court [if] when lodging your appeal you [include] a short reason why you wish for it to be determined in Court.
>
> Furthermore Magistrate Burns has invited you to present any legal argument that Magistrate does NOT have authority to deal with these matters in Chambers and she will also consider your submission.
>
> Please feel free to contact me if you wish to discuss further."

249 The Conduct Division finds that Mr G had his bail revoked unlawfully on 14 December and he was detained for seven days until 21 December 2016. The Conduct Division finds that the judicial officer was without power to refuse bail in chambers without hearing from the parties in circumstances where the person denied bail sought a hearing.

250 The Conduct Division rejects the judicial officer's evidence that she was relying on s 73 of the *Bail Act* in refusing to consider the question of bail in open court. Ms Crofts of Legal Aid asked Registrar Langstaff on 3 February to explain the judicial officer's authority to deal with a contested bail application in chambers without hearing from the parties. Registrar Langstaff responded, based on the judicial officer's instructions, that Ms Crofts was invited "to present any legal argument that Magistrate does NOT have authority to deal with these matters in Chambers". If the judicial officer truly

believed at the time that s 73 of the *Bail Act* had anything to do with the decisions she was making she would have said so.

251 The Conduct Division finds that the bail application heard on 21 December 2016 is also problematic. The transcript of those proceedings makes erroneous reference to s 52 of the *Bail Act*, but relevantly the Magistrate identifies as her reasoning for revoking bail "I placed his bail on the basis of a full time custodial sentence". The Magistrate then purports to "make a s 43 correction" and restores Mr G's bail.

252 The Conduct Division finds that s 43 of the *Crimes (Sentencing Procedure) Act* applies to a criminal proceeding in which a court has imposed a penalty that is contrary to law or failed to impose a penalty that is required to be imposed by law, and consequently had no application to a bail determination.

253 The Conduct Division finds that Magistrate Burns restored Mr G's bail without identifying any change in circumstances which could go to bail concerns or unacceptable risks. The Conduct Division finds on this basis that the earlier decision to revoke Mr G's bail on 14 December was not properly reasoned.

254 Magistrate Burns contends that she did consider and assess bail concerns and unacceptable risk but that she failed to record those matters orally or in writing. Having regard to the transcript and audio recording of the proceedings on 14 December 2016, including the speed with which Mr G was detained and the absence of any direct or indirect reference to any of those matters on the record, the Conduct Division rejects that evidence.

255 While the judicial officer's current claim independently to recall the case is unpersuasive given her initial lack of recollection, the reasons she now identifies for revoking bail still do not sit comfortably within ss 17-19 of the *Bail Act* and instead demonstrate that her Honour was minded to commence the custodial term immediately on entry of plea without any consideration of bail or sentence submissions.

256 It is of concern to the Conduct Division that Magistrate Burns denies that she revoked Mr G's bail on 14 December without considering bail concerns or unacceptable risks, but rather that she merely failed to record those matters orally or in writing. The Conduct Division rejects that explanation because it is not consistent with the transcript of proceedings. Although the Magistrate states that on 21 December she was apologetic and appreciative of the practitioner for highlighting the error, this is not at all reflected in the transcript of 21 December.

257 The Conduct Division finds that Mr G's appeal bail application was refused in chambers without giving the parties the opportunity to be heard. This is so notwithstanding an e-mail from Mr Marriott expressly seeking that there be an application before the Court.

258 The judicial officer contends that she erroneously considered s 73(1)(b) of the *Bail Act* in determining Mr G's application in chambers because she considered the application had no reasonable chance of success. However, the Conduct Division does not accept this explanation. The judicial officer did not identify or purport to rely upon s 73 of the *Bail Act* when given the opportunity to do so at the relevant time.

259 The Conduct Division finds that the conduct towards Mr G amounts to misconduct.

260 The Conduct Division also finds that the Magistrate's evidence in relation to Mr G, and the asserted procedure to determine appeals bail her Honour claims to have established, demonstrate incapacity on the part of the judicial officer.

261 For the reasons earlier given, the Conduct Division finds that the reliance now by the judicial officer on s 73 of the *Bail Act* to excuse her Honour's decision, at a time when any mental illness she suffered from is in remission, is evidence of current and likely future incapacity.

Conclusions of the Conduct Division about the matter of Mr I

262 On 22 February 2017, Mr I, who had received a field court attendance notice for driving with a mid-range PCA, appeared before the judicial officer. He was not on bail.

263 At 4:00pm on 22 February, Mr Marriott of the Legal Aid Commission entered a plea of guilty on Mr I's behalf and requested an adjournment so that Mr I could be referred to the traffic offender's program.

264 After a brief exchange, Magistrate Burns said to Sergeant Griffin the police prosecutor "oral detention application, thank you Sergeant". Sergeant Griffin responded "sorry your Honour?" to which Magistrate Burns replied "are you making an oral detention application Sergeant?" Sergeant Griffin then said "yes…". Magistrate Burns did not permit Mr Marriott to make any submissions before Mr I was taken into custody. Mr I was taken down to the cells.

265 After obtaining instructions from his client, Mr Marriott sought an adjournment to the following day so that Mr I could make a bail application. He also indicated that he was unsure of Magistrate Burns' power to invite a detention application. The adjournment was granted but Magistrate Burns refused Mr I bail overnight. Mr I was taken to Mid-North Coast Correctional Centre after Court on 22 February.

266 On 23 February 2017, Mr Renard appeared for Mr I. On 23 February 2017, Magistrate Burns acceded to Mr Renard's application that she should disqualify herself in Mr I's matter. Mr I's matter was transferred to DCM O'Brien who was also sitting in Port Macquarie providing relief at the time and Mr I was granted bail by O'Brien DCM.

267 The Conduct Division finds that on 22 February 2017:

(1) the judicial officer invited the police prosecutor to make an oral detention application despite neither party adverting to the prospect of detention and no notice being given to Mr I;

(2) Mr I attended Court on a field court attendance notice and pleaded guilty to a charge of drive with mid-range PCA;

(3) the judicial officer denied Mr I procedural fairness by remanding him in custody without an opportunity to make submissions;

(4) the judicial officer ought to have known to give Mr I a chance to be heard before remanding him in custody, but does not admit knowledge or wilful blindness of this fact;

(5) the judicial officer remanded Mr I in custody overnight without hearing submissions as to the lawfulness of this action, notwithstanding that Mr I's solicitor had objected to the lawfulness of the detention *per se* and the matter was adjourned to the following day;

(6) the judicial officer purported to dispense with giving notice of the detention application purportedly on the basis that there was no alternative to a full-time custodial sentence, contrary to the *Bail Act* and *Bail Regulation.*

268 The Conduct Division finds that on 22 February 2017, Sergeant Griffin believed that Magistrate Burns was requesting her to make a detention application. The Conduct Division accepts Sergeant Griffin's evidence that she had not intended to make any such application and felt that she had to make the detention application.

269 The Conduct Division finds that Mr Marriott directly challenged Magistrate Burns' legal power to do what she was doing. In response, her Honour did not check the legislation, the Bench Book or take any steps to ascertain the extent of her powers, but rather she ordered Mr I into detention and did not permit Mr Marriott to make submissions about the detention application. This is in the context where Mr G's matter, which raised questions about the Magistrate's power to take such action, had previously been dealt with.

270 The Conduct Division finds that the police (including the police prosecutor) had no concerns about Mr I being on bail. Magistrate Burns initially found that she should not excuse herself. The application for disqualification was pressed by Mr Renard and her Honour was ultimately persuaded that "a lay observer could have and may have a perception of bias or that there may be a perception of bias and under those circumstances I must disqualify myself".

271 The Conduct Division finds that the transcript of 23 February demonstrates that the judicial officer knew that she could not effect or invite detention of her own volition. Further, her Honour proceeded to identify that Mr I had been detained and a requirement for a bail application arose, notwithstanding that Mr I's representatives had not yet been heard on the question of the detention application which they had already indicated that they wished to be heard on. The Conduct Division finds that this approach was erroneous and knowingly erroneous.

272 The Conduct Division finds that the judicial officer's' reliance upon s 92 of the *Bail Act* is misconceived. The Magistrate stated in court on 23 February 2017 that the Court did not have the power to revoke bail of its own motion. Her Honour at that time made no mention of s 92 of the *Bail Act*, the provision which she now contends she believed gave her the power to remand people on bail to gaol without notice. The Conduct Division does not accept that, in February 2017, the judicial officer was relying upon s 92 of the *Bail Act*.

273 The Magistrate's misuse of detention powers in the case of Mr I demonstrates serious misbehaviour.

274 Magistrate Burns accepted in her oral evidence that when she requested that Sgt Griffin make an oral detention application she took into account Mr I's criminal history. She accepts this this was wrong, because it is not her job as a judicial officer to determine how the prosecution approach their case. Magistrate Burns accepted that her behaviour was unacceptable in the case of Mr I.

275 Mr I was in court on a field court attendance notice, and Magistrate Burns had not invited or heard any submissions as to the question of unacceptable risk. The Conduct Division finds that there was and is no evidence to indicate that there was an unacceptable risk of Mr I not appearing.

276 The Conduct Division finds that the judicial officer remanded Mr I in custody where there was no proper purpose for her to do so because he attended court pursuant to a field court attendance notice and the police prosecutor indicated that she felt she had to make an oral detention application at the request of Magistrate Burns. We reject, for the reasons given at [152]-[165], the judicial officer's evidence about the proper operation of s 92 of the *Bail Act*.

277 The concerns regarding Mr I's case unfortunately do not end there. The judicial officer made a number of notations on the bench sheet, which is the only record made by a magistrate as to his or her decision. The judicial officer has recorded her view of the discount on the plea of guilty, recorded a conviction and decided a pre-sentence report was unnecessary. She also decided on a gaol sentence (which was the maximum term) and noted the mandatory interlock periods. All of these steps were taken before hearing submissions on sentence and before eventually recusing herself and transferring the case to Deputy Chief Magistrate O'Brien, who was sitting next door. The judicial officer formed a definite view about the outcome of the case before hearing it.

278 The Conduct Division concludes that the evidence given by the judicial officer about Mr I and her present understanding of her detention powers displays a troubling and continuing lack of insight into, and understanding of, the nature and scope of her powers to detain individuals in custody of her own motion, particularly without any notice.

279 The apparent withdrawal by the judicial officer on the final day of the hearing of her earlier concession that procedural fairness was necessary before remanding a person on bail to the cells was even more troubling.

280 This evidence was given in circumstances where it is common ground that Magistrate Burns' mental illness is in remission. Her Honour was on clear notice that this topic would be examined in evidence.

281 The Conduct Division finds that the conduct towards Mr I is a serious instance of misconduct. By reason of the evidence of the judicial officer, the Conduct Division finds there is a real risk that the conduct in the matter of Mr I would be repeated by her Honour.

Conclusions of the Conduct Division about the matter of Mr J

282 Mr J was charged with five offences, including drive recklessly, furiously or at speed or manner dangerous (s 117(2) *Road Transport Act 2013*).

283 The judicial officer admits that on 22 June 2016 she imposed a custodial sentence for the offence of drive manner dangerous that exceeded (by 11 months) the relevant maximum penalty of 9 months' imprisonment. The judicial officer admits that she ought to have known that the sentence she imposed exceeded the maximum term for the offence.

284 The judicial officer states that in her "haste", she "misread the summary of driving offence sentences provided in the Bench Book" and that she "may have" mistaken the minimum disqualification period for a second offence to be the relevant penalty for a first offence. The Magistrate states that neither the prosecutor nor the solicitor appearing for Mr J notified her of her error "which would have been immediately corrected".

285 The Conduct Division finds that this matter demonstrates incapacity by imposing a sentence that exceeded the maximum penalty for the relevant offence.

Conclusions of the Conduct Division about the matter of Mr K

286 Mr K was charged with fourteen offences, including trespass, stealing, assault police/resist arrest, possess prohibited drugs and goods in custody.

287 Notwithstanding Mr K's guilty plea, and despite stating that she had applied a discount of 25 per cent, the judicial officer imposed a custodial sentence for the offence of goods in custody that exceeded the maximum penalty of 6 months' imprisonment (*Crimes Act 1900* (NSW) s 527C(1)(b)). The Magistrate admits that she ought to have known that the sentence she imposed exceeded the maximum term for the offence. She states that she "honestly but incorrectly believed the maximum sentence for goods in custody was 12 months".

288 The judicial officer then refused Mr K's application for appeals bail in chambers rather than in open court without notifying the parties that this would be done. The Magistrate admits that she denied Mr K procedural fairness by refusing his application for appeals bail in those circumstances and without providing the parties with an opportunity to be heard. The Magistrate admits that she ought to have known that she ought to have given Mr K an opportunity to be heard before refusing appeals bail.

289 The judicial officer denied Mr K procedural fairness when refusing his application for appeals bail.

290 The judicial officer knew that she ought to have given Mr K an opportunity to be heard before refusing appeals bail.

291 The judicial officer failed to comply with the requirements of the *Bail Act*. The Conduct Division also finds that the Magistrate failed to record written reasons for refusing appeals bail to Mr K.

292 The Conduct Division finds that the judicial officer's actions in the matter of Mr K demonstrate proved misbehaviour and incapacity. They show a failure to accord basic procedural fairness to accused persons.

293 The Conduct Division finds that the instances of misbehaviour in the matter of Mr K underscore the gravity of the failures that are identified in the particulars

of the Complaint and the importance of the maintenance of the standards of judicial conduct.

Conclusions of the Conduct Division about the matter of Mr L

294 Mr L received a court attendance notice for one offence, of unlawfully obtained goods in custody (s 527C(1)(a) *Crimes Act 1900*).

295 Notwithstanding Mr L's guilty plea, and his tragic subjective circumstances, the judicial officer purported to impose a 12 months' suspended sentence for the offence of goods in custody in circumstances where the maximum term is 6 months (*Crimes Act 1900* (NSW) s 527C(1)(b)).

296 The Magistrate admits, and the Conduct Division finds, that on 10 October 2016, her Honour purported to impose a 12 months' suspended sentence for the offence of goods in custody in circumstances where:

(a) the maximum term is 6 months; and

(b) Mr L pleaded guilty to one count of unlawfully obtained goods in custody, namely a bicycle.

297 The judicial officer stated that "[t]o save Court time, I had relied on my memory for the sentence for goods in custody" and had "incorrectly remembered it as 12 months rather than the correct 6 months".

298 The judicial officer admits that she failed to record any reasons for declining to impose a lesser penalty on account of Mr L's early plea of guilty, contrary to s 22(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW). She also acknowledges that she failed to apply the appropriate discount on sentence for the early plea, and apologises for her error. The Magistrate "do[es] not know why" she failed to apply that discount.

299 The Conduct Division finds this aspect of the Complaint sustained. It demonstrates incapacity in imposing sentences that exceeded the maximum penalty for the relevant offence.

Conclusions of the Conduct Division about the matter of Ms M

300 Ms M received a court attendance notice regarding two counts of cultivating a prohibited plant (s 23(1)(a) *Drug Misuse and Trafficking Act*).

301 The judicial officer imposed a good behaviour bond for a period that exceeded the maximum allowable term of 2 years for such a bond (*Crimes (Sentencing Procedure) Act 1999* (NSW) s 10(1)(b)).

302 The judicial officer admits and the Conduct Division finds that on 7 December 2016 she imposed a good behaviour bond for a period that exceeded (by one year) the maximum allowable term of 2 years for such a bond in circumstances where Ms M pleaded guilty to one count of cultivate prohibited plant.

303 The Magistrate admits she ought to have known that the sentence she imposed exceeded the maximum allowable term for such a bond. She has "no explanation of why [she] imposed three years and this was clearly an error".

304 The Conduct Division finds this aspect of the Complaint sustained. It demonstrates incapacity in imposing sentences that exceeded the maximum penalty for the relevant offence.

Conclusions of the Conduct Division about the matter of Mr N

305 Mr N's situation was a somewhat complicated one. In mid-July 2016 he had 15 charges pending before the Port Macquarie Local Court. In most of the matters he had entered pleas of guilty and those matters were adjourned for sentence on 30 September 2016. Bail was refused.

306 Mr N was charged with numerous offences. The Complaint, as it relates to Mr N, is that the judicial officer by her conduct of the hearing on 20 October 2016 gave the appearance of suggesting to Mr N that conditional bail to attend The Glen Rehabilitation Centre would be granted if Mr N changed his plea to guilty, in circumstances where it was apparent to the judicial officer and to Mr N that a bed was available at The Glen but that that bed would likely only remain available for a short period of time.

307 In relation to two charges of "stalk and intimidate" and two counts of "common assault", Mr N had pleaded not guilty, and those cases were listed for a defended hearing on 14 November 2016, bail refused.

308 The evidence demonstrates that on the 30 September 2016, that is, the day he was due to be sentenced for most matters, it was apparent that Mr N could attend the residential rehabilitation centre known as "The Glen" before being sentenced.

309 The judicial officer granted Mr N conditional bail on that day, with provisions which would allow him to take up the opportunity of a bed at The Glen as soon as one became available. Those charges were all adjourned for one year for sentence under s 11 of the *Crimes (Sentencing Procedure) Act 1999*.

310 A complicating factor arose on 20 October 2016. The parties and the Court became aware of a bed becoming available at The Glen, but Mr N was still bail refused in relation to the defended cases referred to above. Those cases were still listed for hearing on 14 November 2016. Mr N in those circumstances could not be released on the bail granted in the sentencing cases to take up that opportunity.

311 Ms Karim of the Legal Aid Commission appeared on behalf of Mr N on 20 October 2016, and sought to ensure Mr N's availability to take up the bed in either of two ways:

(1) have his bail varied in relation to the defended cases, so he could be allowed to leave The Glen for the purpose of attending court on 14th November; or

(2) for the defended hearing date to be vacated, and the matters listed on a later date.

312 The complaint regarding Mr N's matter is that the judicial officer, by her conduct of the hearing on 20 October 2016, gave the appearance of suggesting to Mr N that conditional bail to attend The Glen would be granted if Mr N changed his plea to guilty in the defended cases. This occurred in circumstances where it was apparent to the judicial officer, and to Mr N, that a bed was available at The Glen, but that that bed would only remain available for a very short period of time.

313 Ms Karim, during three appearances via video link on 20 October 2016, sought bail for Mr N to be allowed to go to The Glen. Bail remained refused, so after that first option had been canvassed and denied, Ms Karim sought to have the hearing vacated. The judicial officer was not inclined to that course either, so Ms Karim asked for the matter to be adjourned to the next day to allow her to get instructions as to whether the pleas of not guilty were going to be maintained.

314 Ms Le of the Legal Aid Commission attended court on behalf of Mr N on 21 October 2016. Ms Le spoke to Mr N before court and provided him with some legal advice. When she was speaking to him about his options, nothing Mr N said satisfied her that he was admitting the elements of the offence. It was Ms Le's view that Mr N intended to enter pleas of guilty because he felt pressured to do so, and understood it was the only way to ensure he obtained a bed at The Glen.

315 Ms Le sought and obtained leave to withdraw from the matter because she had formed the view that his guilty pleas did not reflect a genuine consciousness of guilt. Mr N entered pleas of guilty to the charges himself:

"I'd like to plead guilty so I can get myself to rehab as soon as possible, if that would be okay". The judicial officer then went through each of the charges, and Mr N entered pleas of guilty to each. The prosecutor then immediately tendered the facts and criminal record, and the judicial officer, without any submissions or preamble, adjourned the cases for approximately 11 months to 29 September 2017, which of course was the same date selected for the earlier cases. A s 11 bond, in identical terms, was ordered. The effect of these orders was to allow Mr N to take up the bed at The Glen.

316 The judicial officer contends that she dealt with Mr N "in the honest belief that he had determined freely, with advice from his solicitors, that he wished to plead guilty", despite Legal Aid indicating that it no longer had instructions to appear and therefore seeking and obtaining leave to withdraw from the matter, and notwithstanding Mr N's statement to the judicial officer that "I'd like to plead guilty so I can get myself to rehab as soon as possible, if that would be okay".

317 The judicial officer gave evidence that she did not, by her conduct of the hearing on 20 October, give the appearance of suggesting to Mr N that conditional bail to attend The Glen would be granted if he changed his plea to guilty.

318 The judicial officer was aware on 20 October that there was a bed available to Mr N at The Glen, and that she was aware it was only available for a limited time. The judicial officer gave evidence that she was aware Mr N had been on a waiting list, but said that the idea that it would be significant to Mr N to get off the waiting list and have access to the rehabilitation facility was "a matter for him".

319 The judicial officer gave evidence that when she said "why is he going to rehab now when those matters are still defended?" she was not intending to convey an impression that the opportunity for Mr N to go to rehab depended upon him pleading guilty to the defended matters. The judicial officer gave evidence that she was simply asking the status of those charges. The judicial

officer further stated that it was inappropriate to send people to rehabilitation facilities as these were show-cause matters, and there had to be a release application and satisfaction of the show-cause requirements if the matters were still to be defended.

320 The judicial officer gave evidence that it was not apparent to her when she accepted a plea of guilty that Mr N was pleading guilty only to obtain bail and to secure his place at The Glen.

321 The Conduct Division is satisfied that the judicial officer was clearly of the view that interrupting Mr N's treatment to attend a defended court case was not a good idea. Indeed, the fact that The Glen was prepared to allow Mr N to interrupt his treatment to attend to the defended cases does not necessarily mean that it is in fact a good plan. There are a number of obvious potential pitfalls. It can be assumed that Mr N would be distracted from focussing on his recovery by the outstanding court case. Defended hearings are inherently stressful, and, if found guilty, he may not be at liberty to return to treatment, hence treatment resources would have been wasted, or at least diminished in their effectiveness.

322 The Complaint in relation to Mr N centres on the incorrect and improper application of the *Bail Act*. As counsel assisting rightly points out, as to the statutory considerations to be taken into account on the question of bail, there can be no dispute that the only change in circumstances between 20 and 21 October was that pleas of guilty were entered.

323 The Conduct Division finds that the judicial officer could have formed the legitimate view that any question of attending residential rehabilitation should be deferred until after any contested hearings had been completed.

324 The Conduct Division also finds that the judicial officer was acting appropriately in refusing to delay the hearing of the defended matters.

325 The Conduct Division finds that it is quite clear from the evidence and the transcript, and would have been quite clear to the judicial officer at the time of the hearing, that Mr N was pleading guilty to gain access to his rehabilitation opportunity. The judicial officer should not have allowed the issue of the plea to become the gateway to a place in rehabilitation and the judicial officer should not have misused the statutory requirements of the *Bail Act* as she did.

326 It is the view of the Conduct Division that the case of Mr N was handled poorly by the judicial officer. The multitude of offences, dates and issues complicated the matter for all concerned, and sensible reasons can be found (although not from her Honour's evidence) for the outcome achieved. While her Honour's handling of the matter reflects poorly on her capacity to deal fairly with a fundamental issue concerning the entry of a plea of guilty, the Conduct Division is not persuaded to the *Briginshaw* standard that this aspect of the Complaint is sustained. The particulars of the Complaint which relate to Mr N must be dismissed.

Conclusions of the Conduct Division about the matter of Mr O

327 On 9 November 2016, Mr O appeared before the judicial officer and entered guilty pleas in relation to two charges of contravene prohibition/restriction in AVO (domestic).

328 As at 9 November 2016, Mr O had other charges listed for hearing in May 2017 in respect of which he had pleaded not guilty and been granted conditional bail on 11 October 2016.

329 The judicial officer adjourned the sentencing hearing until 2 June 2017, notwithstanding that Mr O was in custody and that this could lead to him remaining in custody for a further seven months, and despite Mr O's legal representative requesting that the two fresh charges be finally determined as it would be a disproportionate outcome for Mr O to remain in custody for such a lengthy period.

330 Mr O's representative stated in Court that "your Honour also indicated that...your Honour would not be entertaining a release application" and the Magistrate did not take any steps to correct this or to indicate that she would be prepared to entertain a release application. The Conduct Division finds that the judicial officer made it clear that a release application would not be entertained.

331 Mr O had never before been in custody and had no criminal history apart from convictions on 15 November 2007 for "never licenced drive on road first offence" and "mid-range PCA" for which he was fined $600.

332 The judicial officer gave evidence that her Honour "agree[s] the adjournment period being bail refused was disproportionate to the matters for sentence".

333 Mr O's lawyer renewed his application for the judicial officer to finalise the fresh matters and then made an application for her Honour to disqualify herself for apprehended bias. The judicial officer adjourned all matters to 2 June 2017 and declined to disqualify herself for apprehended bias.

334 The judicial officer admitted the matters above. Her Honour also stated, however, that while she agreed the adjournment period being bail refused was disproportionate, the factual matter remained that the defendant was bail refused on the hearing matters and would remain in custody on those until the hearing, and this hearing was listed for the first available opportunity in the diary.

335 On 31 January 2017, Mr O was granted Supreme Court bail by Justice Adams.

336 The Conduct Division finds the Complaint in respect of Mr O sustained. It was a demonstration of serious incapacity for her Honour to conclude that the appropriate course was not to deal immediately with the pleas of guilty. This ensured that the offender remained in custody bail refused until the hearing of defended matters in respect of which he had already been granted bail.

337 It was misconduct for her Honour to take that course whilst refusing to entertain a release application on behalf of Mr O.

Conclusions of the Conduct Division about the matter of Mr P

338 Mr P received a future court attendance notice for a mid-range PCA under s 110(4)(A) of the *Road Transport Act 2013* (NSW).

339 This aspect of the Complaint was that the judicial officer by her conduct of the hearing on 24 August 2016 gave the appearance of suggesting to the police prosecutor that further charges ought to be laid against Mr P.

340 The transcript of 24 August 2016 relevantly records the following:

> "HER HONOUR: Are the charges laid sergeant?
>
> MARRIOTT: Pardon your Honour?
>
> HER HONOUR: I'm talking to sergeant.
>
> MARRIOTT: Sorry.
>
> HER HONOUR: Are there other charges pending and if not –
>
> PROSECUTOR: No, your Honour.
>
> HER HONOUR: --why not?
>
> PROSECUTOR: Your Honour, in relation to this there's no further charges pending because it was a one vehicle accident and the accused received all the injuries to himself.
>
> HER HONOUR: Through sheer luck.
>
> ...
>
> PROSECUTOR: Yes. Your Honour, unfortunately I hear what you're saying, I can't make that decision today. I have to send it off to Sydney for consideration of the facts that you've read. It might be appropriate to order a PSR for Mr [P] and during that time I can refer the matter to Sydney."

341 The transcript of the matter's re-listing, on 5 October 2016, relevantly records:

> "PROSECUTOR: So your Honour the last time this was in sentence on 24/08 you asked me to refer it to Sydney for consideration of further offences and

has come back as we're proceeding with these charges and these charges alone."

342 There is a significant problem with the judicial officer's response to this aspect of the Complaint. Initially, in her response to the Judicial Commission dated 6 October 2017, concerning the original complaint against her, the Magistrate characterised her conduct in the matter of Mr P as "entirely appropriate having regard to the factual circumstances that she was presented with". In her statement of 27 August 2018, the judicial officer stated that she did not intend to place any pressure upon the prosecution to take any action but "can see how that may clearly have been perceived" and that she "did improperly allow for an adjournment without request, to enable the prosecution to consider if they wished to lay further charges…I should not have done so and I apologise for so doing".

343 The Conduct Division finds that the judicial officer encouraged and sought to influence the police prosecutor to cause further criminal charges to be laid against Mr P.

344 The Conduct Division finds it is clear from the transcript that, even though the judicial officer does not admit that she intended to give the appearance of suggesting that additional charges ought to be laid, this has been proved. The judicial officer's failure to correct the record, when the police prosecutor indicated that he believed she had asked him to consider laying further charges, indicates clearly that her Honour was seeking to have further charges laid.

345 The Conduct Division finds that the judicial officer's actions in seeking to influence the police prosecutor to take steps to cause further criminal charges to be laid warrants characterisation as a particularly serious demonstration of misbehaviour.

346 It is fundamental to the role of a judicial officer that the officer be both independent and impartial. The Conduct Division accepts the evidence of Deputy Chief Magistrate Mottley that, during the pre-Bench training program,

it was emphasised to the judicial officer that it is never appropriate for a magistrate to urge the prosecutor to lay a different charge because that is not the role of the judicial officer.

347 The Conduct Division finds the Complaint as it relates to Mr P is sustained. The behaviour demonstrates both misconduct and incapacity. The judicial officer's pre-Bench training in February 2015 placed emphasis on the importance of the independent and impartial role of judicial officers, and that this message was repeated at the Magistrate's Orientation Program in December 2015. The Conduct Division finds that the judicial officer was aware of this in any event.

Conclusions of the Conduct Division about the matter of Ms Q

348 Ms Q received a field court attendance notice for driving with a mid-range PCA on 16 November 2016, and for three additional offences (negligent driving and two fail to stop and exchange particulars relating to two vehicles) on 22 December 2016.

349 The Complaint in this respect alleged that the judicial officer improperly sought to influence the police prosecutor to take steps to cause further charges to be laid against Ms Q.

350 The judicial officer admits that on 14 December 2016:

(1) Ms Q's solicitor entered a plea of guilty to one count of drive with middle range PCA (second offence) and requested a pre-sentence report;

(2) the judicial officer asked the police prosecutor why there was only one offence; and

(3) the judicial officer adjourned the matter until 21 December 2016 for further charges to be laid against Ms Q.

351 The judicial officer does not admit that she told the police prosecutor (as distinct from Ms Q's solicitor) that further charges must be laid, notwithstanding the following passage from the transcript of 14 December 2016:

> "HER HONOUR: I will adjourn this matter to when those charges can be laid.
>
> PROSECUTOR: This can be adjourned to next Wednesday.
>
> MARRIOT: So any potential pre-sentence report would not be initiated until the full ambit –
>
> HER HONOUR: It's not appropriate for me to order that before the – *there must be other charges laid*, she's hit two other motor vehicles and then removed herself from the scene." (italics added)

352 The judicial officer admits that she should not have said the italicised words and that such a comment "could be construed as seeking to influence the prosecutor". The Magistrate "fully acknowledge[s]...an observer of the Court could have thought I was indeed placing pressure on the prosecution" and accepts that this behaviour was improper.

353 The judicial officer gave evidence that she asked the question "why is there only one offence, Sergeant?" in relation to Ms Q. The judicial officer gave evidence that she was frustrated and confused as to how there could only be one PCA charge given all the other events on the facts sheets. The judicial officer also stated that she was frustrated as she was trying to get through the lists as it was a week before Christmas and she was busy.

354 The Conduct Division finds that, in the matter of Ms Q, the judicial officer encouraged, invited or otherwise sought to influence the police prosecutor to cause further criminal charges to be laid against the accused.

355 The Conduct Division finds that the judicial officer was telling the police prosecutor that further charges should be laid, illustrated by two transcript statements:

(1) "there must be other charges laid, she's hit two other motor vehicles and then removed herself from the scene"; and

(2) when told by the police prosecutor that further charges had not been laid responded "it certainly should be done".

356 The Conduct Division finds that the judicial officer's conduct in seeking to influence the police prosecutor to take steps to cause further criminal charges to be laid was a demonstration of serious misbehaviour.

357 In the matter of Ms Q, Sergeant France formed the view that the judicial officer would not deal with the matters until consideration was given to a "more serious" charge or until "further charges had been laid". After the judicial officer adjourned the matter for further charges to be laid, Ms Q was charged with three fresh offences by the police.

358 The judicial officer's language in the matter of Ms Q could not be characterised as accidental, unwitting or equivocal so as to support her Honour's denial of aspects of this allegation. To the contrary, the transcript and audio recording of the proceedings reveal a deliberate and unequivocal series of exchanges in which interventions by her Honour were plainly designed to influence the police prosecutor to take steps to cause further criminal charges to be laid, as in fact ultimately happened.

359 This aspect of the Complaint is sustained and demonstrates both misconduct and incapacity.

Conclusions of the Conduct Division about the matter of Mr R

360 The Complaint as far as it relates to Mr R was that on 31 August 2016 the judicial officer improperly sought to influence the police prosecutor to take steps to cause further charges to be laid against Mr R.

361 The judicial officer admits that:

(1) Mr R's solicitor entered a guilty plea to one count of common assault, for which the police had granted Mr R conditional bail;

(2) the judicial officer asked the prosecutor why there was only an assault charge, indicated she would stand the matter down and stated that the prosecutor should speak to the officer in charge; and

(3) upon being informed the prosecutor would make those inquiries, the judicial officer stated that "I'm saying that a charge of assault is absolutely inappropriate given the facts sheets, should be two charges and it should be assault occasioning" and "there should be a stalk/ intimidate".

362 The judicial officer accepts that she behaved inappropriately and should not have questioned the police prosecutor as to other charges available on the facts. She should not have suggested the additional and alternate charges, and should not have stood the matter down.

363 While the judicial officer denies intending to influence the police prosecutor, the Conduct Division finds that the evidence is inconsistent with any suggestion the judicial officer was not seeking to influence charging decisions.

364 Despite the training the judicial officer received about the fundamental issue of impartiality, the judicial officer indicated that she would stand the matter down so that the prosecutor could "have a chat to the [officer-in-charge]" and then told the prosecutor that there should be additional and more serious charges laid.

365 The judicial officer accepts the impression conveyed by her words namely, "I can clearly see that a person sitting in the Court could have come to the conclusion that I was trying to influence the prosecutors" but denied intention to influence. In the next passage of her evidence, however, the judicial officer clearly admitted and conveyed her frustration with the inadequacy of the

charges. That evidence contradicts the suggestion the judicial officer was not seeking to influence police charging decisions.

366 The Conduct Division finds that the judicial officer's conduct in seeking to influence police prosecutors to lay additional charges against Mr R was deliberate and indicates both serious misbehaviour and incapacity.

367 The Complaint in this respect is sustained. Her Honour's conduct was fundamentally inconsistent with the role of a judicial officer.

Additional findings of the Conduct Division about knowledge and wilful blindness

368 Having made findings about each aspect of the particularised Complaint and having found, with the exception of Mr N, the Complaint sustained, it is necessary to make specific findings about the remaining disputed issues relating to knowledge, in particular, knowledge of the requirements of procedural fairness and knowledge that contested bail hearings should be conducted in open court.[2]

369 The judicial officer does not dispute that she had actual knowledge of the requirements of procedural fairness at all times when acting as a Local Court Magistrate. Her Honour accepts that she was aware that it was important to accord procedural fairness at all times to the people who appeared before her.

370 The Conduct Division finds that the requirements of procedural fairness were something that her Honour was aware of, in the sense that she had actual knowledge of the requirements, throughout the period to which the particulars of Complaint relate. To the extent that it has not already been made clear, the Conduct Division finds that the judicial officer had actual knowledge at all times that she ought to hear from an accused person or from his or her legal representative before remanding that person in custody.

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[2] See the allegations in paragraphs [5], [11], [14], [18], [22], [26], [30], [33], [37], [40], [43], [47] and [55] of the Complaint.

371 The Guide to Judicial Conduct emphasises the central role of impartiality, judicial independence, integrity and personal behaviour, with the "indicia" of impartiality being "to be fair and even-handed, to be patient and attentive, and to avoid stepping into the arena or appearing to take sides". The Guide sets out the principle that judges should "always take care that their conduct, official or private, does not undermine their institutional or individual independence, or the public appearance of independence". A judge must "above all" be "even-handed in the conduct of the trial" which involves "observance of the principles of natural justice".

372 On a number of occasions the judicial officer gave evidence that procedural fairness, or the importance of impartiality, or some particular limit on her powers, or the need to consider individual circumstances, did not "consciously cross her mind", or that such requirements did not enter into her "consciousness and ... thought process".

373 The Conduct Division gives little weight to these explanations, given in hindsight, for the following reasons. First, the judicial officer's ability to recollect her thought processes accurately after the time which has elapsed is doubtful. Secondly, such explanations appear to be a reconstruction of events which seek to explain her conduct. Many of those explanations differ in significant respects from the initial account given to the Judicial Commission. Thirdly, in circumstances where the judicial officer has accepted that she was aware of these central components of being a judicial officer, an assertion that on a particular occasion that central feature of her judicial office did not enter her conscious thought process is no answer to the particularised allegations of actual knowledge of the requirements of procedural fairness.

374 The judicial officer was well aware of procedural fairness, the source and limits of her powers, the importance of being sure as to the ambit of her power and the importance of judicial impartiality and the appearance of such impartiality. She knew that she needed to give those matters active consideration in every matter before her. An assertion that she gave no active consideration to those matters in any case of itself does not mean that

she did not have actual knowledge that she must afford litigants before her procedural fairness.

375 The judicial officer's evidence that she "forgot to look at" procedural fairness when determining applications for appeals bail in chambers or "did not put [her] mind" to it or that procedural fairness did not "specifically come through [her] consciousness" does not amount to a lack of *actual knowledge* that she ought to have accorded procedural fairness to the individual accused affected by her appeals bail practice; rather, that evidence indicates at its highest that her Honour did not consciously turn her mind to the actual knowledge she had from her long legal career, her time in Local Courts, her pre-Bench and other professional development training and her experience as a Magistrate.

376 In each of the cases particularised in the Complaint there was either an express request (in the matters of Mr D, Mr E, Mr F and Mr G) and/or an allocation of an appeals bail hearing (in the cases of Mr C, Mr D, Mr E, Mr F and Mr G). The request for, or allocation of, a hearing provided clear evidence to the judicial officer that the accused in each of those proceedings sought an opportunity to be heard in relation to the application for appeals bail.

377 The judicial officer accepts that she knew throughout the relevant period that a decision to refuse bail was a decision that affected the rights of the accused. She does not "dispute in any way" DCM Mottley's evidence that she was told during pre-Bench training that "every judicial decision needs to be made in court and on the record while administrative decisions may be made in chambers".

378 The Conduct Division does not accept the judicial officer's evidence that she was unaware that there had been a request for a bail hearing in the cases of Mr D, Mr E, Mr F and Mr G when she was in possession of the court file and each file contained clear written requests for a bail hearing. In Mr E's case the request for a bail hearing is recorded close to her Honour's signature.

379 While the judicial officer now seeks to rely upon s 73 of the *Bail Act* as her basis to refuse contested appeals bail applications in chambers in 2016 and 2017, her Honour did not identify s 73 of the *Bail Act* (or any other source of power) when challenged about the existence of her power to deny a hearing in appeals bail matters in February 2017.

380 Registrar Langstaff's account of his conversation with Magistrate Burns after the e-mail query from Ms Crofts makes clear that the Magistrate made no reference to s 73 of the *Bail Act* but instead requested him to ask Ms Crofts why the Magistrate could not determine appeals bail matters in chambers. The judicial officer did not dispute the content of the conversation with Mr Langstaff in her oral evidence. The Conduct Division finds that if her Honour was relying on s 73 she would have said so to Mr Langstaff when her power was queried and she would have directed him to respond to Ms Crofts accordingly.

381 That failure to refer to s 73 in the e-mail to Ms Crofts leads the Conduct Division to reject Magistrate Burns' contention that she relied upon s 73 as at the time of her adoption and implementation of her practice of determining appeals bail applications in chambers from at least September 2016 to February 2017.

382 In any event, s 73 of the *Bail Act* does not permit a bail application to be determined in chambers without providing a party with the opportunity to be heard. The Magistrate had re-read the *Bail Act* after the events of Mr G and knew that she was acting outside her statutory power.

The Conduct Division is not of the opinion that the Complaint should be summarily dismissed

383 Section 26(1) of the Act provides that "the Conduct Division shall dismiss a complaint to the extent that the Division is of the opinion that ... the complaint should be dismissed on any of the grounds on which the Commission may summarily dismiss complaints".

384 The Conduct Division is not of that opinion.

385 Section 20 of the Act provides the "grounds on which the Commission may summarily dismiss complaints". It states:

> "**20 Summary dismissal of complaints**
> (1) The Commission shall summarily dismiss the complaint if it is of the opinion that, whether or not it appears to be substantiated:
> (a) the complaint is one that it is required not to deal with,
> (b) the complaint is frivolous, vexatious or not in good faith,
> (c) the subject-matter of the complaint is trivial,
> (d) the matter complained about occurred at too remote a time to justify further consideration,
> (e) in relation to the matter complained about, there is or was available a satisfactory means of redress or of dealing with the complaint or the subject-matter of the complaint,
> (f) without limiting paragraph (e), the complaint relates to the exercise of a judicial or other function that is or was subject to adequate appeal or review rights,
> (g) the person complained about is no longer a judicial officer, or
> (h) having regard to all the circumstances of the case, further consideration of the complaint would be or is unnecessary or unjustifiable.
> (2) In deciding whether or not to summarily dismiss a complaint, the Commission may have regard to such matters as it thinks fit."

386 In their oral closing submissions, counsel for the Magistrate submitted that:

> "All of these matters which are the subject of complaint here relate to what is said to be the exercise of a judicial or other function that is or was subject to adequate appeal or review rights, which in some circumstances were exercised."

> "The magistrate made errors. Yes, she did. The magistrate did not wilfully, nor was she wilfully blind in relation to the making of those errors, but if it is to be suggested that this is the benchmark to establish judicial misbehaviour in this State, then it in effect turns the legislation on its head in terms of the express section 20 subsection (1)(f) provision, and it potentially puts judicial officers who are just getting the law wrong, some continuously, as meeting the test of judicial misbehaviour. That's not what this legislation was directed to. That's why we have appeal courts. That's why we have the supervisory jurisdiction of courts."

> "The conclusion of this matter is that we say that you ought either find that each of the complaints fall within the terms of section 20(1) of the Act in that each of the complaints related to the purported exercise of judicial power with such power amenable to redress via the exercise that should be of appeal or review rights in 31.1."

387 In the opinion of the Conduct Division, in no relevant respect does the Complaint raise an issue "that is or was subject to adequate appeal or review rights". The Conduct Division is not of the opinion that there "is or was available a satisfactory means of redress or of dealing with the complaint or the subject-matter of the complaint". Senior Counsel for the judicial officer did not explain in any detail how it was said that any aspect of the Complaint could be dealt with by "satisfactory means of redress or of dealing with the complaint or the subject-matter of the complaint" or "was subject to adequate appeal or review rights". The only submission which was developed was that the conduct comprising the Complaint could be characterised as amounting to jurisdictional error, amenable to correction by a court exercising supervisory jurisdiction. That characterisation is not a fair or complete analysis of the conduct the subject of the Complaint. A characterisation of the conduct of inviting additional charges or detaining people without lawful authority as amounting merely to jurisdictional error is seriously to understate the gravamen of the Complaint.

388 The Conduct Division is not of the opinion required by s 20 of the Act. The Complaint raises issues that go to the heart of the judicial function. The Conduct Division is of the opinion that the procedure identified by the Act for the making and determination of complaints about a judicial officer is engaged, in whole, by the Complaint here. It is not of the opinion required by s 20(1) of the Act.

The Conduct Division is not of the opinion that a referral back to the head of jurisdiction should be made

389 Where the Conduct Division finds that a complaint is wholly or partly substantiated, but forms the opinion that (notwithstanding that the complaint is substantiated) the matter does not justify parliamentary consideration of the removal of the judicial officer from office, and should therefore be referred back to the relevant head of jurisdiction, it must send a report to that person, setting out its conclusions, which may include recommendations as to what steps might be taken to deal with the complaint. This is the principal course

that Senior Counsel for the judicial officer submits the Conduct Division should adopt.

390 The principal submission by Senior Counsel for the judicial officer was that the Conduct Division should determine that the matter does not justify parliamentary consideration of the removal of the judicial officer and should therefore be referred back to the relevant head of jurisdiction under s 28 of the Act.

391 The Conduct Division is not of that opinion. Our reasons are as follows.

392 The Complaint which has been sustained raises issues that go to the heart of the judicial function. Critical to the judicial function are the interrelated issues of procedural fairness and keeping the balance between the parties, which in a criminal case in the Local Court is between the police and the accused. In the respects in which the Complaint has been sustained, the judicial officer has been found to have engaged in misconduct and to have demonstrated present and likely future incapacity properly to perform all of the central tasks of a judicial officer. This is not a matter where the judicial officer's mental illness provides the sole or predominant explanation for the proven incapacity.

393 The findings the Conduct Division has made, which we have set out in detail above, have led the Conduct Division to form an opinion that the matter *could* justify parliamentary consideration of the removal of the judicial officer complained about from office.

394 Unlike an employee in a typical workplace, a judicial officer occupies a special place in our system of justice. That is because of the central importance of the principle of judicial independence. A referral of the judicial officer to the Chief Magistrate, accepting all undertakings offered by the judicial officer to attend on a continuing basis to her mental health problems, does not and could not adequately address the issues examined in this report and which have been the subject of our findings.

395 The job of a judicial officer cannot be supervised in any meaningful way consistent with judicial independence. A more senior magistrate, even the Chief Magistrate, cannot determine the appropriateness or otherwise of decisions made by another member of the Local Court or give directions about how that judicial function is to be exercised.

396 The jealous protection of judicial independence is a key factor at the heart of the complaint mechanism provided by the Act. As we have explained, the detailed processes through which a complaint must pass before it may be considered as one which could justify parliamentary consideration of the removal of the judicial officer from office is protective of that principle of judicial independence.

397 The corollary, protection of the public from misbehaviour by a judicial officer or incapacity on the part of judicial officers, is also provided for by the complaint mechanism in the Act.

398 In the opinion of the Conduct Division, no amount of additional training or assistance would be sufficient to eliminate the real risk in the future of misconduct of the kind demonstrated in the present case and the likely future incapacity properly to perform all of the central tasks of a judicial officer.

399 The findings of misconduct and incapacity, together with the evidence of the judicial officer about critical issues, given at a time when her Honour's mental illness was in remission, leads the Conduct Division to conclude that this matter could justify parliamentary consideration of the removal of the judicial officer from office. Accordingly, the Conduct Division does not propose to refer the matter back to the Chief Magistrate.

The matter could justify parliamentary consideration of the removal of the judicial officer complained about from office in accordance with ss 28 and 29 of the Act

400 The Conduct Division is of the opinion that, on the basis of either or both of proved misbehaviour or incapacity, the matter could justify parliamentary

consideration of the removal of the judicial officer complained about from office.

401 The Conduct Division finds that, on the basis of the facts it has found and the conclusions it has reached in this report, the circumstances are capable of establishing misbehaviour and incapacity warranting or justifying removal the judicial officer from office.

402 The matters in the Complaint which have been sustained are properly characterised, both individually and cumulatively, as "misbehaviour". A finding as to past misbehaviour is capable of providing a proper basis for the formation of an opinion that the matter could justify parliamentary consideration of the removal of the judicial officer from office: *Bruce v Cole* at 175G (per Spigelman CJ).

Misuse of detention powers: matters of Mr A, Mr B, Mr G and Mr I

403 The Conduct Division finds that in the matters of Messrs A, B, G and I the judicial officer's conduct displayed a clear and serious disregard for the limits and purpose of detention powers. Her Honour's conduct demonstrates both misbehaviour and incapacity.

404 Her Honour's conduct in remanding persons in custody of her own motion when she had no power or proper purpose to do so (in the matters of Mr A and Mr B) and in encouraging or inviting oral detention applications where neither party had adverted to the prospect of detention and where the accused was not provided with an opportunity to make submissions (in the matters of Mr G and Mr I) demonstrates both misbehaviour and incapacity.

405 In the matter of Mr A, it is of considerable concern that the judicial officer gave evidence, at a time when her mental illness was in remission, which suggested that she considered that it would be an appropriate exercise of power to detain Mr A without hearing a detention application if Mr A had attended court on bail rather than a field court attendance notice.

406 The Conduct Division also finds that the Magistrate's evidence in relation to Mr A, and the asserted proper basis for detaining Mr A in custody to "reinforce" the gravity of his offending, demonstrates current and likely future incapacity on the part of the judicial officer.

407 In the matter of Mr B, the judicial officer's conduct demonstrates both misbehaviour and incapacity in that she detained Mr B in custody for the purpose of conveying to him the seriousness of his conduct and then informed the legal representatives "off the record" that she intended to "scare" Mr B.

408 The Conduct Division finds that the judicial officer's account given in evidence before us at a time when her illness was in remission, namely that she detained Mr B in custody on an interim basis for the purpose of conveying to him the gravity of his criminal conduct, is an improper purpose for remanding an accused in custody.

409 In respect of each of Mr A, Mr B, Mr G and Mr I, the judicial officer's conduct is properly characterised as an abuse of power. There was no lawful basis for remanding each person in custody prior to or during the submissions of their respective representatives.

410 For the reasons we have given, the Conduct Division has concluded that the judicial officer suffers from a current and likely future incapacity. Although the mental illness the judicial officer suffers from is in remission, her Honour's evidence to the Conduct Division demonstrates current and likely future incapacity.

411 Regrettably, the Conduct Division has come to the view that it is not able to accept the evidence of her Honour that she was relying on s 92 of the *Bail Act* when she detained Mr A, Mr B, Mr G and Mr I. This is for the reasons stated at [152]-[157].

412 The Conduct Division also finds that remanding a person on bail into a gaol cell not as part of any sentence but because of their "demeanour" is

significant misconduct, particularly where such action is taken without providing any opportunity for the person or their lawyer to address the judicial officer on the alleged offending demeanour.

Seeking to improperly influence police prosecutors: matters of Mr P, Ms Q and Mr R

413 The judicial officer's conduct in seeking to influence police prosecutors to lay additional charges against Mr P, Ms Q and Mr R demonstrates misbehaviour and incapacity.

414 This conduct strikes at the heart of judicial independence.

415 It is fundamental to the role of a judicial officer that the officer be both independent and impartial. The Conduct Division accepts the evidence of Deputy Chief Magistrate Mottley that, during the pre-Bench training program, it was emphasised to the judicial officer that it is never appropriate for a magistrate to urge the prosecutor to lay a different charge because that is not the role of the judicial officer.

416 The judicial officer's pre-Bench training in February 2015 placed emphasis on the importance of the independent and impartial role of judicial officers, and this message was repeated at the Magistrate's Orientation Program in December 2015. The Conduct Division finds that the judicial officer was aware of this in any event.

417 The Conduct Division finds that the judicial officer's actions in seeking to influence the police prosecutor to take steps to cause further criminal charges to be laid in the matters of Mr P, Ms Q and Mr R warrants characterisation as a demonstration of particularly serious misbehaviour and incapacity.

Determining appeals bail applications in chambers: matters of Messrs C, D, E, F, G, H and K

418 The judicial officer's practice of denying appeals bail in chambers was a manifest denial of procedural fairness. Parties had not been notified that such

a procedure would be adopted and were not afforded an opportunity to be heard. Cumulatively, such conduct "lacks the primary judicial requirement of ability and desire to hear both sides" (*Judicial Ethics in Australia* at 4.6; Betts Report at [146]) and demonstrates both misbehaviour and incapacity.

419 The judicial officer contended in evidence that she determined that she could refuse to hear appeals bail applications in open court pursuant to s 73(1)(b) of the *Bail Act* having formed the view that the applications had no reasonable prospects of success.

420 The Conduct Division regrets to find that the judicial officer's evidence about the asserted procedure to determine appeals bail cannot be accepted.

421 The Conduct Division finds that the reliance by the judicial officer on s 73 of the *Bail Act* now, at a time when any mental illness she suffered from is in remission, to excuse her Honour's conduct is evidence of current and likely future incapacity.

422 Section 73 of the *Bail Act* does not permit a contested bail application to be determined in chambers without providing a party who wishes to be heard with the opportunity to be heard.

423 Perhaps the most important feature of our criminal justice system is that the judicial officer presiding should make a decision after hearing from both parties. To the extent that the judicial officer continues to rely on s 73 of the *Bail Act* as justifying, even retrospectively, the decisions she made not to hear from the parties about bail, this is a demonstration of current and likely future incapacity.

Present and likely future incapacity

424 The Conduct Division considers that an additional significant factor bearing upon the question of present and likely future incapacity is the judicial officer's current attitude to her conduct the subject of the Complaint. In this respect,

her various responses, and most particularly the oral evidence, are of concern.

425 The judicial officer's response to the Complaint demonstrates a lack of insight into her conduct. In her Honour's initial response dated 6 October 2017 the judicial officer described her conduct in the matter of Mr P as "entirely appropriate having regard to the factual circumstances that she was presented with". This was later changed in her statement of 24 August 2018 where she accepted that her conduct in the matter was inappropriate and improper.

426 When directly challenged about the lawfulness or propriety of her conduct by the legal representatives in the matters of Mr G and Mr I, the judicial officer persisted in the course she had embarked upon and showed no apparent concern for her conduct.

427 It may be recalled that in the Betts Report an essential quality of a judicial officer was described as "an appreciation of what constitutes proper judicial conduct, and what does not". The absence of that quality is apt to signify incapacity to discharge the judicial functions. Regrettably, the Conduct Division is of the view that the judicial officer's evidence in many respects reveals incapacity to discharge judicial functions.

428 Many of the judicial officer's responses to the Judicial Commission do not accord with contemporaneous evidence. In respect of the practice of determining appeals bail applications in chambers, in evidence the judicial officer frequently referred to s 73 of the *Bail Act*. However, when asked in February 2017 a direct question in writing by Ms Crofts of Legal Aid to identify the source of her power to determine a contested application in chambers without hearing from the parties, the judicial officer did not cite s 73 but invited Ms Crofts to present any legal argument as to why the judicial officer did not have such authority.

429 The judicial officer's responses demonstrate a continuing lack of understanding of her statutory powers. For example, her Honour's present understanding of her powers under s 92 of the *Bail Act* in order to detain persons in custody of her own motion leads the Conduct Division to conclude that the judicial officer is suffering from a present and likely future incapacity to fulfil her role. Her evidence demonstrates a fundamental lack of appreciation of matters critical to the judicial role; identifying the source and extent of power and hearing from both sides before making any decision affecting rights.

430 The Conduct Division concludes that the evidence given by the judicial officer about Mr A and Mr B and her present understanding of her detention powers displays a troubling and continuing lack of insight into, and understanding of, the nature and scope of her powers to detain individuals in custody of her own motion, particularly without any notice.

431 The apparent withdrawal by the judicial officer on the final day of the hearing of her earlier concession that procedural fairness was necessary before remanding a person on bail to the cells was even more troubling.

432 This evidence was given in circumstances where it is common ground that the judicial officer's mental illness is in remission. Her Honour was on clear notice that this topic would be examined in evidence.

433 The Conduct Division is of the view that the judicial officer's present and future capacity is not such that she is able to discharge her duties in a manner that accords with recognised standards of judicial propriety.

Report to the Governor

434 The Conduct Division is satisfied that the Complaint is substantiated, in all but one of its component parts, in the ways described above, and is of the opinion under s 28(1)(a) of the *Judicial Officers Act 1986* (NSW) that the matter could justify parliamentary consideration of the removal of the judicial officer from office. The matters proved against the judicial officer are instances of serious

misbehaviour and reflect Magistrate Burns' present and likely future incapacity to exercise the functions of a judicial officer.

435 The Conduct Division finds:

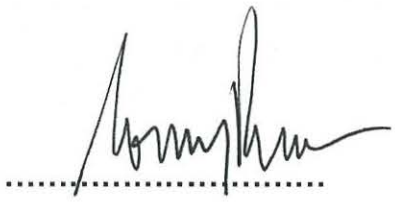
(1) misbehaviour has been proved;

(2) incapacity has been proved;

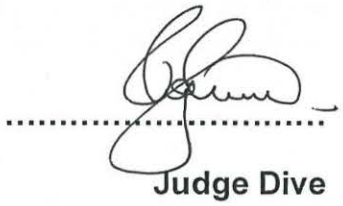
(3) the misbehaviour found proved could justify parliamentary consideration of the removal of the judicial officer;

(4) the incapacity found proved could justify parliamentary consideration of the removal of the judicial officer.

436 The Conduct Division so reports to the Governor.



Justice Payne



Judge Dive

Mr K Moroney AO

Annexure A - Index of Evidence

Document	Description
Exhibit A	
Evidence Volume 1	Witness statements
Evidence Volume 1A	Witness statements of judicial officers (and comprehensive index of documents inside sleeve)
Evidence Volume 1B	Statements of Magistrate Burns, statements of judicial officers
Evidence Volume 1C	Medical Records and Expert Reports
Evidence Volume 2	Medical Records and Expert Reports and Court Files
Evidence Volume 3	Court Files, Bench Books, Training Materials, and Conference Papers
Evidence Volume 4	Responses to complaint by and on behalf of Magistrate Burns and assistance at Port Macquarie circuit
Exhibit B	E-mail dated 31 August 2016
Exhibit C	E-mail correspondence between Judicial Commission and Legal Aid containing complaint dated 3 March 2017
Exhibit D	Evidence of affirmation made in Peru by Mr Marriott
Exhibit E	Statistics of Matters Pending as of February 2016 (formerly MFI 2)
Exhibit F	Swipe Card Access Data for Court Houses (formerly MFI 6)
Exhibit G	Sitting Times (formerly MFI 7)
Exhibit 1	E-mail from Teresa Parkinson annexing letter from CM of Local Court dated 30/3/16
Exhibit 2	Letter from Chief Magistrate to Magistrate Burns dated 14 March 2017
Exhibit 3	"Preparation of community corrections assessment reports and management of order conditions under the new sentencing regime", Local Court Annual Conference 2018
Exhibit 4	E-mail dated 2 February 2017
Exhibit 5	Statistics for Jan and Feb 2016 from Department of Justice
Transcripts	Six daily transcripts of evidence 19, 20, 21, 22, 23 and 28 November.

Annexure B - the Complaint

IN THE MATTER OF
JUDICIAL OFFICERS ACT 1986

IN THE CONDUCT DIVISION OF
THE JUDICIAL COMMISSION OF NSW

IN THE MATTER OF DOMINIQUE BURNS
MAGISTRATE OF THE LOCAL COURT OF NSW

PARTICULARS OF COMPLAINT

The matters set out below are relied upon cumulatively and individually as demonstrating that:

(i) the Judicial Officer is incapable of performing the functions of her judicial office; and/or

(ii) the Judicial Officer is guilty of misbehaviour;

such that Parliamentary consideration of removal of the Judicial Officer is justified, and that there are grounds for suspecting that the Judicial Officer may be mentally incapable of performing the functions of her judicial office.

A. MR A

The following complaint is made about the behaviour and/or capacity of the Judicial Officer while acting in the course of her duties at Port Macquarie Local Court on 24 August 2016.

1. The Judicial Officer ordered that Mr A be taken into custody in circumstances where she had no power to do so.

   Particulars:

   (a) Mr A was charged by field Court Attendance Notice with drive with high-range PCA (second offence), drive while licence cancelled (second offence) and use unregistered vehicle.

(b) Mr A was at liberty and subject to no bail conditions when he attended Port Macquarie Local Court on 24 August 2016.

(c) The Judicial Officer remanded Mr A in custody in the absence of any detention application made by the prosecution pursuant to s 50 of the *Bail Act 2013* (NSW) (***Bail Act***).

2. The Judicial Officer ordered that Mr A be taken into custody without having heard from the parties on the question of bail.

3. The Judicial Officer remanded Mr A in custody when there was no proper purpose for her to do so.

Particulars:

(a) Particulars at [1] above are repeated.

(b) The Judicial Officer remanded Mr A in custody without identifying or assessing any prescribed "bail concern" or identifying any unacceptable risk if Mr A was released from custody, as required by ss 17 and 19 of the *Bail Act*.

(c) The Judicial Officer released Mr A from custody on the same day without imposing any bail conditions and without identifying any relevant change in circumstances from the time when the Judicial Officer remanded Mr A in custody (earlier that day).

4. The Judicial Officer failed to comply with the requirements of the *Bail Act*.

Particulars:

(a) Particulars at [1] above are repeated.

(b) The Judicial Officer remanded Mr A in custody without identifying or assessing any prescribed "bail concern" or identifying any unacceptable risk if Mr A was released from custody, as required by ss 17 and 19 of the *Bail Act*.

(c) The Judicial Officer remanded Mr A in custody in circumstances where Mr A had not been given reasonable notice of any detention application, contrary to s 50(5) of the *Bail Act*, and the Judicial Officer had not dispensed with the giving of such notice, contrary to reg 18(4) of the *Bail Regulation 2014* (NSW) (***Bail Regulation***).

(d) The Judicial Officer did not record the reasons for refusing bail or remanding Mr A in custody, contrary to s 38(1) of the *Bail Act*.

5. The Judicial Officer knew, was wilfully blind to the fact or ought to have known that:

(a) she had no power to take the steps set out in [1], [3] and/or [4] above; and/or

(b) she ought to have heard from the parties before remanding Mr A in custody, contrary to the course taken by the Judicial Officer as set out in [2] above.

B. MR B

The following complaint is made about the behaviour and/or capacity of the Judicial Officer while acting in the course of her duties at Port Macquarie Local Court on 12 October 2016.

6. The Judicial Officer remanded Mr B in custody in circumstances where she had no power to do so.

Particulars:

(a) Mr B was sent a future Court Attendance Notice by post on 22 August 2016 in relation to the 10 July 2016 charge of drive while disqualified (second offence).

(b) Mr B was issued with a field Court Attendance Notice in relation to the two 9 September 2016 charges of drive while disqualified and driver use mobile phone when not permitted.

(c) Mr B was at liberty and subject to no bail conditions when he attended Port Macquarie Local Court on 12 October 2016.

(d) On 12 October 2016 Mr B entered a plea of guilty in relation to the three charges from 10 July and 9 September 2016.

(e) The Judicial Officer sent Mr B "downstairs" to the cells in the absence of any detention application made by the prosecution pursuant to s 50 of the *Bail Act.*

7. The Judicial Officer remanded Mr B in custody without having heard from the parties on the question of bail.

Particulars:

Particulars at [6] above are repeated.

8. The Judicial Officer remanded Mr B in custody when there was no proper purpose for her to do so.

Particulars

(a) Particulars at [6] above are repeated.

(b) The Judicial Officer remanded Mr B without identifying or assessing any prescribed "bail concern", or identifying any unacceptable risk if Mr B was released into the community, as required by ss 17 and 19 of the *Bail Act*.

(c) The Judicial Officer granted Mr B conditional bail on 12 October 2016 after he had been remanded without any identifying any relevant change in circumstances from when he was remanded in custody (earlier that day).

(d) The Judicial Officer did not identify any lawful grounds under the *Bail Act* or otherwise for remanding Mr B in custody.

9. The Judicial Officer remanded Mr B in custody for an improper purpose.

Particulars:

(a) Particulars at [8] above are repeated.

(b) In correspondence from Mr Walsh, the solicitor for the Judicial Officer, dated 6 October 2017, sent on behalf of the Judicial Officer, it was stated that the Judicial Officer's "intention at that time was to convey to [Mr B] a proper understanding of the gravity of his criminal conduct by placing him in the cells for a short period of time".

(c) The Judicial Officer advised the legal representatives off the Bench of her purpose in remanding Mr B in custody, using words to the effect that she intended to grant bail that day but had refused bail in order to scare Mr B.

10. The Judicial Officer failed to comply with the requirements of the *Bail Act*.

Particulars:

(a) Particulars at [6] above are repeated.

(b) The Judicial Officer did not consider the matters prescribed by ss 17, 18 and 19 of the *Bail Act* before remanding Mr B in custody.

(c) The Judicial Officer remanded Mr B in custody without notice and in the absence of any detention application contrary to ss 48 and 50 of the *Bail Act*.

(d) The Judicial Officer did not record the reasons for remanding Mr B in custody, as required by s 38(1) of the *Bail Act*.

11. The Judicial Officer knew, was wilfully blind to the fact or ought to have known that:

(a) she had no power to take the steps set out in [7], [8] and/or [9] above; and/or

(b) she ought to have heard from the parties before remanding Mr B in custody, contrary to the course taken by the Judicial Officer as set out in [6] above.

C. MR C

The following complaint is made about the behaviour and/or capacity of the Judicial Officer while acting in the course of her duties at Port Macquarie Local Court on or about 22 December 2016.

12. The Judicial Officer refused Mr C's application for bail pending appeal to the District Court (**appeals bail**) in chambers rather than in open court without notifying the parties that this would be done.

13. The Judicial Officer denied Mr C procedural fairness when refusing his application for appeals bail.

Particulars:

(a) The matters set out at [12] above are relied upon.

(b) The Judicial Officer refused Mr C's application for appeals bail without providing the parties with an opportunity to be heard.

(c) The Judicial Officer refused the application for appeals bail before the time at which it was listed for hearing.

(d) Upon Mr C's solicitor discovering that the matter had been dealt with by the Judicial Officer in chambers in advance of the time of the listing, he sought to mention the matter, putting matters on the record including that a surety was present, but the Judicial Officer refused to consider the application further.

14. The Judicial Officer knew, was wilfully blind to the fact or ought to have known that she ought to have given Mr C an opportunity to be heard before refusing appeals bail.

15. The Judicial Officer failed to comply with the requirements of the *Bail Act*.

Particulars:

(a) The Judicial Officer failed to record reasons for refusing Mr C's application for appeals bail as required by s 38(1) of the *Bail Act*.

(b) The Judicial Officer failed to ensure that Mr C was given a written notice of refusal of bail as required by s 34 of the *Bail Act*.

D. MR D

The following complaint is made about the behaviour and/or capacity of the Judicial Officer while acting in the course of her duties at Port Macquarie Local Court on 24 January 2017.

16. The Judicial Officer refused Mr D's application for appeals bail in chambers rather than in open court without notifying the parties that this would be done.

17. The Judicial Officer denied Mr D procedural fairness when refusing his application for appeals bail.

Particulars:

(a) The matters set out at [16] above are relied upon.

(b) The Judicial Officer refused Mr D's application for appeals bail without providing the parties with an opportunity to be heard.

(c) The Judicial Officer failed to record reasons for refusing Mr D's application for appeals bail.

(d) The Judicial Officer refused the application for appeals bail before the time at which it was listed for hearing.

18. The Judicial Officer knew, was wilfully blind to the fact or ought to have known that she ought to have given Mr D an opportunity to be heard before refusing appeals bail.

19. The Judicial Officer failed to comply with the requirements of the *Bail Act*.

Particulars:

(a) The Judicial Officer failed to record reasons for refusing Mr D's application for appeals bail as required by s 38(1) of the *Bail Act*.

(b) The Judicial Officer failed to ensure that Mr D was given a written notice of refusal of bail as required by s 34 of the *Bail Act*.

E. MR E

The following complaint is made about the behaviour and/or capacity of the Judicial Officer while acting in the course of her duties at Port Macquarie Local Court on or about 24 January 2017.

20. The Judicial Officer refused Mr E's application for appeals bail in chambers rather than in open court without notifying the parties that this would be done.

21. The Judicial Officer denied Mr E procedural fairness when refusing his application for appeals bail.

Particulars:

(a) The matters at [20] above are relied upon.

(b) The Judicial Officer refused Mr E's application for appeals bail without providing the parties with an opportunity to be heard.

(c) The Judicial Officer refused the application for appeals bail before the time at which it was listed for hearing.

22. The Judicial Officer knew, was wilfully blind to the fact or ought to have known that she ought to have given Mr E an opportunity to be heard before refusing appeals bail.

23. The Judicial Officer failed to comply with the requirements of the *Bail Act*.

Particulars:

(a) The Judicial Officer failed to record reasons for refusing Mr E's application for appeals bail as required by s 38(1) of the *Bail Act*.

(b) The Judicial Officer failed to ensure that Mr E was given a written notice of refusal of bail as required by s 34 of the *Bail Act*.

F. MR F

The following complaint is made about the behaviour and/or capacity of the Judicial Officer while acting in the course of her duties at Port Macquarie Local Court on 2 February 2017.

24. The Judicial Officer refused Mr F's application for appeals bail in chambers rather than in open court without notifying the parties that this would be done.

25. The Judicial Officer denied Mr F procedural fairness when refusing his application for appeals bail.

Particulars:

(a) The matters at [24] above are relied upon.

(b) The Judicial Officer refused Mr F's application for appeals bail without providing the parties with an opportunity to be heard.

(c) The Judicial Officer refused the application for appeals bail before the time at which it was listed for hearing.

26. The Judicial Officer knew, was wilfully blind to the fact or ought to have known that she ought to have given Mr F an opportunity to be heard before refusing appeals bail.

G. MR G

The following complaint is made about the behaviour and/or capacity of the Judicial Officer while acting in the course of her duties at Port Macquarie Local Court between 14 December 2016 and 6 February 2017.

Revocation of bail

27. The Judicial Officer invited the police prosecutor to make an oral detention application on 14 December 2016 in circumstances where the prospect of a revocation of bail had not been adverted to by either party in court and no notice of any detention application had been provided to Mr G or his legal representatives.
Particulars:

(a) Mr G pleaded guilty to one count of obtain financial advantage by deception contrary to s 192E(1)(b) of the *Crimes Act 1900* (NSW). It was alleged that he stole a poker machine payout ticket worth $167.39 while at Port City Bowling Club with his co-offender [name].

(b) Mr G had been granted conditional court bail by the Relieving Registrar at Port Macquarie Local Court on 11 December 2016.

(c) The Judicial Officer did not purport to dispense with the requirement that notice be given of a detention application.

(d) The Judicial Officer did not purport to identify any reason within reg 18(4) of the *Bail Regulation* why notice of a detention application would not be required.

28. On 14 December 2016, after the police prosecutor confirmed that he would make an oral detention application by responding "*yes*" to the Judicial Officer's question "*Making a bail revocation application, sergeant?*", the Judicial Officer revoked Mr G's bail without hearing from either party in relation to the oral detention application.

29. The Judicial Officer denied Mr G procedural fairness by revoking his bail without giving his representative an opportunity to make submissions.

30. The Judicial Officer knew, was wilfully blind to the fact or ought to have known that she ought to have given Mr G an opportunity to be heard before remanding him in custody pursuant to an oral detention application.

31. The Judicial Officer failed to comply with the requirements of the *Bail Act* and *Bail Regulation*.

Particulars:

(a) The Judicial Officer revoked Mr G's bail without considering the matters prescribed by ss 17, 18 and 19 of the *Bail Act* with the exception of s 18(1)(h).

(b) The Judicial Officer revoked Mr G's bail without identifying and assessing any prescribed "bail concern" or identifying any unacceptable risk if Mr G was released from custody, contrary to ss 17 and 19 of the *Bail Act*.

(c) The Judicial Officer revoked Mr G's bail in circumstances where Mr G had not been given reasonable notice of any detention application, contrary to s 50(5) of the *Bail Act*, and the Judicial Officer had not dispensed with the giving of such notice, contrary to reg 18(4) of the *Bail Regulation*.

(d) On 21 December 2016 the Judicial Officer acknowledged in open court that the bail order that she made on 14 December appeared to have been in error and purported to rescind that order.

32. The Judicial Officer purported to utilise s 43 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) to reopen the proceedings in order to "rescind" the bail revocation order made on 14 December 2016 when she had no power to do so.

33. The Judicial Officer knew, was wilfully blind to the fact or ought to have known that she had no power to take the steps set out in [32] above.

Appeals bail

34. The Judicial Officer refused Mr G's application for appeals bail in chambers rather than in open court without notifying the parties that this would be done.

Particulars:

(a) By emails dated 30 January and 2 February 2017, Legal Aid indicated its intention to apply for appeals bail in respect of Mr G on 1 February, in response to which the Port Macquarie Registrar advised Legal Aid that

"*Magistrate Burns elected to deal with the bail application in chambers. Bail has been refused ...*".

(b) The Judicial Officer nonetheless refused the application for appeals bail in chambers without notifying the parties that this would be done.

35. The Judicial Officer refused Mr G's application for appeals bail without providing the parties with any opportunity to be heard.

Particulars:

Particulars 34(a)-(b) are repeated.

36. The Judicial Officer denied Mr G procedural fairness when refusing his application for appeals bail.

Particulars:

Particulars 34(a)-(b) and 35 are repeated.

37. The Judicial Officer knew, was wilfully blind to the fact or ought to have known that she ought to have given Mr G an opportunity to be heard before refusing appeals bail.

38. The Judicial Officer failed to record reasons for refusing Mr G's application for appeals bail as required by s 38(1) of the *Bail Act*.

Particulars:

Particulars 34(a)-(b) are repeated.

H. PRACTICE ADOPTED BY THE JUDICIAL OFFICER IN RELATION TO APPEALS BAIL

39. For a period leading from a date which is not known up to 3 February 2017 the Judicial Officer adopted a practice of determining applications for appeals bail in chambers without informing the parties that she intended to do so.

Particulars:

(a) By email dated 3 and 6 February 2017 respectively, Legal Aid informed the Port Macquarie Registrar that it was "*not familiar with the Local Court Practice Notice or statutory power that gives a Magistrate the authority to deal with a contested bail application in Chambers, without hearing from the prosecution or the defence. Could you please advise?*".

(b) In response, the Port Macquarie Registrar advised Legal Aid that "*Magistrate Burns has indicated that she will consider any requests to have individuals [sic] appeal matters heard in Court it [sic] when lodging your appeal you indiclude [sic] a short reason why you wish for it to be determined in Court. Furthermore Magistrate Burns has invited you to present any legal argument that Magistrate does NOT have authority to deal with these matters in Chambers and she will also consider your submission.*"

40. The Judicial Officer knew, was wilfully blind to the fact or ought to have known that she ought to give a defendant an opportunity to be heard before refusing appeals bail.

I. MR I

The following complaint is made about the behaviour and/or capacity of the Judicial Officer while acting in the course of her duties at Port Macquarie Local Court on 22 and 23 February 2017.

41. The Judicial Officer invited the police prosecutor to make an oral detention application in circumstances where the prospect of detention had not been adverted to by either party and no notice of the application had been provided to Mr I or his legal representatives.

Particulars:

(a) Mr I attended Court on a Field Court Attendance Notice issued by the police at the time of his arrest.

(b) Mr I's solicitor had sought an adjournment to the traffic offender's program following a plea of guilty to a charge of drive with mid-range PCA.

42. The Judicial Officer denied Mr I procedural fairness by remanding him in custody without giving his representative an opportunity to make submissions.

43. The Judicial Officer knew, was wilfully blind to the fact or ought to have known that she ought to have given Mr I an opportunity to be heard before remanding him in custody pursuant to an oral detention application.

44. The Judicial Officer subsequently gave Mr I's representative an opportunity to be heard as to a bail application, but remanded Mr I in custody overnight without hearing from the parties as to the lawfulness of that overnight detention, in circumstances where Mr I's solicitor had objected to the lawfulness of the detention *per se* and the

matter was adjourned to the following day to enable submissions to be made with respect to a bail application.

45. The Judicial Officer failed to comply with the provisions of the *Bail Act* and the *Bail Regulation*.

Particulars:

(a) The Judicial Officer did not consider the matters prescribed by ss 17, 18 and 19 of the *Bail Act*.

(b) The Judicial Officer remanded Mr I in custody on the basis that there was no alternative to a full-time custodial sentence without identifying this as relevant to a "bail concern", or identifying any unacceptable risk if Mr I was released from custody, contrary to ss 19 and 20 of the *Bail Act*.

(c) The Judicial Officer purported to dispense with the giving of notice of the detention application purportedly on the basis that there was no alternative to a full-time custodial sentence, contrary to s 50(5) of the *Bail Act* and reg 18 of the *Bail Regulation*.

46. The Judicial Officer remanded Mr I in custody when there was no proper purpose for her to do so.

Particulars:

The particulars at 41(a)-(b) above are repeated.

47. The Judicial Officer knew, was wilfully blind to the fact or ought to have known that she had no power to take the steps set out in [41], [42], [44] and [45] above.

48. The Judicial Officer demonstrated pre-judgment by completing a Court Order form (in pen) sentencing Mr I to 12 months' imprisonment with a non-parole period of 9 months on 22 February 2017 without hearing sentencing submissions from his legal representative.

J. MR J

The following complaint is made about the behaviour and/or capacity of the Judicial Officer while acting in the course of her duties at Port Macquarie Local Court on 22 June 2016.

49. The Judicial Officer imposed a custodial sentence for the offence of drive manner dangerous that exceeded the relevant maximum penalty of 9 months' imprisonment (*Road Transport Act 2013* (NSW) s 117(2)).

Particulars:

(a) HER HONOUR: *... And driving in a manner furiously or dangerously – sequence five – you have already been convicted. You are disqualified for a period of two years. You are sentenced to a term of imprisonment of 20 months with a non-parole period of 15 months. ...* (T 6: 15 – 18)

50. The Judicial Officer ought to have known that the sentence she imposed exceeded the maximum term for the offence.

K. MR K

The following complaint is made about the behaviour and/or capacity of the Judicial Officer while acting in the course of her duties at Port Macquarie Local Court on 24 August and 6 September 2016.

51. Notwithstanding Mr K's guilty plea, and despite stating that she had applied a discount of 25 percent, the Judicial Officer imposed a custodial sentence for the offence of goods in custody that exceeded the maximum penalty of 6 months' imprisonment (*Crimes Act 1900* (NSW) s 527C(1)(b)).

Particulars:

(a) Mr K relevantly pleaded guilty to one count of unlawfully obtained goods in personal custody (not motor vehicle), namely, a gold nugget.

52. The Judicial Officer ought to have known that the sentence she imposed exceeded the maximum term for the offence.

53. The Judicial Officer refused Mr K's application for appeals bail in chambers rather than in open court without notifying the parties that this would be done.

54. The Judicial Officer denied Mr K procedural fairness when refusing his application for appeals bail.

Particulars:

(b) The matters at [53] above are relied upon.

(b) The Judicial Officer refused Mr K's application for appeals bail without providing the parties with an opportunity to be heard.

55. The Judicial Officer knew, was wilfully blind to the fact or ought to have known that she ought to have given Mr K an opportunity to be heard before refusing appeals bail.

56. The Judicial Officer failed to comply with the requirements of the *Bail Act*.

Particulars:

(a) The Judicial Officer failed to record reasons for refusing Mr K's application for appeals bail as required by s 38(1) of the *Bail Act*.

L. MR L

The following complaint is made about the behaviour and/or capacity of the Judicial Officer while acting in the course of her duties at Kempsey Local Court on 10 October 2016.

57. Notwithstanding Mr L's guilty plea, the Judicial Officer purported to impose a 12 months' suspended sentence for the offence of goods in custody in circumstances where the maximum term is 6 months (*Crimes Act 1900* (NSW) s 527C(1)(b)).

Particulars:

(a) Mr L pleaded guilty to one count of unlawfully obtained goods in custody, namely, a bicycle.

58. The Judicial Officer failed to record any reasons for declining to impose a lesser penalty on account of Mr L's early plea of guilty, contrary to s 22(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

M. MS M

The following complaint is made about the behaviour and/or capacity of the Judicial Officer while acting in the course of her duties at Port Macquarie Local Court on 7 December 2016.

59. The Judicial Officer imposed a good behaviour bond for a period that exceeded the maximum allowable term of 2 years for such a bond (*Crimes (Sentencing Procedure) Act 1999* (NSW) s 10(1)(b)).

Particulars:

(a) Ms M pleaded guilty to one count of cultivate prohibited plant.

(b) HER HONOUR: *A plea of guilty is entered at the first available opportunity and for that you are afforded the full discount available of 25 percent … Having regard for all those circumstances and for purposes of sentencing I find the offence proven. You are discharged conditionally upon you entering a good behaviour bond pursuant to s 10(1)(b) for a period of three years.* … (T 3: 7 – 15)

60. The Judicial Officer ought to have known that the sentence she imposed exceeded the maximum allowable term for such a bond.

N. MR N

The following complaint is made about the behaviour and/or capacity of the Judicial Officer while acting in the course of her duties at Port Macquarie Local Court on 20 and 21 October 2016.

61. The Judicial Officer by her conduct of the hearing on 20 October 2016 gave the appearance of suggesting to Mr N that conditional bail to attend the Glen Rehabilitation Centre would be granted if Mr N changed his plea to guilty, in circumstances where it was apparent to the Judicial Officer and to Mr N that a bed was available at the Glen Rehabilitation Centre but that that bed would likely only remain available for a short period of time.

Particulars:

(a) The entire transcript of the hearing on 20 October 2016 is relied upon.

(b) On 21 October 2016 Ms Le indicated in open court to the Judicial Officer that it was her understanding that on the previous day it had been indicated by the Judicial Officer to Mr N that if Mr N was in a position to plead guilty the following day then the matter could be relisted for a bail application, and the Judicial Officer said nothing to indicate that Ms Le's account of the proceedings the previous day was in any way inaccurate.

(c) Mr N stated in open court on 21 October 2016 that he wished to plead guilty so that he could get himself to rehab as soon as possible, and the Judicial Officer took no steps to indicate to Mr N that a plea of guilty should not be given as a means of securing a place in the Glen Rehabilitation Centre.

62. The Judicial Officer accepted a plea of guilty in circumstances where it was or ought to have been apparent to the Judicial Officer that Mr N was pleading guilty only in order to be granted bail by the Judicial Officer and thus secure a place which was available to him at the Glen Rehabilitation Centre.

Particulars:

The particulars at [61] above are relied upon

63. The Judicial Officer refused Mr N's bail application on 20 October 2016 for an improper purpose.

Particulars:

(a) On 21 October 2016, following pleas of guilty to the previously defended charges, the Judicial Officer granted Mr N conditional bail to attend the Glen Rehabilitation Centre in the absence of any other change of circumstances since her previous refusal of bail and without hearing from either party on the question of bail.

(b) One purpose of the Judicial Officer for refusing bail on 20 October 2016 was to seek to persuade Mr N to change his plea to a guilty plea.

O. MR O

The following complaint is made about the behaviour and/or capacity of the Judicial Officer while acting in the course of her duties at Port Macquarie Local Court on 9 November 2016.

64. The Judicial Officer refused a request to sentence Mr O for two charges of contravene prohibition/restriction in AVO (domestic) upon entry of a guilty plea to those charges in circumstances where:

(a) as at 9 November 2016 Mr O had other charges listed for hearing in May 2017 in respect of which he had been granted conditional bail on 11 October 2016;

(b) the two breaches of an AVO that were the subject of the guilty pleas involved contact on Facebook on 21 October 2016 whilst parked in a car across the street from the victim's house and a call 5 days later on a mobile phone which was answered by a police officer (as the victim was at the police station at that time). Upon being charged with these offences on 2 November 2016 Mr O was refused bail and his bail on the other matters was revoked;

(c) when Mr O appeared before the Judicial Officer by AVL on 9 November 2016 he had thus spent 7 days in custody. His legal representative submitted to the Judicial Officer that it would be a disproportionate outcome for his client to remain in custody until May 2017 and requested that the two contravene prohibition/restriction in AVO (domestic) charges to which Mr O pleaded guilty be finally determined;

(d) the Judicial Officer instead adjourned the sentencing hearing for those matters until May/June 2017 notwithstanding that Mr O was in custody and that this could lead to him remaining in custody for a further seven months;

(e) during the hearing the Judicial Officer indicated that her understanding was that Mr O would "*remain in custody*" as bail had been revoked on the other

matters and bail had on 2 November 2016 been refused as regards the matters the subject of the guilty pleas before her;

(f) Mr O's representative stated in Court on 9 November 2016 that "*your Honour also indicated that ... Your Honour would not be entertaining a release application*" and the Judicial Officer did not take any steps to correct this or to indicate that she would be prepared to entertain a release application; and

(g) Mr O had never before been in custody, had no criminal history apart from convictions "never licenced drive on road first offence" and "mid-range PCA" on 15 October 2007 for which he was fined $600.

Particulars:

The entire transcript of 9 November 2016 is relied upon.

P. MR P

The following complaint is made about the behaviour of the Judicial Officer while acting in the course of her duties at Port Macquarie Local Court on 24 August 2016.

65. The Judicial Officer by her conduct of the hearing on 24 August 2016 gave the appearance of suggesting to the police prosecutor that further charges ought to be laid against Mr P

Particulars:

The entire transcript of 24 August 2016 is relied upon.

Q. MS Q

The following complaint is made about the behaviour of the Judicial Officer while acting in the course of her duties at Port Macquarie Local Court on 14, 21 and 22 December 2016.

66. The Judicial Officer improperly sought to influence the police prosecutor to take steps to cause further charges to be laid against Ms Q.

Particulars:

(a) Ms Q was charged by Field Court Attendance Notice on 16 November 2016 with one count of drive with middle range PCA (first offence) which was amended by consent on 14 December 2016 to one count of drive with middle range PCA (second offence).

(b) On 14 December 2016, Ms Q's solicitor entered a plea of guilty to the charge before the Court and requested a pre-sentence report.

(c) The Judicial Officer asked the police prosecutor on 14 December 2016 why there was only one offence and told the police prosecutor that further charges must be laid against Ms Q.

(d) The Judicial Officer adjourned the matter until 21 December 2016 for further charges to be laid against Ms Q.

(e) On 21 December 2016, the Judicial Officer asked the police prosecutor whether there were any other charges pending against Ms Q and upon being informed that further charges had not been laid, the Judicial Officer told the police prosecutor that further charges certainly should be laid.

(f) The Judicial Officer adjourned the matter part-heard to 22 December 2016 for further charges to be laid against Ms Q.

(g) On or about 22 December 2016, Ms Q was charged with three fresh offences, being one count of negligent driving (no death or grievous bodily harm) and two counts of not give particulars to owner of damaged property.

(h) On 22 December 2016, the Judicial Officer adjourned the matter to 11 January 2017 for Ms Q to obtain legal advice in relation to the fresh charges and for pleas to be entered to those charges.

(i) The entire transcripts of 14, 21 and 22 December 2016 are relied upon.

R. MR R

The following complaint is made about the behaviour of the Judicial Officer while acting in the course of her duties at Port Macquarie Local Court on 31 August 2016.

67. The Judicial Officer improperly sought to influence the police prosecutor to take steps to cause further charges to be laid against Mr R.

Particulars:

(a) Mr R was charged by Court Attendance Notice on 10 August 2016 with one count of common assault and granted conditional bail by the police.

(b) On 31 August 2016 Mr R's solicitor Ms Le entered a plea of guilty to the charge before the court.

(c) The Judicial Officer asked the prosecutor why there was only a charge of assault and indicated that she would stand the matter stating that the prosecutor should speak to the officer in charge.

(d) When the prosecutor stated that she would make those inquiries the Judicial Officer stated, before standing the matter down, "*I'm saying that a charge of assault is absolutely inappropriate given the fact sheets, should be two charges and it should be assault occasioning*" (1.30) ... "*and there should be a stalk/intimidate*" (1.35).

(e) The entire transcript of 31 August 2016 is relied upon.

SUSPECTED IMPAIRMENT

68. There are grounds for suspecting that the Judicial Officer has a mental impairment such as to incapacitate her from performing the functions of her judicial office.

Particulars:

Report of Dr Eagle, Consultant Psychiatrist, dated 29 May 2018.