IN THE MATTER of the Judicial Conduct Commissioner Act 2015 ("the Act")

and

IN THE MATTER of Magistrate Simon Hugh Milazzo, a judicial officer ("the Magistrate")

and

IN THE MATTER of an inquiry by a Judicial Conduct Panel ("the Panel") into and report on the matters concerning the conduct of the Magistrate pursuant to section 23 of the Act

REPORT OF THE PANEL TO THE HONOURABLE THE ATTORNEY-GENERAL PURSUANT TO SECTION 25 OF THE ACT

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Part 1: Background and appointment of the Panel

1.1 The Judicial Conduct Commissioner

On 7 May 2021 the Judicial Conduct Commissioner ("the JCC") notified the Magistrate of a series of complaints which she had either received or treated on her own initiative and which she listed as complaints 1 to 7. In a further letter dated 31 May 2021 the JCC notified the Magistrate of one further complaint which she numbered 8.

The Magistrate was invited to respond to these allegations.

On 3 June 2021 the Magistrate's solicitor responded by letter to each of the complaints, in essence denying all allegations of misconduct.

On 10 June 2021 the JCC reported to the Attorney-General advising that she had conducted a preliminary investigation of the complaints and expressing her opinion that an inquiry into the conduct alleged against the Magistrate was both necessary and justified, and further, that if established the conduct may warrant consideration of removal of the Magistrate by the Governor.

In that letter the JCC recommended the appointment of a judicial conduct panel to inquire into and report on the eight complaints concerning the conduct alleged against the Magistrate.

The JCC reported that she had put the essence of all of the allegations 1 to 8 to the Magistrate who either denied any allegation of misconduct or asserted that his alleged conduct was, in effect, innocuous.

1.2 Constitution of the Judicial Conduct Panel

On 24 June 2021 the Attorney-General constituted the Panel consisting of then Justice Patricia Kelly, President of the Court of Appeal, the Honourable David Bleby SC, a retired Supreme Court Judge, and Dr Christopher Moy, a medical practitioner. The Panel was appointed pursuant to the provisions of Part 4 of the Act.

The allegations which the Panel was requested to investigate were those set out in the report of the JCC to the Attorney-General in her letter of 10 June 2021. In brief, the allegations were as follows.

Complaints 1, 2 and 3 related to Witness A.[1] In 2015 and 2016 Witness A worked as an associate in the Adelaide Magistrates Court.

Complaint 1 related to an allegation that on an occasion during 2015 and 2016, Witness A was in the Magistrate's chambers and was chatting with him about non-work matters. During the course of the conversation Witness A alleged

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[1] For an explanation of the method of and reason for identifying witnesses in the passages which follow, see Part 2.1, page 6.

that the Magistrate said something to the effect that he did not understand why boys did not "do anything" for Witness A. Witness A said that the Magistrate made the statement knowing that she was a lesbian, as she was open about this to her work colleagues.

Complaint 2 related to conduct which allegedly occurred on 6 November 2016. Witness A on that occasion had been invited to the Magistrate's house. The Magistrate showed her his house and garden and they had a cup of tea and biscuits. At one stage the Magistrate drew Witness A's attention to a statuette which was in his dining room. The statuette was of a semi-naked woman, the legs of which were partly open. The Magistrate allegedly drew her attention to the genitals of the woman, which he said were "anatomically correct".

Complaint 3 is said to have occurred on 10 February 2017. Witness A was in her office with another associate. The Magistrate was also there sitting on a visitor's chair speaking to them. The fact that Witness A was a lesbian came up in conversation. The Magistrate was alleged to have said words to the effect that he did not believe she was gay, or did not understand how she was. He said, "You have a vagina, and it was designed for a penis". Witness A said she was shocked by the statement. They were then interrupted by another Magistrate entering the room.

Complaints 4 and 5 related to Witness C. In February 2018 Witness C was a female associate to Witness D, a District Court Judge. In February 2018 they were on circuit in Port Augusta.

Complaint 4 related to a dinner which took place at Ian's Western Hotel attended by Witness D, Witness C, Witness E (another magistrate resident in Port Augusta), Witness F (Witness D's judicial support officer), and Magistrate Milazzo. The Magistrate had not met Witness C before. It was alleged that the Magistrate arrived a little late and was somewhat intoxicated. It was alleged that the Magistrate said, in front of everyone at the table, "She's a very attractive girl, isn't she?". Later, the Magistrate added words to the effect of "If I were one to two years younger I'd definitely want to have a crack". Witness C said that she felt very uncomfortable and that the remainder of the evening was punctuated by comments by the Magistrate to the effect that she was his "type". He asked whether Witness C, who was impressively tall, had a partner and whether he was shorter than she was. Witness C responded, "What of it?". It was alleged that the Magistrate then said words to the effect: "I bet he doesn't fulfill you, does he?". Witness C considered that this was a sexualised comment. She alleged that the conduct was discussed with Witness D and Witness F during the journey back to their accommodation. Witness D was said to have apologised to Witness C for not intervening during the dinner.

Complaint 5 concerned conduct allegedly engaged in by the Magistrate towards Witness C at the Port Augusta courthouse, following the dinner. Witness C alleged that the Magistrate approached her from behind as she sat at her desk in

the associates' room, that he placed his hands on the back of her chair, leaned in to bring his mouth close to her ear and whispered words to the effect, "I know what you did on the weekend, confess your sins to me".

Complaint 6 was an allegation which concerned a junior female legal officer, Witness G, who was sitting with two Magistrates Court associates discussing work matters in their office. It was alleged that the Magistrate came into the room, and without invitation sat on Witness G's knee and thigh and touched her left shoulder and neck as if to massage it. Witness G was allegedly shocked.

Complaint 7 concerned inappropriate conduct alleged against the Magistrate with regard to Witness K, an IT support officer who worked in the Magistrates Court. At this time the Magistrate was at home on extended sick leave following a bicycle accident resulting in injury. The Magistrate telephoned and asked if she would attend at his home to have a face to face conversation about a topic that he would not disclose. Witness K said she would get back to him as she was very busy. The following day Witness K telephoned the Magistrate. He reiterated that he did not wish to discuss the matter over the telephone and wanted her to come to his house. It was alleged that the Magistrate raised his voice and became upset at Witness K's refusal.

Complaint 8 concerned allegations made by Witness L, a cleaning supervisor within the Courts Administration Authority. Witness L was based in the Adelaide Magistrates Court from October 2012 until about early 2020. Part of her duties was to undertake the cleaning of Magistrates' offices. It was alleged that the Magistrate "took a shine" to her from the time she started. She said he would often say crude things to her including comments about her breasts. She would tell him to, "Knock it off".

On one occasion in 2014 the Magistrate, Witness J and Witness L were in a lift in the building. It was alleged that when Witness L commented on how cold she was, the Magistrate then said, "Let me warm you up". He then reached straight out with both hands and open palms and placed his hands within a millimetre of her breasts. From then on she did her best to avoid the Magistrate. However, there were other incidents subsequently, consisting of "generally sexual talk".

1.3 Procedural Matters and Delays

The work of the Panel commenced on 9 August 2021 with a directions hearing. After counsel assisting the Panel, Mr Besanko, outlined the manner in which the Panel intended to proceed, counsel then acting for the Magistrate, Mr Wells QC, indicated a number of concerns about the procedure to be followed. Those concerns foreshadowed an objection that those who had given witness statements in relation to the allegations before the Panel should be permitted to attend to listen to the evidence concerning the particular matter that involved them. He also indicated that the Magistrate was in the process of obtaining statements and that an early hearing date would not be suitable. Finally, he indicated a

concern at that stage as to whether complaint 8 was properly before the Panel at all. At that hearing Mr Wells raised questions as to the validity of the referral by the Judicial Conduct Commissioner to the Attorney-General, and consequently, the Attorney-General's referral of the complaints to the Panel.

There were a number of directions hearings in August and September 2021 at which counsel for the Magistrate raised further concerns in relation to the manner in which the Panel intended to proceed. One of those matters related to a request by one of the complainant's legal representatives in Melbourne to represent her at the hearing.

Further concerns were raised by counsel for the Magistrate during these hearings as to the validity of the referral in relation to complaint 8 on the basis that the allegations made in respect of that complaint were so wide and vague that they failed to properly identify the conduct which was the subject of the referral.

At subsequent hearings in September and October 2021 further concerns were raised as to the status of Witness C, the principal witness proposed to be called in relation to complaints 4 and 5. After raising an objection that the witness should not be treated as a complainant, the Panel met and determined that Witness C should be treated as a complainant for the purpose of the inquiry.

Further hearings conducted in November 2021 were held to determine various objections made by the Magistrate to aspects of all of the witness statements proposed to be presented to the inquiry. On 9 November 2021 Mr Wells indicated that any application by the legal representative of the complainant in respect of complaints 4 and 5 would be opposed. On that day the Panel heard legal argument and after a brief adjournment ruled that the complainant in respect of complaints 4 and 5 was entitled to be represented by counsel.

At that point in the proceedings, and contrary to earlier indications, counsel for the Magistrate indicated that the Magistrate would seek to judicially review that ruling in addition to other matters already agitated concerning the validity of the recommendation made by the Judicial Conduct Commissioner and the referral by the Attorney-General of the matters to the Panel.

As a consequence of the judicial review proceedings this matter was adjourned on 9 November 2021. On 5 May 2022 the Court of Appeal handed down its judgment dismissing all grounds of review agitated by the Magistrate. The Court held that the Magistrate was given sufficient notice of the impugned complaints to enable meaningful participation in an examination. The contention that there was no preliminary examination of complaint 8 by the Judicial Conduct Commissioner was rejected. The objection by the Magistrate that the Panel's ruling to permit a limited right of appearance for the witness in respect of complaints 4 and 5 was not beyond jurisdiction and that it was open to the Panel to find that counsel for the witness was a person whose presence was reasonably

required for the purposes of or in connection with the performance by the Panel of its functions.

Finally, the Magistrate's challenge to the jurisdiction of the Panel on the basis of *Kable v Director of Public Prosecutions (NSW)*[2] was dismissed.

As a consequence of the six month delay caused by the application for judicial review, it was necessary for counsel and junior then acting for the Magistrate to withdraw from the matter.

The Panel was finally able to commence its inquiry into the facts with different counsel for the Magistrate on Monday, 5 September 2022.

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[2] (1996) 189 CLR 51.

Part 2: Introduction

2.1 Procedures of the Panel

By virtue of section 25(2) of the Act this report must set out:

(a) the Panel's findings of fact; and

(b) the Panel's opinion as to whether removal of the judicial officer is justified; and

(c) the reasons for the Panel's conclusion.

The Panel was required to hold all its meetings in private.[3] For that reason and in order to ensure the continued anonymity of complainants and of persons who gave evidence before the Panel, all witnesses to the facts that are the subject of this report are identified by reference to a letter of the alphabet. The Panel also received a number of affidavits containing character evidence relating to the Magistrate. For the same reasons they are identified by reference to a number with the prefix "CW". Witness CW1 is a former South Australian Barrister. Witnesses CW2, CW3, CW4 and CW6 are judicial colleagues of the Magistrate. Witness CW5 is a court officer of the Adelaide Magistrates Court.

The eight complaints relate to various incidents occurring over a period of six years between 18 July 2014 (complaint 8) and 14 August 2020 (complaint 7). While we refer to the persons immediately affected by the alleged behaviour as "complainants", we do so as a matter of convenience only. The complaints were not referred to the JCC by the complainants. Three of them (complaints 1, 2 and 3) were referred by the Equal Opportunity Commissioner. Two of them (complaints 4 and 5) were referred by the Chief Justice. One of them (complaint 7) was referred by the Chief Magistrate, and two of them (complaints 6 and 8) were treated as complaints on the JCC's own initiative.[4] That is not to say that none of the complainants raised a complaint with anyone. All but two of them did. However, it would appear that they were only brought to the notice of the JCC as a result of a report of the Equal Opportunity Commission on Harassment in the South Australian Legal Profession. The report was published in April 2021.

All the complainants except one had made written statements or affidavits, which were received in evidence, and they all gave evidence in person or by video link to the Panel. Besides evidence from each of the complainants, the Panel received written statements or affidavits and heard oral evidence from witnesses to or relevant to each complaint. All these witnesses were cross-examined by counsel for the Magistrate. As mentioned above, the Panel also received affidavits by way of character evidence from six persons who knew or had worked with the Magistrate. The Panel received an affidavit of the Magistrate who also gave oral

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3 *Judicial Conduct Commissioner Act 2015* (SA) section 23(3)(b).

4 See *Judicial Conduct Commissioner Act 2015* (SA) section 12(8).

evidence and was cross-examined by counsel assisting the Panel, Mr T Besanko. The Panel also received three reports and heard oral evidence from Professor Robyn Young, a Registered Clinical Psychologist and Professor of Psychology at Flinders University of South Australia, who was also cross-examined by Mr Besanko.

2.2 The Standard of Proof

The Act does not specify what standard of proof the Panel is to apply when making findings of fact. Section 23 of the Act relevantly provides:

> **23—Functions and procedures of panel**
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> …
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> (2) The procedure for the calling of meetings of a judicial conduct panel and for the conduct of business at those meetings is, subject to this Act, determined by the panel.
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> (3) A judicial conduct panel must, however—
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> (a) act in accordance with the principles of procedural fairness; and
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> (b) hold all meetings of the panel in private; and
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> (c) call meetings and conduct business at those meetings in accordance with any guidelines approved by the Chief Justice of the Supreme Court.
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> …

In respect of section 23(3)(c) there are presently no guidelines approved by the Chief Justice for the calling of meetings and the conduct of the Panel's business. The Act is therefore silent as to the standard of proof to be applied by the Panel in making findings of fact. It is therefore for the Panel to determine the standard of proof that should apply.

The Panel is to act in accordance with the principles of procedural fairness. That is but one aspect of the rules of natural justice. In *Mahon v Air New Zealand Ltd*[5] the Privy Council was called upon to review the order of a Royal Commissioner investigating the cause and circumstances of what was commonly known as the Mount Erebus disaster. Speaking of the rules of natural justice germane to that appeal their Lordships said:

> The first rule is that the person making a finding in the exercise of such a jurisdiction must base his decision upon evidence that has some probative value in the sense described below. The second rule is that he must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry, whose interests (including in that term career or reputation) may be adversely

[5] [1984] AC 808.

> affected by it, may wish to place before him or would have so wished if he had been aware of the risk of the finding being made.[6]

By way of explanation of the first rule their Lordships said:

> The technical rules of evidence applicable to civil or criminal litigation form no part of the rules of natural justice. What is required by the first rule is that the decision to make the finding must be based upon some material that tends logically to show the existence of facts consistent with the finding and that the reasoning supportive of the finding, if it be disclosed, is not logically self-contradictory.[7]

It may be suggested that this allows, in an inquiry of this nature, a standard of proof lower than that of the civil standard of proof on the balance of probabilities. However, in this case, where the consequences of the Panel's findings may result in action being taken, albeit by another authority, to remove a person from judicial office, where a copy of the report of this Panel must be laid before each House of Parliament and with the probable consequence of intense media coverage and public interest, the Panel considers that it is appropriate to apply the civil standard of proof but with due regard being paid to the principles enunciated by the High Court in *Briginshaw v Briginshaw*[8] where it was held that the standard of proof on a petition for divorce on the ground of adultery was not that of proof beyond reasonable doubt required for prosecution in criminal proceedings but with certain qualifications.

Latham CJ said:

> There is no mathematical scale according to which degrees of certainty of intellectual conviction can be computed or valued. But there are differences in degree of certainty, which are real, and which can be intelligently stated, although it is impossible to draw precise lines, as upon a diagram, and to assign each case to a particular subdivision of certainty. No court should act upon mere suspicion, surmise or guesswork in any case. In a civil case, fair inference may justify a finding upon the basis of preponderance of probability. The standard of proof required by a cautious and responsible tribunal will naturally vary in accordance with the seriousness or importance of the issue …[9]

Rich J said:

> The nature of the allegation requires as a matter of common sense and worldly wisdom the careful weighing of testimony, the close examination of facts proved as a basis of inference and a comfortable satisfaction that the tribunal has reached both a correct and just conclusion. But to say this is not to lay it down as a matter of law that such complete and absolute certainty must be reached as is ordinarily described in a criminal charge as "satisfaction beyond reasonable doubt."[10]

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6 Ibid at 820.
7 Ibid at 821.
8 (1938) 60 CLR 336.
9 Ibid at 343-344.
10 Ibid at 350.

The principle was perhaps best explained by Dixon J (as he then was) in the following terms:

> The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences.[11]

The submission of counsel for the Magistrate suggested that the principles in *Briginshaw* required a high degree of satisfaction of the allegations "approaching the criminal standard (of proof beyond reasonable doubt)". As Dixon J pointed out, the principles do not require or set such a different standard.

In making its findings of fact the Panel is conscious of the need to find any complaints proved to the Panel's reasonable satisfaction, having regard to the *Briginshaw* principles and the possible consequences of its findings.

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[11] Ibid at 361-362.

Part 3: Findings

3.1 The Magistrate

3.1.1 History and Current Position

The Magistrate was born on 18 May 1954. At the time of giving his evidence he was aged 68. The compulsory retirement age for a magistrate in South Australia is 70.

He was born in the United Kingdom when his parents were temporarily residing there. The family returned to Australia when he was aged three and he has been living in South Australia ever since.

He attended a Roman Catholic Priory school and later, a State high school. He was a good student until about the age of 8 or 9 when he says he was beaten by his father, a consultant physician. There followed a somewhat acrimonious relationship with his father. He was also unhappy at school and had few friends. His academic achievement was poor and he failed year 11. He then moved to the State high school to which a friend of his had previously moved. He succeeded well in his repeat year 11 and in year 12, and matriculated with a scholarship.

After leaving school he had about six months of work with a local council and about a year in a brickyard, but then decided to study law, beginning his university studies in 1974 at the age of 19. He continued working in the brickyard during university vacations. He was admitted as a legal practitioner in 1979, following which he was employed for three years as a solicitor in the firm in which he had served as an articled clerk. That was followed by a further period of four years with another Adelaide law firm. In 1988 he began practising as a barrister and continued doing so until he was appointed a Magistrate in the Adelaide Magistrates Court in 2006.

The Magistrate has three younger brothers with whom he enjoys a close relationship. He was married in 1978 but became separated from his wife in 2000 and divorced about five years later. He has had a number of relationships since separation. He has one daughter of his marriage, now aged 29.

Mr Milazzo was diagnosed with depression in 2001. He believes that he suffered this throughout his teenage years. He said that he had engaged in therapy around the age of 35 to work on himself, and that this mostly focused on healthy emotional development.

After his appointment as a Magistrate in 2006 he spent an initial period of one year in the Adelaide Magistrates Court being initiated into criminal work, of which he had done very little in practice. Apart from that period, another 18 months at Christies Beach Magistrates Court doing mostly criminal work and a period of two years between July 2016 and June 2018 when he was a resident Magistrate at Port Augusta, he has worked in the Adelaide Magistrates Court, principally in the civil jurisdiction of that Court.

From time to time he acted as a Regional Manager of Civil in that Court but did not enjoy administrative work. He preferred to assist other civil magistrates and to assist with the Court's mediation program in addition to his own civil workload.

In October 2020 the then Regional Manager of Civil was leaving the Magistrates Court to work in the Youth Court. With the encouragement of the registry staff he reluctantly agreed to take on the position. However, at the same time he had also been considering his future as a magistrate, and on 21 December 2020 he informed the Chief Magistrate that he intended to retire in February 2021. The civil workgroup and the Chief Magistrate expressed unhappiness about that, and on 31 March 2021 he agreed to remain as Regional Manager of Civil until October 2021. He was asked by the Chief Magistrate if he would be prepared to accept appointment as an auxiliary District Court Master after retirement. He said he would. However, those plans were overtaken by the process leading to the appointment of this Panel and his suspension from office by the Governor in Council from 1 July 2021.

When he was not sitting in court the Magistrate encouraged other workers in the Courts Administration Authority, and particularly in the civil registry, to see him as a colleague. He said that he wanted them to feel comfortable and that while he did recognise that he had a leadership role, he chose to exercise it inclusively and as a colleague. He invited many members of staff to call him by his first name, but not all of them did. He would invite his clerks and the magistrates' associates to Friday lunches from time to time and he believed that the likes of Witness A, Witness G and Witness H to be work friends with whom he had a good functional work relationship where personal issues were sometimes discussed.

Each of Witnesses CW2, CW3, CW4, CW5 and CW6 were unanimous in their undisputed views that the Magistrate was a hard worker, and a conscientious magistrate with an excellent knowledge of the law, especially in the civil jurisdiction of the Magistrates Court. Typical of those views is that of Witness CW2 who said:

> I would say without reservation that Simon is regarded by the Civil Magistrates as an excellent lawyer who discharges his judicial duties responsibly, fairly, and expertly. … He has a wide reputation for being a hard worker. … He is known for his depth and breadth of legal knowledge.[12]

Similar views were expressed by Witnesses CW3,[13] CW4,[14] CW5,[15] and CW6.[16] He was always willing to assist other magistrates as mentor and

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[12] Exhibit M17, Item 2, [5], [7]-[8].
[13] Ibid, Item 3, [5].
[14] Ibid, Item 4, [19].
[15] Ibid, Item 5, [14]-[15].
[16] Ibid, Item 6, [23].

supervisor, was generous with his time, approachable, and assisted litigants with patience, understanding and compassion.[17]

3.1.2 Character Evidence

However, at the same time there was significant evidence of some concern about other aspects of the Magistrate's behaviour. Witness B, the witness to complaint 3, in the course of her evidence said "I recall him making inappropriate comments to other people, mainly associates, during the time I was in the Court. I do not recall any particular comments, but I remember feeling uncomfortable about things he had said while I was an associate". Witness J who gave evidence in relation to complaints 6 and 8, held a senior position in the Adelaide Magistrates Court registry. Witness J said that at all material times the Magistrate had "a reputation for being a joker and for acting inappropriately. By this I mean that he sometimes takes things too far and does not consider the audience when he is telling jokes". Witness H, who was a magistrates' associate and who gave evidence in relation to complaint 6, said "… there were other times during my associateship when Magistrate Milazzo's behaviour was, in my view, borderline unprofessional". Witness H could not recall any specific incidents but said that she had "a general recollection of what I considered to be inappropriate comments made by Magistrate Milazzo on occasion, for example in relation to the clothing of female staff". She could not recall the exact comments but said that the manner in which he made those comments "raised some internal concerns within myself and put me on guard. I also observed that Magistrate Milazzo was extremely casual about the way he conducted himself, which would make me cautious about how I engaged with him". Witness I, also an associate and a witness to the events of complaint 6, said she spoke to Witness J and other senior members of the registry staff in general terms about the Magistrate's conduct in the workplace "at times being odd, and his sense of humour being inappropriate for the workplace on occasion". Witness L, the complainant in complaint 8 said there were many occasions on which she was treated by the Magistrate in a way similar to the subject matter of complaint 8. Her evidence is discussed further in relation to complaint 8 below.

It should be noted that the evidence referred to above from Witness B, Witness H and Witness I was the subject of objection. The evidence was admitted *de bene esse*. In the Panel's opinion it is admissible not by way of proof of other complaints not the subject of this investigation, but as indicative of the character of the Magistrate in assessing the value and reliability of his own evidence. It is admissible for the same purpose as that of four other Witnesses mentioned below tendered by Magistrate Milazzo himself.

Witness CW1 said that the Magistrate "is not beyond frank conversations and sometimes he is hilarious. I would say that his sense of humour is not necessarily

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[17] Ibid, Witness CW2, Item 2, [6], [10]; Witness CW3, Item 3, [6]-[10]; Witness CW4, Item 4, [16]-[19]; Witness CW5, Item 5, [9]-[10], [14]; Witness CW6, Item 6, [24].

strictly politically correct …".[18] Witness CW3, while expressing surprise at complaints 4 and 5 if they occurred, also said that in that witness' experience the Magistrate "has not always had an appropriate filter" and "There have been occasions when, in open conversation amongst several people, I have heard Simon make remarks or innuendo of a nature that may cause offence. I consider such comments to have been an awkward attempt at humour rather than seeking to cause discomfort or illicit any other response from those present".[19]

Witness CW4 made a number of observations. The first was that in that witness' view, in his efforts to "get along" with others "there have been occasions where he has lacked judgment about his audience and what might be appropriate topics or comments".[20] The witness went on to say:

> While I think he would be genuinely distressed if he thought he caused anyone offence I believe his judgment in such circumstances is not what it should be. In my opinion, I am surprised that he still continues to say inappropriate things from time to time and not appreciate that they may cause offence, even if he does not intend any offence.
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> I perceive there may be a tension between his genuine intentions and his wanting to get along with everyone on the one hand, and his inability at times to exercise proper judgment about the appropriateness of his comments in a particular audience or in a particular circumstance on the other.[21]

Witness CW4 also went on to say, however, that in other conversations in relation to genuinely personal or private matters the witness found him empathetic, genuinely interested and caring on those occasions. In relation to complaint 1 as related by Witness A, Witness CW4 said the allegation "does fit in with my general impression that he does not always exercise the best judgment in relation to who his audience is and the comments he feels free to make jokingly or otherwise".[22]

In relation to the reported allegations of Witness C in complaints 4 and 5, Witness CW6 said that that witness had never observed the Magistrate do anything similar "other than in jest" at social events and that he had never seen him make comments to any staff of the kind suggested "other than in fun". "I can imagine him doing such a thing and thinking it was funny however I can only imagine he would be mortified if she was embarrassed".[23]

Significantly, the Magistrate acknowledged in his evidence before the Panel that some magistrates had commented on the inappropriateness of his behaviour. However, in the cross-examination which followed it became apparent that the Magistrate's view of appropriateness related not to what may be said or done in a particular situation but to the environment in which the discussion or event might

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[18] Ibid, Item 1, [21]-[22].
[19] Ibid, Item 3, [11], [23].
[20] Ibid, Item 4, [23].
[21] Ibid, Item 4, [26]-[27].
[22] Ibid, Item 4, [40].
[23] Ibid, Item 6, [43]-[44].

take place. He described the Court as being "a very, very appropriate" place to work in. He said: "Whilst I am inappropriate, the workplace is also very appropriate … Well it's too appropriate for me, but that doesn't mean a lot. It's not too appropriate for most of the people … I'm just saying that the concept of appropriateness at times in the Magistrates Court is extreme. It extends to complaining on behalf of people who don't want to be complained about. That's how appropriate it is. That is overly appropriate".

The Panel accepts that there is abundant evidence of the Magistrate displaying a pattern of unintentionally inappropriate behaviour in situations where he had no desire to cause harm or embarrassment and where, had he become conscious of doing so, he would have wished to apologise. Such expressions as "would genuinely distress him if he thought he caused someone offence or upset them" were repeated by all the witnesses who gave character evidence, and by some several times.

Whatever may have been the reason for or explanation of the Magistrate's behaviour described above, the fact remains and the Panel accepts that the Magistrate was prone to make out of court comments of a sexual nature to work colleagues which could, in the case of some hearers, cause distress and offence.

He may well have wished not to offend and to apologise if he became aware of having done so. However, if the complainants' evidence is accepted, a recurring theme in all the complaints that are the subject of this Report is an apparent failure on the part of the Magistrate to consider at the time the effect his words or actions might have had on the person or persons concerned.

3.2 Complaints 1, 2 and 3: Witness A

It is convenient to consider these three complaints together, as they all involve Witness A. She is a legal practitioner but from October 2015 until July 2017 she was employed by the Courts Administration Authority as a Magistrate's Associate, working throughout that period in the Adelaide Magistrates Court. She was one of two associates who conducted out of court research work and support for the entire Magistracy.

Mr Milazzo was very friendly with Witness A and the other associate. He had insisted that she call him by his first name, which she did, in contradistinction with other Magistrates who had invited her to call them by their first name but who did not press the issue when she explained that their general practice was to take a uniform approach to avoid confusion. She had what she described as a friendly, mentor-like relationship which she did not consider unusual. She and the other associate and Mr Milazzo's clerk were sometimes taken out to lunch by Mr Milazzo.

During the period of her employment as an associate she lived in a suburb adjacent to that of the Magistrate. Sometimes he would give her a ride to work if he drove by when she was waiting at her bus stop. Later in the course of her employment rides were prearranged. There was no evidence of any sexual attraction of the Magistrate to Witness A.

Witness A described herself as gay and had been quite open about her sexual orientation. It was known by the Magistrate and by other Magistrates and staff of the Adelaide Magistrates Court. The Panel accepts the evidence of the Magistrate, and of other witnesses, that he never discriminated in any way against people of different sexual orientation. He had such people as friends and indeed Witness A was one of the court staff he regarded as a work friend.

Complaint 1 relates to an occasion when the Magistrate was still based in Adelaide. Witness A was in the Magistrate's office chatting. He had a large photograph of his daughter's rowing team hanging on his wall. It was of the State's King's Cup men's rowing crew all in their rowing singlets and shorts, along with their female cox, who was the Magistrate's daughter, a matter of some pride on the part of the Magistrate. They were talking about the photograph and about his daughter's experience in the rowing team. During the discussion the Magistrate commented that he did not understand why boys do not do anything for her. Witness A considered that that was, to her, an inappropriate social remark in the workplace.

The incident the subject of complaint 2 occurred on 6 November 2016. At that time the Magistrate was based in Port Augusta but had returned to Adelaide briefly. He invited Witness A to go and see his house. It was on a weekend. She visited the house with her dog. He showed her the house and garden and they had a cup of tea and biscuits together. Among other artworks that he showed her, he

drew Witness A's attention to a statuette that he had in his dining room, photographs of which were admitted into evidence. It was approximately 30 to 40 centimetres high. It was a statuette of a partially clothed bare-breasted dark-skinned woman sitting on a flat surface with her knees raised and partially bent, with the right lower leg crossed over the left lower leg. From the front and left hand side of the statuette when viewed from the front, the woman's genitalia were obscured by clothing. When the statuette was tilted backwards and viewed from the right hand side of the statuette when viewed from the front, there was revealed a detailed impression of the woman's genitalia. The Magistrate particularly directed Witness A's attention to the genitalia as being "anatomically correct". In evidence the Magistrate described this as being an interesting and unusual feature of a statuette of its early 20th century vintage.

The Magistrate did not question the accuracy of the events the subject of complaints 1 and 2 as described by Witness A. The observation he made about the genitalia being anatomically correct was a remark he made to many visitors to whom he had shown the statuette.

Witness A herself did not complain at the time about either of these two incidents, although she thought that they were "a bit weird". However, her attitude to the Magistrate changed after the third incident the subject of complaint 3.

That incident occurred on 10 February 2017. Witness A was in her office with the other associate, Witness B. The Magistrate had returned again from Port Augusta. He was in the associates' office sitting in the chair which they had for visitors and was talking to them. The fact that Witness A was gay came up in the conversation. The Magistrate said that he did not understand how she was gay or that he did not believe she really was gay. She asked him why. He demurred and said words to the effect that he was not sure how to say it but then said "You have a vagina, and it was designed for a penis". Witness A described it as very shocking to her and said she could not recall what was said after that. Shortly after the Magistrate had made that statement a female Magistrate came to the office. Witness A said that Mr Milazzo had just been arguing that "gay people don't exist". The Magistrate became angry and admonished her for sharing the contents of their conversation with someone else. Witness A interpreted his demeanour as suggesting to her that he felt betrayed. She felt quite uncomfortable and guilty and said that she felt sick.

Witness B was the other Magistrates' associate on the occasion when the incident the subject of complaint 3 occurred. She was present in the room when the incident took place. She had also witnessed other conversations between the Magistrate and Witness A on the topic of Witness A's sexuality, the details of which she could not recall. On those occasions she considered that the Magistrate appeared to be genuinely curious about Witness A's sexuality and was interested in understanding it.

Witness B's witnessing of this incident was also against the background of hearing the Magistrate make inappropriate comments to other people, mainly associates, during her time at the Court. She could not recall any particular comments but remembered feeling uncomfortable about things he had said.

Witness B's recollection of the details of the incident comprising complaint 3 were not as clear as that of Witness A, and her recollection of the actual words the Magistrate used differed slightly from what was said by Witness A. The words she recalled were, however, of similar effect and were, in her view, "outrageous" and came across as homophobic. Not surprisingly the recollection of Witness A of the whole event was clearer than that of Witness B, and we accept the evidence of Witness A and of its effect on her, which is strongly corroborated by the evidence of Witness B.

The Magistrate had no recollection of any of the events the subject of these complaints save for what he described as "a throwaway line" at the end of the first incident. He did say, however, that it distressed him that possibly he spoke to Witness A as she remembers. The Panel finds that they all occurred as described by Witness A.

These findings are not affected by the fact that Witness A may have continued a cordial relationship with the Magistrate after the events had occurred. The same may be said of some of the other complainants who continued to have ongoing contact with the Magistrate in the course of their employment.

As to the objection concerning paragraph 24 of Witness A's statement, the Panel upholds the objection and has not relied on that paragraph.

3.3 Complaints 4 and 5: Witness C

3.3.1 Complaint 4

Witness C was an associate to Witness D, a District Court Judge. During the month of February 2018, the Judge and two court staff, including Witness C, travelled to a circuit court in Port Augusta.

The conduct the subject of complaint 4 occurred at a dinner at Ian's Weston Hotel in Port Augusta on the evening of Thursday 15 February 2018. Witness C, Witness D, and another member of court staff, Witness F, attended, along with two Magistrates then resident in Port Augusta, who were invited by Witness D. In her evidence before the Panel, Witness D explained that it is customary for a visiting District Court Judge while on circuit to invite the resident Magistrate or Magistrates in Port Augusta. In that sense, Witness D regarded it as a semi-professional dinner.

Witness C gave a written statement to the Judicial Conduct Commissioner dated 2 June 2021. Subject to one minor and presently irrelevant alteration, she verified that statement in evidence before the Panel. In the statement Witness C described what she said happened when the Magistrate arrived at the table at Ian's Weston Hotel:

> Shortly after sitting down directly opposite me at the small table, Magistrate Milazzo began making comments about my physical appearance. He said words to the effect of:
>
> "She's a very attractive girl, isn't she"
>
> "If I was one to two years younger, I would definitely have a crack."
>
> He spoke in a loud voice, with the comments seemingly directed to the table at large. The statements were heard by all persons at the table. No one said anything. I felt as if everyone was stunned by the remarks. Somehow, we moved on with other topics of conversation and the dinner progressed.
>
> The rest of the night was punctuated with statements made by Magistrate Milazzo to the effect that I was his physical "type". I was shocked that he felt comfortable making such explicitly sexualized comments around his peer as well as [Witness D], his hierarchical superior. However, I felt that I could not ask him to stop as he was too senior to me. I had hoped [Witness D] or [Witness E] would step in, but this did not occur.
>
> At one stage, he asked whether I had a partner and I replied that I did.
>
> He said, "is he shorter than you are?" (I am over six feet tall)
>
> I said "Yes, what of it?"
>
> He said, "I bet he doesn't fulfill you, does he?"
>
> I understood this comment to be inherently sexual and it made me feel very uncomfortable.

3.3.2 Complaint 5

Complaint 5 also arises out of conduct allegedly engaged in by the Magistrate towards Witness C at the Magistrates Court in Port Augusta during the same circuit in 2018.

In her statement on 2 June 2021, Witness C described what happened subsequent to the dinner at Ian's Weston Hotel on 15 February 2018. She said:

> On occasions he would come out of his chambers, go straight to the area where I sat and stand directly behind me. He would only stand by or address me; I noted that he seemed to ignore [Witness F] when she was present. I found this to be odd as our desks were so close. As he and I did not work together in any capacity and had no reason to speak with each other, I felt as though Magistrate Milazzo was specifically seeking me out for these exchanges and created reasons to stand by my desk. On one occasion he placed his hands on the back of my chair so that they were almost brushing my shoulders and leaned into me from behind with his mouth very close to my ear and neck. He whispered to me:
>
> "I know what you did on the weekend. Confess your sins to me; confess."

[Witness C said in evidence that she had returned to Adelaide at weekends.]

> I know he spoke to me in a similar way, and from this position, at least twice. Those words are all that I can specifically recall. I felt very unsettled by these instances.

Witness C explained that immediately after the conclusion of the dinner on 15 February 2018 whilst she and Witness D and F were travelling home, she complained to the Judge saying words to the effect that what had occurred was "creepy" and "inappropriate". Witness C said that the Judge agreed and advised her never to be alone with the Magistrate and made a specific recommendation that she not be alone in a stairwell with him. Witness C took that advice to heart and thereafter attempted to avoid the Magistrate.

After she returned to Adelaide, Witness C spoke with another District Court Judge about the matter, who suggested that she should make a complaint to the ICAC. Witness C then spoke to Witness D, the District Court Judge, for advice. According to Witness C, Witness D advised her not to make a formal complaint but said that she would speak to the Chief Magistrate about it.

3.3.3 Other Witnesses: Complaint 4

Witnesses D, E, and F gave evidence at the hearing about the dinner at Ian's Weston Hotel on 15 February 2018.

Witness E was, at the time, the other resident Magistrate in Port Augusta. He had little recollection of what occurred at the dinner. In an affidavit sworn on 6 August 2021, he said:

> I do not recall any specific conversation I had with anyone at the table. I also do not recall seeing Simon or [Witness D] speak to [Witness D's] staff directly. However, that may have happened.

> I have an independent recollection that at some point during the dinner, I do not recall when, Simon said something that I considered to be inappropriate for the gathering. I do not recall what the topic was. He may have talked about the imposition of intervention orders. Simon had a view about such orders that may not be considered 'mainstream'. Although he has outlined his view previously, I am unable to be more specific about it. However, with respect to this topic, I am speculating – I do not recall what the topic was.

Witness E said he did not remember whether the Magistrate was intoxicated at any stage, but he has never seen him intoxicated.

He said that Witness D had spoken to him at some stage after the dinner, saying that her staff felt uncomfortable due to something the Magistrate had said at the dinner.

Witness E confirmed that he did attend a barbeque with Witness D at the Oasis Apartments a week or two after the dinner in response to Witness D's invitation.

In cross-examination at the hearing, Witness E said he did not recall anything being said at the dinner which either shocked or stunned him.

Witness D made a statement about this matter to the Judicial Conduct Commissioner on 1 June 2021.

In that statement, Witness D described her memory of the dinner:

> When Simon arrived it appeared that he may have already had a drink. I would not describe him as intoxicated but disinhibited and very outgoing.
>
> We had reserved a table and sat down. We each organised our own meals. I may have bought a bottle of wine for the table. I sat towards one end of the table next to [Witness E]. I think [Witness C] was to my right and Simon was opposite me and with [Witness F] to his left.
>
> For most of the meal I was talking to [Witness E] as I had not seen him since he was appointed as a Magistrate.
>
> During the meal Simon made some inappropriate comments to [Witness C] about her appearance. He appeared to be quite taken with her. He asked her about her partner and there was some discussion about her partner's PhD.
>
> I regarded his behaviour as inappropriate and overly familiar with an associate in this setting.
>
> [Witness C] was upset about his behaviour and we spoke about it afterwards. I told her that I would not invite him to any other social events so as to no put her in that position again. I may have also suggested that she avoid seeing him at work.

In an affidavit which she swore on 11 August 2021 and in response to specific matters raised with her, Witness D explained that what she had said in her earlier statement about the Magistrate appearing disinhibited and outgoing meant that he was loud and overly enthusiastic at the dinner. He was very over the top and

animated in the way that he was behaving. She did say that she had seen him in another setting at an advocacy workshop where he had behaved in the same animated way and, as a consequence, she was not sure whether he was intoxicated or not when he arrived at the dinner. That may just have been behaviour attributable to his particular personality.

As to the specific comments attributed to the Magistrate by Witness C during the dinner, Witness D again affirmed that she could not recall those comments being said but did not deny that they could have been said. She reiterated that she was not listening to their conversation all night and did not hear everything that was said between them.

On the topic of what occurred after the dinner, Witness D also said:

> In paragraph 8 of Exhibit [1], I stated that [Witness C] and I spoke about the dinner afterwards. I believe that this was straight after the dinner. It may have been when we were walking on the bridge on the way back to our accommodation, but I do not recall where or precisely when the conversation occurred. I only recall that Simon's behaviour was a topic of conversation that night after the dinner. My recollection is that [Witness C] and I spoke about his behaviour being inappropriate and out of order. I told [Witness C] that I would not invite him to anymore social events so as to not put her in that position again, but I do not recall telling [Witness C] to make sure she was never alone with Simon, but it is possible that I did say this.
>
> …
>
> In paragraph 10 of Exhibit [1] I stated that I also spoke to [Witness C] about the incident at Ian's when we returned to Adelaide. I recall that [Witness C] was upset and concerned about Simon's behaviour and we spoke about what she should do. I recall being unsure about what to do. It is possible that I said to her to think carefully about what she did and the possible impacts it could have on her. I said to [Witness C] that one way to deal with it was for me to ensure that the Chief Magistrate knew about the incident. That is the approach that I recall [Witness C] and I settling on.

Witness D said she chose not to invite the Magistrate to a barbeque which she held at the Oasis Apartments some days later because of his behaviour towards the Witness C.

In cross-examination, Witness D acknowledged that everyone was seated closely enough together at the dinner to be able to hear what others said. However, she said she spent most of the evening talking to Witness E, whom she already knew.

Witness D was cross-examined closely about the words Witness C said the Magistrate used at the dinner:

> MS POWELL: Going back to your note or your comment in paragraph 16 about him saying something about her general appearance, might he had said to the table generally, "Isn't [she] a lovely young woman?"

[Witness D]: Well, I can't discount that he – he did say something along those lines. He might have said that.

…

MS POWELL: Now, I want to put some specific things to you and before I do I suggest to you that had you heard these things said by Mr Milazzo you would have intervened and done something about it. And the first thing is if he had said to [Witness C] or you had heard him say, I should say, to [Witness C], "If only I was two years younger, I would have a crack."

[Witness D]: So - - -

MS POWELL: You wouldn't tolerate that, would you?

[Witness D]: No, I – I – I'd hope I wouldn't tolerate that and – and I – I don't recall hearing that.

MS POWELL: No. You - - -

[Witness D]: I think I – I - - -

MS POWELL; I'm sorry to interrupt.

[Witness D]: I've obviously given this quite a lot of thought and what you hope you'd tolerate and what you do tolerate in a social setting, I think, are – are two quite different things, really, but I didn't hear – I didn't him say that.

…

MS POWELL: Can you – the next comment I want to put to you is if Mr Milazzo had said in respect of [Witness C's] partner, "I bet he doesn't fulfil you, does he?" Did you hear that?

[Witness D]: I don't recall hearing that. No.

MS POWELL: Had you heard that is that, like the earlier comment, something that you think you might have intervened in relation to?

[Witness D]: I'd hope I'd intervene if somebody said that to any person, especially a young person that I feel responsibility for.

…

MS POWELL: Yes. When you – you've said that you heard comments that were unusual and inappropriate, would you describe yourself as stunned or shocked by anything that Mr Milazzo said?

[Witness D]: Not necessarily by what he said. I was taken by the [fact] that he was engrossed, I think, is a – a word that I'd use with [Witness C] to – to the exclusion of [Witness F]. I was taken by that fact. Exactly what they were talking about I don't I don't know. But it – it was – it was an unusual dynamic.

MS POWELL: Yes. And I take it that you were somewhat curious and perplexed about this, but you weren't shocked into silence by this.

[Witness D]: Was I shocked - - -

MS POWELL: Well, you didn't - - -

[Witness D]: - - - into silence?

MS POWELL: You didn't drop your jaw and sit there raising – with your eyebrows raised, did you?

[Witness D]: Well, I don't recall doing that. No.

MS POWELL: No.

MS KELLY: Can you recall whether you felt comfortable or uncomfortable about the scene you have described.

[Witness D]: I – I was uncomfortable about it. It – it was an unusual dynamic for the table where we were in a pub with the local magistrates and one of them had taken a shine to my associate who he didn't know. It was – it was uncomfortable.

In response to questions about whether Witness C had complained to her about the Magistrate's behaviour in Port Augusta, she said:

MS POWELL: Yes. She never complained to you about anything that Mr Milazzo said or did in relation to her in ensuing days and weeks when you are at the Port Augusta Courthouse?

[Witness D]: No. But she – we spoke about the dinner and the behaviour and I was embarrassed about the fact that I'd put her in that position because I'd invited them to – to dinner and I had spoke to both her and [Witness F] about it afterwards and said that I wouldn't put them in the position where that could occur again and I didn't. But – and – and it was discussed over time and when we came back to Adelaide it was discussed, but I don't have the recollection – the recollection of her talking about him approaching her, if this is what you're talking about, in the courthouse separate to this – to this dinner.

Notwithstanding the apparent acquiescence of Witness D to the propositions put to her in cross-examination that she heard and saw nothing which stunned or shocked her, the Panel considers that Witness D's actions immediately after the dinner at Ian's Weston speak eloquently of her reaction at the time. It is clear from the evidence of Witnesses C, D, and F that Witness D immediately told Witnesses C and F after the dinner, on the way back to the apartments where they were staying, that she was distressed and upset by the Magistrate's behaviour at the dinner.

Witness D apologised for putting her in that position and told Witness C that she would be sure the Chief Magistrate knew about the incident.

The Magistrate's counsel submitted that Witness C is an unreliable witness, whose account of what the Magistrate did and said at the dinner and in court should not be accepted.

It was submitted that she was plainly wrong about many aspects of the events she recounted, including the following:

- She was wrong to say the Magistrate had said he bought a bottle of wine from his home and was wrong about the fact that he said there was a problem with the cellaring.

- She was wrong that the Magistrate was intoxicated and behaved obnoxiously as none of the other witnesses said that, with the exception of Witness D who merely said that he was disinhibited and outgoing.

- Witness C was wrong about how Witnesses C, D, and F got back to the apartments as both Witness D and F said they walked back.

- Despite everybody at the dinner being within earshot, no-one heard of the particular remarks attributed to the Magistrate by Witness C and that she complained of. Indeed, Witness F went so far as to say if she had heard the Magistrate say "If only I were two years younger, I'd have a crack", that she would have intervened and tried to get Witness C out of the situation.

3.3.4 Discussion and Conclusion: Complaints 4 and 5

The Panel has closely examined the evidence of all the witnesses in respect of complaints 4 and 5.

The Panel finds that most of the matters complained of are peripheral to the core account given by Witness C. Whether the discussion about the inappropriateness of the Magistrate's behaviour occurred between the three witnesses, Witnesses C, D and F while walking back to the hotel or driving is immaterial. The bottom line is that each of the witnesses recounted a similar conversation.

In any case Witness C acknowledged that she may be incorrect about her recollection of driving back to the motel.

The differences between each of the witnesses as to the table placements is minor. Whether the table was rectangular or round is also immaterial. The fact is that every person at the dinner conceded that they were within earshot to have heard what other people had said if they were listening.

While some aspects of Witness C's recollection may be mistaken as to whether the bottle had a cork or a screw top and whether the Magistrate criticised

the staff as to the opening of the bottle, the Magistrate himself acknowledged that there was a conversation between him and staff members about the corkage payable for wines bought in the bottle shop. In these circumstances the Panel considers that Witness C could easily have been mistaken. In any event, the conversation at the time when the Magistrate first arrived at the table is not central to the core account which she gave as to his subsequent behaviour.

Whether or not the Magistrate was intoxicated on arrival at the hotel is also not a matter which the Panel believes is necessary to rule. The fact is that some of the witnesses, including Witnesses C, D and F formed the impression that he had been drinking however nothing turns on this. Insofar as Witness C's reliability is challenged on the basis of the view she expressed, the Panel simply notes that her evidence to some extent was supported by both Witness D and Witness F, who both observed conduct consistent with intoxication. In these circumstances it is not surprising that Witness C might have gained the impression that the Magistrate was intoxicated. She had never met him before.

As to the complaints made about Witness C's reliability on the core aspects of her account the Panel finds that there is considerable support in the evidence of both Witnesses D and F for the account given by Witness C.

The Panel regards the core aspects of Witness C's account of the conversation at the dinner to be the following comments made by the Magistrate:

- "She's a very attractive girl, isn't she".
- "If I was one to two years younger, I would definitely have a crack".
- "I bet he doesn't fulfil you, does he?".
- Numerous remarks throughout the dinner that Witness C was his "type".

In the courthouse subsequent to the dinner:

- "I know what you did on the weekend. Confess your sins to me; confess".

The Panel accepts the evidence of Witness C as to each utterance above.

As to the Magistrate's own evidence about this, the Magistrate conceded in evidence that he had not given any thought about the dinner in February 2018 for about three years until after it had happened and that he did not remember any of the conversation word for word. Nor could he specifically recall any of the words spoken. On his own evidence the Magistrate conceded that he had said something like "Isn't she a lovely young woman".

The Magistrate's evidence that it is not his practice to comment on a woman's beauty to her face and that he does not comment on a woman's physical appearance generally cannot be accepted in light of the fact that in addition to Witness C, both Witnesses D and F heard the Magistrate make comments about Witness C's lipstick as well as her height. Both Witness D's evidence that the Magistrate appeared to be taken with Witness C and was overly familiar with her, and Witness F's evidence that the Magistrate made remarks with sexual undertones both during the dinner and afterwards at the courthouse and that the Magistrate ignored Witness F and appeared only to be interested in speaking with Witness C all support the account given by Witness C.

The Magistrate's own evidence on this particular issue is puzzling. On the one hand he conceded that for him to have said "If I was one to two years younger" or "If I was six months younger", was a matter that he might jokingly have said. In his evidence he explained what he meant by that:

> … The old man, the archetypal old man, bemoans his age by saying, "If I was only young again." Which is open to a couple of interpretations. One: If only I had my strength and virility, is one. And the other one is: the attractive women who are at the table with me would be interested in me. I parody it by saying, "If only I was six months younger." It doesn't make the slightest bit of difference. It's a silly thing to say. I mock myself and the old man, the archetypal old man.

The Panel finds, contrary to the Magistrate's denial, that his own evidence on this topic supports the account given by Witness C. The Panel finds that the Magistrate did make the comment attributed to him "If I was one to two years younger, I would definitely have a crack".

As to Witness C's account that during the dinner he made a remark to the effect "I bet he doesn't fulfil you, does he?" the Panel accepts Witness C's evidence that those words were said and the context in which she said they were made.

Once again there is some support for Witness C's account in that although Witness F did not claim to have heard everything, she did hear words to the effect of "fulfill" or something along those lines. Witness F also said that the comment made by the Magistrate was more of a question. This is contrary to the Magistrate's own admission that he said words to the effect of "I hope he fulfills you".

On any view of that particular conversation the remark had sexual undertones.

As to the comments to the effect that Witness C was the Magistrate's type, the Panel accepts that such comments were made.

Although those remarks were not specifically heard by Witnesses D or F, the fact is that comments to that effect are entirely consistent with the conduct of the Magistrate towards Witness C as described by both Witness D and Witness F.

As to the fifth complaint and the words said to be uttered by the Magistrate in the courthouse "I know what you did on the weekend. Confess your sins to me; confess" the Panel finds that those words were said and in the context recounted by Witness C. Contrary to the Magistrate's evidence that he only sought to communicate with Witness C about pleasantries, the Panel finds that he did continue to exhibit a particular interest in Witness C and that the remark uttered in the circumstances recounted by Witness C conveyed sexual undertones.

It is significant in this respect that Witness F, on the way back to Adelaide after the Port Augusta circuit, said that Witness C recounted an incident in which the Magistrate came very close behind her and placed his leg or hand on her chair, even though Witness F could not remember the words that Witness C used.

Witness F also said in evidence that during their work at the Port Augusta courthouse the Magistrate did have further conversations with Witness C during which he ignored Witness F and according to Witness F persisted despite the fact that Witness C was trying to get back to work most of the time.

Finally, the Magistrate's own admission that he might have jokingly said words to the effect of "confess your sins" is consistent with the account given by Witness C.

The Panel was impressed by the evidence of both Witness D and Witness F. The Panel regards it as significant that Witness D was so concerned by the inappropriateness of the Magistrate's conduct that after that dinner she refrained from inviting him to social events, later discussed his conduct with the Chief Judge and informed the next judge to go on circuit about the Magistrate's conduct. She also does not deny what both Witness C and Witness F said that she warned them to be careful around him.

For reasons which were not explained to the Panel, it does not appear that the incident at the dinner at Port Augusta did reach the ear of the Chief Magistrate because in April 2021 the Chief Justice issued a press release stating that in respect of the South Australian Equal Opportunity Commission Report to the Attorney-General that month, there was no issue with any current judicial officers.

It is significant that prior to that time Witness C, apart from having spoken to the judges of the District Court, did not make a formal complaint. She explained that that was because she was counselled not to pursue a more formal complaint however after the inaccurate press release she decided to pursue the complaint and to speak with the press because she considered that her complaint should be dealt with appropriately.

The Panel makes no criticism about Witness C's actions after the issue of the press release in April 2021. In the circumstances, her reaction is entirely understandable.

For these reasons the Panel finds that in relation to the central issues before it, Witness C's evidence is accepted. Insofar as her account differs from that of the Magistrate, his evidence is rejected.

Any inconsistencies or inaccuracies in Witness C's evidence, for the reasons we have given, are peripheral to the central issues in this inquiry.

3.4 Complaint 6: Witness G

The incident the subject of complaint 6 took place on Monday 30 September 2019. Witness G was at all material times an employee of the Courts Administration Authority. Her duties required consultation from time to time with the magistrates' associates. She also knew the Magistrate, but her relationship with Mr Milazzo was no different from that which she had with other magistrates. She described that as being a good working relationship but not a relationship with someone with whom she would socialise.

Witness G did not make or sign a formal statement about the events, but at the request of the Principal Registrar to whom she reported the matter at the end of the meeting at which the event occurred, she then sent an email to the Registrar at 5.55pm in which she recorded the events. That was a little over two hours after the actual event. She verified in evidence what she had said in the email. What follows as her description of the events is based on that email.

On the day in question Witness G was in the associates' room at a meeting with the two associates, Witness H and Witness I. She was there to discuss matters pertaining to her work. She was sitting in the guest chair in the associates' office facing the two associates whose desk was against the opposite wall of the room. The associates had turned around from their desk to face Witness G. During the course of the meeting at about 3.45pm the Magistrate came into the office, uninvited, and sat on the left thigh and knee of Witness G, also uninvited. He asked the associates if one of them could go to the Supreme Court library to get him a book. Witness G also said that he touched her left shoulder and neck as if to massage it. Witness G's evidence as to what happened then was as follows:

> I went quiet. I did not know what to say. It was unexpected and I was taken by surprise. My stomach turned and I felt anxious. I wanted to ask him to get off my leg as it was rather uncomfortable and his weight was pushing on my knee. But I didn't say anything. I froze. In that moment, I felt I had no way of getting out of the room.

When the Magistrate left the room Witness G said to the associates that she thought the behaviour was inappropriate. She nevertheless continued the meeting with Witness I while Witness H went to the get the book for the Magistrate.

At the end of the meeting Witness G went to the then Principal Registrar of the Court, Witness J, and told her what happened. She told the Registrar that she did not want the associates to think that this was normal behaviour in the workplace and that she did not want anything like that to happen to any other young women. Witness J's evidence was that when Witness G reported the incident to her she looked uncomfortable and that Witness G was concerned about how the incident was going to be handled and in a way that would not destroy her relationship with the Magistrate. She also expressed concern about the two young associates who were present during the incident. Witness G in her oral evidence said that she appreciated that the approach may have been done in a friendly manner rather than a sexual manner, but that it was still unpleasant.

Witness H, one of the associates, remembered the Magistrate walking in and sitting on Witness G's lap. She could not remember if he said anything when he was in the room, but that he sat on her lap for a very short time and could not recall if he did anything else or touched Witness G while he was sitting on her lap. She did notice a shocked expression on Witness G's face. She said she was shocked by the Magistrate's conduct as she had not witnessed any conduct of that nature before by any magistrate. She did recall, however, as did other witnesses, that there were other times when the Magistrate's behaviour was, in her view, "borderline unprofessional". She could not recall any specific incidents. It was enough to make her cautious about how she engaged with him.

The other associate, Witness I, was also in the room at the time. She said that she saw the Magistrate walk into the adjacent tea room as they were talking and then began to talk to the three of them through the doorway. She recalled that he said something to the effect of "You girls are busy in here" and "There is nowhere for me to sit". Witness I was focused on Witness G rather than the Magistrate. However, she recalled him coming in and sitting on Witness G's lap for period of seconds, that Witness G appeared to be "shocked" and "clearly uncomfortable", and that the Magistrate had not asked Witness G for permission to sit on her lap nor had he been invited to do so. She could not recall anything about the Magistrate touching Witness G apart from sitting on her lap.

Although neither Witness H nor Witness I could recall any other touching of Witness G by the Magistrate, neither of them denied that it happened.

In evidence the Magistrate accepted the account of Witness G, save for one immaterial difference, namely that he said that he went to the associates' room to ask one of them to return a book. He accepted that the behaviour was inappropriate. He did not intend it to be so but it was "a bit reckless … I don't think I thought it through quite enough to be honest". On 2 October 2019 the then Supervising Magistrate, at his request, spoke to Mr Milazzo about the incident. The Magistrate's immediate response was "I fucked up. I realise it was inappropriate. I went across the line". He said he would like to apologise. However, Witness G was by then on leave and did not return until 29 October 2019. It appears that by then no apology was expected or given.

The Panel is satisfied that the incident and its effects on Witness G occurred as Witness G described.

3.5 Complaint 7: Witness K

Witness K worked in the IT Services Delivery Branch of the Courts Administration Authority. Her duties involved providing IT support as needed to staff of the Courts Administration Authority. The offices of the Branch were situated in Flinders Street, Adelaide. However, for a period of approximately four years ending sometime in 2017, Witness K was seconded to work in the Adelaide Magistrates Court and she shared an office on the same floor as the Magistrates. During that secondment she met Mr Milazzo and a number of other Magistrates. In 2017 she became Service Desk Coordinator and returned to the Flinders Street office.

On 13 August 2020 Witness K received an email from Mr Milazzo's clerk advising her that the Magistrate was at home recovering after a bicycle accident and had requested that Witness K ring him on his mobile number. The purpose of the call was not disclosed. On the same day she telephoned the Magistrate and they spoke about his accident and how he was feeling. Witness K enquired why the Magistrate had wanted her to ring him, thinking that it was probably to set him up to work from home. The Magistrate said that he wanted to talk to her but not on the telephone and that it had to be a face to face meeting. He asked her to come to his home because of his current incapacity. He suggested that she come to his home on the weekend and that she could bring her "boy" which she understood to mean her husband. It was a short conversation as Witness K was dealing with other urgent IT problems. She said that she would ring back the next day. She said that she then felt confused about the nature of the call, as she still had no idea what the Magistrate wanted her to do from an IT perspective. On some previous occasions IT personnel had attended at the home of Court staff to address IT issues, but that was rare, and such visits were always arranged through the Chief Magistrate or Executive Management. This request was different, coming direct from the Magistrate. As Witness K was unsure about exactly what was happening she reported the request to the appropriate person in Human Resources, describing the request as "weird".

The next morning Witness K sent a text message to the Magistrate. Having identified who she was, the message said "… You've weirded me out over your phone call yesterday". She then sent a second text message "Can I call you this morning sometime?". She then received a text message from the Magistrate saying "Yes", followed by a second message which said "Anytime".

Witness K was concerned about the call so she asked another staff member to be present while she phoned the Magistrate with her phone on speaker. There was some general small talk about his injuries and what Witness K described as "usual banter for them", and the Magistrate said that he did not want to discuss the matter over the phone. Feeling frustrated, Witness K told the Magistrate that she was happy to help, but did not understand why he could not tell her over the phone what he wanted. Witness K's evidence as to what happened next was as follows:

> Magistrate Milazzo then started yelling at me, saying "Look, you're not listening, I don't want to discuss it over the phone. You are breaking the number one rule and talking over the phone. All I am asking for, is for you to come here and talk face to face for twenty minutes, It's a short drive, twenty minutes from the city. What are you worried about, my daughter is here and I am incapacitated." Magistrate Milazzo, then said "the CAA has a toxic culture and my colleague recently lost his job because of phone tapping". He then yelled "I don't want to discuss it over the phone, I hope you never feel the fear when someone asks you questions". Magistrate Milazzo then added, "Anyway I have asked you and you are not feeling comfortable, I asked you for some help and you aren't keen, so this is the end of the discussion". I confirmed with him that I was feeling uncomfortable. Magistrate Milazzo then ended the call by saying "End of discussion, don't worry about it have a good day", he then hung up on me.

A few minutes after that call Witness K received the following text message from the Magistrate: "Very sorry for strong reaction. If I could take over the phone I would have. Your conversation with me was beyond inappropriate in the circumstances. Have a good day". Witness K said that she believed that the word "take" was a typing mistake and was meant to be "talk".

Witness K then reported the additional call to Human Resources, as she wanted to have the matter documented, not for the purpose of making a complaint but out of concern that it may reflect on her as doing something wrong.

The Magistrate was subsequently spoken to by the Chief Magistrate and was counselled about the incident and the way the Magistrate had spoken to Witness K. He maintained in evidence that he had never insisted that Witness K should come to his house, and that he had only insisted that he would not discuss the issue on the telephone. However, in the Panel's view that would most likely have been interpreted by Witness K as a requirement that she should come to his home for some unstated purpose.

On 25 November 2020 Witness K was again in the Adelaide Magistrates Court to do some software training with another Magistrate. Mr Milazzo asked her to come and see him in his office on her way out, which she did reluctantly. On entering his office, he invited her in and asked her to take a seat and said "Are we alright?". She said "Yes, I don't know what your problem was". He then started talking about random things which Witness K did not understand. She wanted to terminate the discussion so she informed him that she had to go. She then left his office, still not having any idea as to what he wanted to talk about. She said that the Magistrate had never been like that in her previous interactions with him.

Be that as it may, it appears from other evidence led before the Panel that the two parties to the telephone calls were at cross purposes during the whole conversation. The Magistrate was deeply concerned, as was another Magistrate, that a female member of the Court staff had been badly mistreated by the Court Administration Authority over what had been a very serious incident. The Magistrate wanted to enlist the aid, if possible, of Witness K in seeking to remedy

that alleged mistreatment – a matter which he was not prepared to discuss over the telephone. Witness K, on the other hand, could only assume, not unreasonably, that she had been contacted about an IT problem which the Magistrate had at home, and could not understand his insistence that he would not disclose the nature of the problem to her. It is clear that the encounter had no sexual connotation at all. As Witness K said, her only reason for reporting the matter was to have it documented and that she had no intention of making a complaint, but was concerned that it might come back to her as she having done something wrong.

The worst that can be said about this conduct is that the Magistrate yelled at Witness K over the telephone, for which he then immediately apologised. In the Panel's view this complaint can have no influence on any ultimate recommendation to be made as to removal or otherwise of the Magistrate from office.

3.6 Complaint 8: Witness L

3.6.1 Witness L – Background

It is not surprising that memories of events which occurred some seven or eight years previously are in some respects imperfect, as the evidence reveals in respect of this complaint. This is so particularly when, in the intervening period, there has been no reason to revisit the events. However, most of the differences in this case relate to peripheral events and circumstances rather than the core events of what happened in the lift. It is also not surprising that all three principal witnesses may have erred by confusing their imperfect memory of some details with reconstruction of some of them as to what they now think must have happened.

Witness L was the complainant of the alleged conduct of the Magistrate the subject of this complaint. She married her husband in 2000. Together they operated a trucking business until her husband became seriously ill and was unable to work. It was because of that that she began her employment as a cleaner. Her husband died in February 2020.

While Witness L was employed by a cleaning company, in October 2012 she commenced as a Cleaning Supervisor within the Courts Administration Authority. She was responsible for cleaners working in the Adelaide Magistrates Court and the adjoining Coroners Court. At all material times she worked split shifts from 9.00am to 2.00pm and from 5.00pm to 9.00pm. In August 2013 her then employer lost the cleaning contract which was then awarded to another company which continued to employ Witness L performing the same role and working the same shifts.

Part of her duties during the afternoon shift was to undertake cleaning of the fifth floor of the Magistrates Court, being the floor where the magistrates had their offices. She was also responsible for supervising four other cleaning employees. On the morning shift she was responsible for cleaning and restocking toilets and kitchens on all floors, as well as spending time on cleaning duties on level 3. In the course of her cleaning duties she encountered and was known by most of the magistrates, including Mr Milazzo.

Witness L's evidence comprised a written statement made on 7 June 2021 which she verified on oath and her oral evidence in person before the Panel. She referred both in her written statement and her oral evidence to incidents of a similar nature to that the subject of this complaint, also involving the Magistrate. These are discussed later in this report.

3.6.2 The Lift Incident – Evidence of Witness L

It was not disputed that the incident took place on Friday 18 July 2014. That was, by all accounts, a very cold day. The incident occurred in the staff lift at the Adelaide Magistrates Court building at a time when Witness L, Witness J (a senior

employee of the Courts Administration Authority), and the Magistrate were in the lift. The lift serviced all levels in the building, being the basement, ground floor and levels 1 to 5.

Witness L's evidence was that she and Witness J got into the lift on the ground floor, she intending to go to level 4 and Witness J to level 3. The Magistrate was already in the lift, Witness L assuming that he would be going to his office on level 5. She was wearing her cleaning uniform which had a three-quarter length sleeve ending just below the elbow. Witness J stepped into the lift first and the Magistrate was at the back of the lift when they got in. Witness J stood near the lift control panel on the left hand side as she walked in and Witness L stood to the right hand side of the lift towards the middle of that side.

Witness L's evidence was that she said "Good morning" to the Magistrate and then stood in the lift with her arms folded so that her right hand was on her left bicep and her left hand on her right bicep, as one might do when it is cold. She said that the Magistrate asked her if she was cold, to which she replied "It's freezing". He is then alleged to have said, "Let me warm you up". In her statement she said that he then reached straight out with both hands and with open palms and placed both hands to within a millimetre of both of her breasts. She then took a step sideways to prevent him actually touching her. In her oral evidence she said that the Magistrate said something about the cold and "I can warm 'em up for you" and cupped his hands and went straight for her breasts. She said that he was probably an inch away from her breasts when she sort of backed sideways. He was looking towards her breasts as he approached. In both accounts she said that Witness J was looking shocked. The doors for the third floor opened and she and Witness J got out. She told the Panel that she did not want to be left in the lift alone with the Magistrate for the remainder of her journey. She did not volunteer any further conversation as she got out of the lift but remembered Witness J saying that they would have to report the matter. She said that she did not want it to go any further and asked Witness J to leave it alone. In her statement she said that the reason for not wanting to pursue the matter was that she was a cleaner and he was a magistrate, and there was no actual contact.

3.6.3 The Lift Incident – Evidence of Witness J

Witness J said that, on the suggestion of the Principal Registrar whom she contacted on that day, she made contemporaneous notes of the incident. She said that the notes were made on the same day. In cross-examination it was suggested that the notes were not made on the same day but possibly very much later. The notes exhibited to her first affidavit referred to below were as follows:

> **NOTES ON INCIDENT IN LIFT WITH CLEANER**
>
> On Friday 18 July 2014, I was in the staff lift with Magistrate Milazzo and the female cleaner who I regularly see on Level 3. (I didn't know the name of the cleaner and have since asked […] who told me that her name is [Witness L]).

> Magistrate Milazzo commented on how cold it was and he placed his hands on [Witness L], and said something like "see how hold [sic] my hands are". [Witness L] had her arms folded. When Magistrate Milazzo placed his hands on her, it was in the vicinity of her breasts. At the same time Magistrate Milazzo was making jokes – the conversation contained sexual innuendo. I do not remember the exact words.
>
> I was concerned that the behaviour might not be perceived as being appropriate by the cleaner, and was feeling a little uncomfortable on behalf of the cleaner. However, I did not know what sort of a relationship they had – ie, how well they knew each other.
>
> Magistrate Milazzo was going to Level 5. I was going to Level 3. I was not sure where the cleaner was going (Level 3 or 5) – there was no other button pressed (from memory). As I was leaving the lift on Level 3 I asked the cleaner "Do you want to get off with me?" – thinking that this might give her an opportunity to leave the lift with me. [Witness L] said something like "No, I need to go to Level 5". At the same time, Magistrate Milazzo said "No, she wants to get off with **me**" and laughed. I also laughed and said "I knew as soon as I had said that, that it came out wrong" (or similar).
>
> As I was feeling a little uncomfortable about the incident, later that afternoon I called [the Registrar, Witness M] for advice.
>
> [Emphasis in original]

It will be noted that she said in parenthesis that at the time of the incident she did not know the name of the cleaner. There was a further note, part of the same exhibit to the affidavit, which recorded a conversation with Witness L on the following business day, Monday 22 July 2014. The efficacy of that note was not challenged. The first part of that note reads:

> **CONVERSATION WITH CLEANER ON 22 JULY 2014**
>
> On 22 July 2014 I saw the cleaner [Witness L] on Level 3. I said to her "I'm so sorry about what I said getting out of the lift the other day". She said that was fine – "I know what you were trying to do" and that she had no concerns about what I had said. She did, however, go on to say that Magistrate Milazzo often treated her in that way and that it made her feel uncomfortable. She said that she had raised it with him on one occasion and that the conversation had not resulted in any change to his behaviour.
>
> …

It is clear that by that time Witness J had ascertained the cleaner's name. The rest of the paragraph is included, not as proof of the facts referred to in the conversation, but as proof that the conversation occurred.

Witness M was the Principal Registrar at the time. From her evidence it is clear that she had a meeting with the Chief Magistrate on Friday 25 July 2014 about matters which included this incident. Before that meeting she had had a meeting with Witness J some time earlier that week. In preparation for her meeting with the Chief Magistrate she prepared some notes for herself concerning matters to be discussed at the meeting. The first line and first three dash points of the notes were as follows:

Terrible timing – Allegation of sexual harassment:
- Incident in lift – inappropriate touching and language – jovial context
- Cleaner has indicated was uncomfortable, not first time has happened, can take care of herself, has not made a formal complaint
- Has raised with husband – has not raised with employer as yet

…

Witness M's evidence was that she could only have obtained that information from Witness J before she made the note for the meeting with the Chief Magistrate on Friday 25 July 2014. The first time she ever spoke to Witness L, the cleaner, was during the following week. Witness M's notes to herself for the meeting reflected what was contained in both sets of Witness J's notes.

The Panel is satisfied that, even if Witness J's contemporaneous notes were not made on 18 July, they must have been made on or about 22 July while the events were still fresh in her memory, and by no later than 25 July 2014.

Witness J also affirmed two affidavits which were in evidence before the Panel and she also gave oral evidence.

In the first affidavit affirmed on 28 May 2021 she said that she could not recall if she entered the lift from the first or second floor. Her intention was to travel to the third floor. In her second affidavit affirmed on 11 August 2021 she said that she entered the lift from level 1 to go to level 3 where her office was located. In both affidavits she said that the Magistrate and Witness L were already in the lift. She did not describe their respective positions in the first affidavit, but in the second affidavit she said that the Magistrate was standing on the left side of the lift (facing the lift doors) towards the back. Witness L was standing in front of him but positioned "slightly diagonal" to him towards the middle of the lift. She had her arms folded across her chest. Witness J got into the lift and stood on the right hand side (facing the lift doors) at about the same level as Witness L. It is not clear whether the expression "(facing the lift doors)" was from the point of view of the people in the lift or whether it was from her point of view looking into the lift. In her oral evidence she was asked in what direction Witness L was facing at the time the incident occurred. The evidence then continued:

[Witness J]: She was facing towards the front of the lift as was he, like, facing towards the doors.

MR BESANKO: And whereabouts was she positioned in the lift?

[Witness J]: Towards the side wall of the lift. She was on one side of the lift. I was on the other.

MR BESANKO: Right. And she was – her front was facing towards the lift door, was it?

[Witness J]: That's right. Yes.

MR BESANKO: And did Magistrate Milazzo approach her from behind?

[Witness J]: Yes. He was behind her.

As to her description of the event, Witness J said in her first affidavit:

> As the lift was in motion, Magistrate Milazzo commented on how cold it was. He then said "see how cold my hands are", and I then saw him reach out with both hands toward the cleaner and place his hands on the cleaner's upper arms. I am unable to say whether he placed his hands over the cleaner's hands. His hands remained there for a very short time. I don't remember the cleaner actually responding in any particular way. From my recollection, she stood there silent.
>
> Whilst he was doing this, I heard Magistrate Milazzo make comments containing sexual innuendo. Due to the time that has passed, I do not recall precisely what the innuendo was but I do remember feeling uncomfortable as a result and embarrassed for the cleaner.

Witness J described her second affidavit as an addendum to her first affidavit. What she said about the incident itself in her second affidavit was as follows:

> Almost immediately after the lift doors had closed and the lift started moving, Magistrate Milazzo started rubbing his hands together saying how cold it was. I turned my head to look at him when he started talking.
>
> I then saw him take one step forwards and touch [Witness L's] arms from behind. Her arms were still folded. Both of his hands were positioned on her upper arms close to, and in line with, her breasts.
>
> While he was doing this, he was making inappropriate comments or jokes of a sexual nature. I do not recall what words he used, but they were of a sexual nature.

She said that Witness L looked uncomfortable and that the incident "felt really off" to her. When the lift reached level 3 she thought she would encourage Witness L to get off the lift with her so that she did not have to be alone with the Magistrate. There followed the conversation recorded in Witness J's notes of the event. In relating that conversation she said that the Magistrate placed emphasis on "me" and that she understood that to be "a further statement of a sexual nature". She said that Witness L remained in the lift with the Magistrate and did not get out with her.

In her oral evidence Witness J said that at the time of the event Witness L was facing towards the front of the lift, as was the Magistrate. She was positioned towards the side wall of the lift, with Witness J on the other side of the lift. The Magistrate was standing behind Witness L and approached her from behind. He was asked what he then did with his hands. The transcript then records:

[Witness J]: Then he placed his hands on her arms. She had her arms crossed so her hands were sort of towards her forearms ..... elbows and he placed her hands – his – his hands towards her hands.

MR BESANKO: And did you see whether Magistrate Milazzo actually touched [Witness L]?

[Witness J]: Yes. I'm fairly confident he did. Yes.

MR BESANKO: And what did [Witness L] do, if anything, when Magistrate Milazzo moved towards her?

[Witness J]: Well, I don't think that she was aware he was moving towards her until he actually touched her. He was behind her.

She accepted in cross-examination that she thought the Magistrate was going to place his hands on Witness L's hands and that she did not suggest that he was groping for her breasts.

3.6.4 The Lift Incident – Evidence of the Magistrate

The Magistrate confessed at the outset of his evidence in relation to complaint 8 that he had had to reconstruct a lot of what happened, but he added "I remember what happened in the lift specifically". He agreed that it was a very cold day. He speculated that he may have been out for a coffee beforehand. He volunteered that he had seen Witness L "out the front" and it was very cold. It had not been put to Witness L that she may have been seen out the front or that she saw the Magistrate there.

He said that he thought all three of them had got in the lift together on the ground floor, but added "… but [Witness J] says no. So apparently it was [Witness L] and me on the ground floor". He then volunteered that Witness L had a trolley in the lift, and that she had pushed the trolley in and stood at the back of the lift. That had not been suggested at any stage in cross-examination of Witness L or Witness J, particularly when both of them had gone to some length to give conflicting evidence as to their respective positions in the lift.

The Magistrate's own evidence as to the positions of the parties in the lift was described by reference to a plan of the lift which he had drawn the previous weekend. He was giving evidence on a Monday. His evidence was that the Magistrate moved to the right of the doors as he entered the lift and was standing on that side of the lift near the front. Witness L was standing on the same side of the lift in about the middle. Witness J was on the opposite side of the lift but not quite as far in as Witness L. There was a large space at the rear of the lift but no trolley had been drawn. However, the Magistrate admitted that the positions shown on the plan were drawn in order to accommodate the recently remembered trolley.

The Magistrate described the incident as follows:

> I stepped towards [Witness L] in what I considered a friendly way. I took her forearms, or hands, in my hands from the front and said, "God, it's cold", and let go, and that's it. It was an empathetic sharing of the pain that morning. We were both cold.

He confirmed that when he gripped Witness L he was facing her. However, having described the incident in that manner he failed to answer a question put by his counsel and intervened:

> On the topic of behind, [Witness L] had the trolley. It would have been – she would have pushed the trolley in first, or did push the trolley in first, and walked out first pulling it. For me to get behind [Witness L] and in front – for me to reach around from behind and grab [Witness L] would have been an awkward, and I think a very intrusive thing to do. I was in front.

However, in cross-examination he admitted that he had no actual recollection of the trolley. It was something that occurred to him "in the last couple of days".

He continued to assert that he approached Witness L from the front. He could not remember whether she had her arms folded in front of her embracing herself. He said that his intention was to touch her forearms and let go. He was asked twice whether he placed his hands near Witness L's breasts, and twice he avoided a direct answer. The first question and answer were as follows:

> MR BESANKO: Would you agree that, again, whatever happened, you placed your hands near [Witness L's] breasts?
>
> MR MILAZZO: I had no thought about her breasts at the time. I was surprised to read that. I don't remember getting anywhere near her breasts but her breasts were not in my head. I would not have placed – I would not have touched her breasts or placed them near her breasts if that was going to cause her discomfort. I don't think so. I don't know about her breasts.

The second question:

> MR BESANKO: Well, if she had her arms like this, [folded as described by Witness L] and your intention was to touch her forearms - - - would you accept that if that was your intention, and you did move to do that, that you would have placed your hands close to [Witness L's] breasts, if that's how she was holding her arms?
>
> MR MILAZZO: Well, if she was holding her arms like that, I think I would have forgotten about my intention and just not done it. So that's – I have no memory about – [Witness L's] breasts were first mentioned to me in … the letter from the Judicial Conduct Commission. I had given them no thought at all. I thought it was an attempt to sexualise non-sexual conduct. But I can't speak to where her breasts were when all this was going on. I gave her breasts no consideration.

He denied that he asked Witness L if it was cold and she responded by saying "it's freezing" but claimed that he had said that it was freezing. He "absolutely" disagreed that he had said "let me warm you up" but said that she might have said "I'm cold". He said that she did not step away and made no movement at all. He said that he thought he did touch her on the forearms or on the back of the hands. When questioned further about the touching he said: "Well, I have a recollection but I don't know if the recollection is correct but I'm pretty confident I did". He asserted that neither Witness L nor Witness J looked uncomfortable.

He said that he was not in a position to dispute that Witness J had asked Witness L "Do you want to get off with me?" or that Witness L said "No I must

go to level 5", but he did not remember whether it was said, neither did he remember saying "She wants to get off with me". Or that he was laughing at the time. He speculated, however, that if he said those words "that was only because I knew she was going to the fifth floor and was getting off with me".

3.6.5 The Lift Incident – Evidence of Witness N

Witness N, from 2013 to 2015, was also a cleaner in the Coroners Court and Magistrates Court. She only worked evening shifts from 5.00pm to 9.00pm. Witness L and Witness N had formed a friendship approximately one year before Witness N commenced work as a cleaner. They became friends because they both had sons at the same school. During her period of employment Witness L was her immediate supervisor. Her usual practice was to clean all levels of the Coroners Court first and then move to the Adelaide Magistrates Court, usually on level 1 or level 5 as designated by Witness L. She would sometimes work alongside Witness L if she needed assistance. Their friendship was such that they drove each other to and from work on the afternoon shift.

She gave evidence that she recalled one occasion, the date of which she could not remember, when she had a conversation with Witness L after she (Witness N) had finished cleaning the Coroners Court and went to the Magistrates Court. She said she recalled seeing Witness L and thinking that she looked upset and worried and was quiet. Witness L told her of an incident that had occurred in the lift that day involving a person she identified as the Magistrate.

Evidence was led of what Witness L had told Witness N about the incident. What Witness L told her about the incident would be inadmissible in a court of law as evidence of what happened in the incident as being inadmissible hearsay. Bearing in mind the principles earlier referred to in the *Briginshaw Case*[24] the Panel, for the purpose of reaching a conclusion as to what happened in the lift, ignores any evidence of what Witness L may have said to Witness N about the incident. However, the significance of Witness N's evidence is to identify the occasion when the conversation occurred and the fact that at the time of the conversation Witness N described Witness L as having "looked upset and worried and was quiet". The inference that can properly be drawn is that whatever happened in the lift had caused embarrassment to Witness L and was significant enough to cause Witness L to mention the incident to Witness N.

On the Monday following the incident Witness L had a conversation with Witness J in her office when, among other things, Witness L told Witness J that she did not wish to pursue the matter any further and that she was "not prepared to take on a Magistrate, that it would be his word against hers and that she couldn't win".

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[24] *Briginshaw v Briginshaw* (1938) 60 CLR 336.

There was a further meeting between Witness L and the Principal Registrar, Witness M, on some date between Friday 25 July 2014 and Friday 1 August 2014 at which Witness L confirmed that she did not wish to take any further action.

3.6.6 Evidence of Other Incidents

Before moving to resolve the obvious differences between the three witnesses as to what happened in the lift, it is necessary also to record the evidence of Witness L as to other similar events involving the Magistrate which she alleged occurred both before and after the event in the lift.

In her written statement Witness L said:

> I feel that Magistrate Milazzo took a shine to me from the time I started. He would follow me around and regularly say crude things to me. My response would be "Simon, knock it off". I would have said that to him on at least a dozen occasions. He would talk about breasts all the time, making comments such as "if you're cold, I can warm them up". He would talk about my breasts, anyone's breasts really. His language was crude. One day he said to me "you must be younger than what you are because your boobs are perky".
>
> There were many times when I thought there was going to be unwanted physical contact. It was the way that he would come at me. His eye contact as he was approaching made me very uncomfortable. He would come well into my personal space. I had to tell him a number of times that he needed to back off. I would tell him "Mr Milazzo, leave me alone, I'm here to do a job, and you need to back off".
>
> There was no particular pattern to his behaviour, these comments occurred day and night, whilst alone, and with others in the nearby vicinity. It didn't seem to matter.
>
> It got to the point, that if he was in the lift and no one else was in there, I wouldn't get in. I made a conscious decision not to put myself in that position.

In her oral evidence she said that these events only ever occurred during the morning shift. The conversations were generally about women's breasts, not about one particular person but they made her feel uncomfortable, but later in her evidence she verified what she had said in her statement. Her evidence was that the comments continued as "generally sexual talk" after the lift incident, other than during the two years that the Magistrate was in Port Augusta, and until February 2020 when her husband died. After that his comments "stopped completely". She estimated that overall the comments occurred on average of about once a month during the total period that the Magistrate was in the Adelaide Magistrates Court.

The Magistrate vehemently denied that any such conversations occurred.

3.6.7 Discussion

There are obvious conflicts in the evidence which need to be resolved. Before turning to the specific areas of conflict it is necessary to make some general observations about the evidence of Witness L, Witness J and the Magistrate.

In the Panel's view Witness L gave her evidence in a matter-of-fact and frank way and did her best to recall events and to assist the Panel. She answered questions directly and did not seek to avoid answering except where she admitted that she could not recollect particular details after such a long time. Her evidence as to the other similar events both before and after the lift incident, while less than precise, except for one or two instances, was consistent with and supported by the expressions of concern about some weaknesses in the Magistrate's conduct referred to in Part 3.1 of this Report. She did not report any of those incidents at the time because, in her words: "I didn't want anything to go any further. I wasn't interested in going to court or he said I said. Wasn't interested in any of that. I was there to do a job. Did my job and went home". Later she said: "I was a contractor, and at that particular time, I was more – my focus was doing my job and going home. I had a husband and a son that I had to provide for, so that was my focus", and again: "I had a sick husband at home; very sick husband. So my priority was getting home to him, not the crap that happened at work. That was my priority". She did not want to cause trouble and felt that she could look after herself.

She was even reluctant to report the lift incident because, as she said: "I'm a cleaner, he's a magistrate. I didn't want it to go any further". When asked what she meant by that she said: "Well I'm a cleaner. Who are they going to believe? The cleaner or the magistrate?", and she was concerned that she would probably lose her job. She was dedicated to keeping her job being, at that stage, the only breadwinner in the family. There was no element of vindictiveness in Witness L's evidence. She resisted reporting any of the incidents when she could have. Her first ever recorded statement about the events was that dated 7 June 2021, being the statement tendered in evidence. That was only made at the request of the JCC.

Counsel assisting the Panel submitted as one of the reasons in favour of accepting the truth of Witness L's evidence was that there was no reason for Witness L to lie. Counsel for the Magistrate submitted that to reason in that manner is wrong and contrary to the rule in *Palmer v The Queen*.[25] It was submitted that the effect of the reasoning is improperly to invite the trier of fact to speculate, with the consequential effect of reversing the onus of proof. *Palmer* was an appeal against a guilty verdict in a criminal trial by jury. It concerned a question asked in evidence of an accused and a direction to the jury in relation to that evidence. However, this is not a criminal trial. It is not a trial by jury. It is a statutory inquiry. There is no jury. It is not "an accusatorial process in which the prosecution bears the onus of proving the offence beyond reasonable doubt".[26] In *Singh v Nursing and Midwifery Board of Australia*[27] it was held that *Palmer* was

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[25] (1998) 193 CLR 1.

[26] See *Hargraves v The Queen* (2011) 245 CLR 257 at [44] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ, where the effect of the decision in *Palmer* is explained.

[27] [2015] VSC 576.

not relevant to proceedings before the Victorian Civil and Administrative Tribunal in which the Tribunal upheld allegations of professional misconduct.[28]

In any event, the submission of counsel assisting the Panel complained of was made in the course of a series of submissions as to whether Witness L or the Magistrate should be believed in relation to this complaint. It was but part of a carefully balanced commentary on the strength or otherwise of the totality of the conflicting evidence of Witness L and the Magistrate on this topic. We agree with the submission.

As will be seen, Witness L was mistaken in respect of some disputed peripheral matters, but that did not detract from her evidence on key issues.

Witness J had the clear advantage of being able to refresh some of her memory from her contemporaneous notes and correspondence. Her notes are not as detailed as her affidavits and oral evidence, but they do contain important detail, including as to the sexual nature of the remarks made by the Magistrate, as perceived by her. As far as they go they are likely to be the most reliable account of the incident. She was an independent witness who had no reason not to record the events accurately. Indeed, she had been advised by the Principal Registrar to make notes of the event. As far as they go they are likely to be a more accurate and reliable account than evidence given seven or eight years later. However, as will be seen, one aspect of her evidence not covered by her notes cannot be relied on. She too did her best to assist the Panel.

The Magistrate had the difficultly of being asked to recall details of events which he had had no reason to recall over a period of seven or eight years. However, his evidence was rendered unreliable by virtue of factors mentioned in Part 3.1 of this Report, namely that he displayed a pattern of unintentionally inappropriate behaviour in situations where he had no desire to cause harm or embarrassment and which would distress him if he knew that he did. In those circumstances it is not surprising that, when confronted with evidence of such facts he might genuinely believe that he had not engaged in the conduct because that is not what he would have done or have wanted to do.

His tendency to reconstruct was manifest in relation to this complaint. Not only was there the belated introduction of the trolley, but in his evidence of the events in the lift he repeatedly used the expression that he "would have" done or said something or would not have done or said something. That is the language of reconstruction. By contrast, the only matters of which he asserted absolute certainty were the key events relating to what he did or did not do or say in the lift, as well as his absolute denial of any of the similar events deposed to by Witness L. Another factor undermining his reliability, if not his credibility, was his vehement denial of the most serious aspect of Witness L's evidence.

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[28] Ibid at [27]-[34] per McDonald J.

In the light of the foregoing general observations it is now necessary to address the various conflicts which emerged in relation to this complaint. The first difference to be addressed is where each of the three witnesses entered the lift and who was in the lift when they did. In the Panel's view it is not necessary to resolve those differences. They are understandable given the lapse of time and are merely peripheral to the more significant issue, also in dispute, as to where each of the participants was standing or facing in the lift when the Magistrate undoubtedly approached Witness L.

As to that issue each of the participants gave conflicting evidence as to where they were all standing or facing, although all of them seem to have agreed that Witness L was standing near the right hand side of the lift when viewed from outside the lift and near the centre of that side. It is not necessary to make any finding as to where each individual was standing at the relevant time. The key issue agreed by both Witness L and the Magistrate was that they were facing towards each other when the Magistrate moved towards Witness L. That necessarily involves rejecting the evidence of Witness J who maintained that the Magistrate approached Witness L from behind. That would have made the manoeuvre of the Magistrate extremely difficult without some form of almost hugging Witness L as he did so. In that respect the Panel is of the view that Witness J is mistaken. It does not form part of her contemporaneous notes nor of her description of the event in her first affidavit. It first appears in her second affidavit affirmed on 11 August 2021, and it was repeated in her oral evidence.

As to whether or not the Magistrate touched Witness L, the Magistrate said that he did, but in a friendly gesture. Witness J was "fairly confident" that he did, but that was in the context of her evidence that the Magistrate approached Witness L from behind. Witness L was definite that the Magistrate did not touch her but that he came close to doing so as she moved away to one side to avoid him. Witness L, being the object of the approach, is more likely to be accurate and the Panel accepts her evidence that he did not touch her.

As to what was said by Witness J and the Magistrate as this occurred, Witness J said in her notes that it was something like "See how hold [sic] my hands are".[29] However, she added that the Magistrate was also making jokes and that the conversation contained sexual innuendo. Witness L said that the Magistrate spoke of warming her or them up as he approached her breasts with open or cupped palms. Whatever may have been said the Panel accepts that the conversation contained sexual overtones.

The next issue is as to what happened and as to the conversation as the lift doors opened on level 3. Witness L did not recall any of the conversation. She said that she decided that she would get out with Witness J at level 3 in order to avoid being left alone in the lift with the Magistrate, and that she then left the lift at that level. The Panel accepts that Witness J asked Witness L if she would like

[29] This would appear to be a typographical error for the word "cold".

to get out with her and that Witness L then said something like "no, I need to go to level 5". She says that Witness L then stayed in the lift with the Magistrate and that the Magistrate responded to her question in the manner described in the notes. The Magistrate said that he was not in a position to dispute what Witness J said or that Witness L said "no, I need go to level 5". He did not remember saying "she wants to get off with me" and laughing, apart from speculating as to what he would have meant if he did say so.

The Panel accepts that the conversation was as recorded by Witness J in the contemporaneous notes, including what Witness L said about staying in the lift to go to level 5. That was what Witness J and the Magistrate both said, namely that she stayed in the lift and went to level 5. It considers that Witness L was mistaken in saying that she got out at level 3 in order to avoid a continued journey with the Magistrate. It will be recalled that she said that Witness J said to her as she got out of the lift that they would have to report the matter and that she did not want it to go any further. It seems, however, she may have confused that event with the subsequent interview with Witness J on the following Monday and with the later discussion with Witness M when she took the same approach. As the Panel has previously noted, Witness L had displayed a stoic attitude to previous events of a similar nature and was dedicated to completing her work. It is not surprising therefore that she remained in the lift to complete her journey. The fact that she may have stayed in the lift with the Magistrate does not diminish the effect of the conduct on her or its objective seriousness.

The Panel accepts the evidence of Witness L that both before and after the lift incident the Magistrate made remarks of a sexually suggestive nature concerning breasts generally. Her evidence about these events provides an obvious explanation as to why she downplayed the lift incident to her superiors at the time. While the Magistrate's conduct in the lift came as a shock to Witness J, it came as no surprise to Witness L. It also provides some context for his behaviour in the lift and supports the likelihood that the Magistrate intended his approach on that occasion to have a sexual connotation.

In their respective accounts of the lift incident there were very few of the material facts on which Witness L and the Magistrate agreed. Where there are differences the Panel accepts the evidence of Witness L with one exception. Her version of the event is supported by the fact that Witness J said that Witness L looked uncomfortable and that the incident felt really off. It is supported also by the fact that that same evening Witness L reported what had happened to Witness N and by Witness N's observation that Witness L looked upset and worried and was quiet. Those facts indicate that something out of the ordinary had happened that day. It is supported by Witness J's observation, recorded in her notes, that she was feeling a little uncomfortable about the incident. Although Witness L's and Witness J's accounts of what the Magistrate said as he approached Witness L were not identical, they were remarkably consistent, and it is inherently unlikely that if Witness J was reconstructing she would have come up with words that are very

similar to what Witness L recalls. It was not suggested that Witness J was being untruthful in that evidence. Finally, both in her evidence and in her statement Witness J said that Witness L sought to avoid the Magistrate as a result of his behaviour before the lift incident. The Magistrate accepted that there were instances where she did not get in a lift with him prior to the lift incident when she had a trolley with her, but he did not realise, to use his word, that she was avoiding him. Witness L's evidence was that she continued that practice after the lift incident as well.

In summary, the Panel finds that an incident occurred in the staff lift at the Adelaide Magistrates Court building on Friday 18 July 2014. Witness J, Witness L and the Magistrate were in the lift. It was a cold day. Witness L was embracing herself with her arms folded across her chest, as she was cold. She was wearing a uniform with a three quarter length sleeve. The Magistrate remarked that it was cold. He then made remarks that had sexual innuendo behind them, including a remark to the effect of "let me warm you up", or "you can warm me up", and moved towards Witness L front on, with his hands in front of him, either with his palms up or in a cupped like way. His hands came very close to, within an inch or so, of Witness L's breasts, but he did not touch her. It accepts Witness L's evidence that he was looking at her breasts.

As Witness J got out of the lift at level 3 she asked Witness L if she wanted to get out with her to which the Magistrate said, "No, she wants to get off with me", emphasising the "me" and then laughing. A comment that had sexual connotations behind it. The incident, including both the conduct with the hands and remarks by the Magistrate, both in the lift and as Witness J was getting out, was a short incident, but it made Witness L and Witness J uncomfortable and they both interpreted it as having sexual connotations. The Panel finds that the Magistrate intentionally engaged in conduct of a sexual nature towards Witness L. In any event, regardless of whatever the Magistrate may have said that his subjective intent was, the conduct was seriously inappropriate, unprofessional, unbecoming and amounted to sexual harassment.

3.6.8 Application to Reopen Inquiry

After the conclusion of the hearings the Panel received an application dated 27 September 2022 from the Magistrate to reopen the inquiry.

The application was said to be consequent upon an observation made by the Chair during submissions as to the contemporaneity of Witness J's notes of 18 and 22 July 2014.

Although it is implicit in the reasons of the Panel when discussing complaint 8 that the Panel does not regard the issue of whether the notes made by Witness J on 18 July 2014 were actually created on a date subsequent to 18 July 2014 as crucial to the credibility of any witness, we now make those reasons explicit.

The letter requesting the reopening of the inquiry dated 27 September 2022 was expressed in the following terms:

> Following intimations by the panel in relation to submissions as to the contemporaneity of the ‘‘[Witness J] notes” (see for example T719 L10) we are instructed to request that the Panel exercise the power it has, akin to that contained in s10(a) of the *Royal Commissions Act 1917*, and prosecute an inquiry to determine the dates upon which exhibits [redacted]1 and [redacted]2 to the affidavit of [Witness J] sworn 11 August 2021 were created and, if relevant, modified. Such an enquiry may include an examination of the metadata relating to the documents.
>
> We respectfully submit that the inquiry is required to properly determine the facts relating to complaint 8. The sexualization of the lift incident by [Witness J] and [Witness L], in two completely different ways, has the potential to affect the Panel’s impression of Mr Milazzo’s behaviour that is contrary to his own evidence and the character evidence of his co-workers. It has the potential to affect his credit and therefore is of clear relevance and significance.
>
> Magistrate Milazzo argues that the inquiry is warranted first, because it is clear on the face of the two exhibits, that the first part of [redacted] 1 could not have been completed in its present form and secondly, because, had the notes been available in 2014, the matter could not logically have been resolved in the manner it was (i.e., filed away, not brought to Mr Milazzo’s attention and not actioned further by the CAA).
>
> [redacted]2 states at p1.7, ‘At the time I did not know the name of the cleaner. When I saw her next on Level 3 Adelaide Magistrates Court on 22 July 2014, I asked […]...’ Notwithstanding this, [redacted]1 mentions ‘[Witness L]” on two separate occasions and at the end of the first paragraph, explains the future event: (I didn’t know the name of the cleaner and have since asked […] who told me her name is [Witness L].)
>
> Further, [redacted]2 suggests that [redacted]1 was still under construction at the time [redacted] 2 was created on 13 May 2021. The version of the notes of 18 July 2014 in [redacted]2 omits the last two lines of the same section of [redacted]1. [redacted]2 continues with: ‘This was said as I was exiting the lift. The lift doors then closed.’ The next paragraph then starts with a sentence that forms the last part of the final sentence in the section. The document appears to have been altered from the copy incorporated in [redacted]2.
>
> It is also noteworthy that the handwritten notes of 22 July 2014 (see below) suggest that [Witness M] was contacted on that day and not on the 18th. There are further incongruities contained in the evidence which bear on the authenticity of the notes which we would rely on should the Panel require further submissions / evidence in support of our application.
>
> In relation to the second matter, we attach an indexed bundle of documents comprising in the main, the CAA Subpoenaed Documents provided to us by the Panel on 14 November 2021. Ignoring the “No date provided” copy of [redacted]1 included in the documents, the only note of [Witness J] is the handwritten note of 22 July 2014 (see p. 1 of indexed bundle attached)
>
> The handwritten note is transcribed for convenience (see p. 2) and the notes of [Witness L’s] report are recorded down the right-hand side of the page. They omit any reference to: Milazzo often treated her in that way; she had raised it with him on one occasion; another cleaner had observed [MM’s] behaviour; the other cleaner had gone up to level 5 ... and decided to leave; and she had told her husband about other incidents.

[Witness M] categorises the information she has received as "Lower end of scale" (see p.3). This characterisation is not consistent with the behaviour recorded in [redacted]1, suggesting that it is unlikely that the document existed then. At the very least the information contained in [redacted] 1 is unlikely to have resulted in such characterisation by [Witness M]. It is unlikely in the extreme that [Witness J] would have failed to advise [Witness M] of the full extent of the issue as known to her at the time and yet "Lower end of scale" remains the characterisation. No more serious allegations seem to have arisen as a result of [Witness M's] meeting with [Witness L]. See email [Witness M] to Bolton Friday, August 1, 2014 6:12 PM (seep. 5).

It seems [Witness L] reported the matter to her employer (see p.7 & 8). Again, there is no suggestion of any of the matters omitted from [redacted]1 as set out in the above.

The matter is concluded with [Witness J's] report to the Chief Magistrate (CM) on 29 August 2014 (see p.14). By this time it can be assumed that [Witness J] has seen the way the matter was reported by [Witness L] to her employer, … It is inexplicable that [Witness L] had earlier reported the matters now contained in [redacted]1 and [Witness J] provided no report of those matters to Ms Bolton or anyone else involved in the process prior to the closure of the matter. In short, the narrative contained in the contemporaneous documents in 2014, is not suggestive of the existence of the note [redacted]1 at that time.

It is only after the sms communications between Mr Milazzo and the CM on 7 May 2021 (see p.20), that the CM reports the lift incident. The letter from CM to JCC dated 13 May refers to 'contemporaneous notes' of [Witness J] for the first time in any CAA communication (see p. 21).

Based on the above summary, we submit it is not unreasonable to suspect that the document [redacted]1 was created at about the same time as [redacted]2 (i.e 11 May 2021). This then casts considerable doubt on the reliability of [redacted] 1 as a contemporaneous record.

It is submitted that the Panel is greatly disadvantaged if it cannot be satisfied of the authenticity of the document. And, if the document should prove, following further investigation, to be a more recent invention, then other inferences would be open to the Panel as to the reliability and/or credit of both [Witness J] and [Witness L].

Thank you for your consideration of the above.

Incidentally, most of the documents referred to in the letter of 27 September 2022 had been available to the Magistrate since they were subpoenaed by his solicitors in 2021. No attempt was made to introduce those documents in evidence or to put them to Witness J.

The Panel, by letter, refused to accede to that request following which a further letter dated 5 October 2022 was sent, requesting the following:

…

We are instructed to press our application and if the panel remains unprepared to conduct the inquiry sought, we request that we be heard on it.

If the documents [redacted]1 and [redacted]2 were created at the same time, it would follow that [Witness J] has created a false document to advance a case against a Judicial Officer. Having regard to the further matters set out in our letter, it may lead to a reasonable inference that she has

conspired with [Witness L] for the same purpose. [Witness L's] conflicting evidence and unsubstantiated recent claims are consistent with this. These matters should not be ignored. We contend they are serious enough to warrant the inquiry.

Complaint 8 is many years old. We submit that the usual principles of case flow management have no application to the present inquiry. There are 3 different versions of the very old incident and no forensic material before the tribunal relating to it. However, objective forensic material is likely to be available by means of the inquiry we seek. Given the gravity of the matters referred to above, it would, we respectfully submit, be a serious omission to ignore the existence of the material.

With respect to the panel, we say the panel cannot properly conclude that an analysis of the meta data would not call into question the credit of [Witness J], without first conducting the inquiry.

It simply cannot say what the results of the analysis will be. And if the analysis raises a serious question for [Witness J] to answer, we submit that it should not be ignored.

If the document is a false document, it should not be relied upon because of a failure to cross examine [Witness J]. We respectfully request the panel to reconsider its position.

The Panel notes that in this letter for the first time the suggestion was made that it is reasonably possible to draw an inference that Witness J and Witness L conspired with each other to create a false document to advance a case against the judicial officer. This was never put to either witness during cross-examination.

The Panel notes that although Witness J was cross-examined to the effect that the notes she claimed to have created on 18 July 2014 may have been compiled later, no suggestion was put to her in cross-examination, or any other witness for that matter, that her notes were made after July 2014.

Witness J never purported to be certain as to the exact date when the combined document comprising […]1 was created.

The extent to which Witness J was cross-examined is as follows:

MS POWELL: Yes. Now, can – I just want to understand something about your affidavit of the 11th of August. If you go to paragraph 19, you commence that paragraph with "Afterwards" you had a conversation with [Witness M]. Might that have been – when you say "afterwards", do you mean the same day, or it might have been – by "afterwards", you might have meant within a number of days?

[Witness J]: No, I think it would have been some – I'm confident it was the same day.

MS POWELL: Yes. Can I just - - -

[Witness J]: And from memory – yes.

MS POWELL: Can I just put this to you, because it might help: you've recorded at paragraph 20: Later that day, I made notes on my computer of what I witnessed during the incident. Is that right?

[Witness J]: Yes.

MS POWELL: Now, if you go to the notes, [...]1, would you agree with me that you couldn't have made the notes of what happened on the 22nd on the 18th?

[Witness J]: No, no, no, no; no.

MS POWELL: No.

[Witness J]: Well, they're two separate lots of notes; yes.

MS POWELL: Might these notes in fact have been made by you on the same day, that is, some time on the 22nd?

[Witness J]: No.

MS POWELL: Why do you say that?

[Witness J]: Because I – I made the notes about the incident first, and then spoke to [Witness L] on another day. The only reason that I – there was such a delay was, as you pointed out, there was a weekend in-between, but also presumably I – well, no, not presumably. I was waiting for an opportunity to see [Witness L]. She was a cleaner, a contractor. I – I see many, you know, different cleaners around the building. I needed to wait until she came to level 3 so I could have a conversation with her, and the first opportunity was the 22nd. I did not wait until the 22nd to make the notes of the incident in the lift.

MS POWELL: And were these made on your computer?

[Witness J]: Yes.

MS POWELL: And so you just added it onto the document, are you saying, on the 22nd?

[Witness J]: Well, actually, I – I don't know. I'd need to have a look. I'm not sure that I combined it or whether I had two separate documents and I just combined them for the purpose of this affidavit; I don't know.

MS POWELL: All right. But one thing is certain, is it not, from your recollection and by reference to your notes, you didn't talk to [Witness L] about this until Tuesday of the week after it happened on the Friday; is that right?

[Witness J]: Yes; yes.

In cross-examination the Magistrate was asked about […]1. His evidence was:

MR BESANKO: Now, [Witness J] says that these are her notes of her recollection of the incident in the lift and a conversation she had with [Witness L] on 22 July 2014?

MR MILAZZO: That's what she says.

MR BESANKO: And her evidence is, as I understand it, that she created the notes of the incident, In Lift With Cleaner section of the document, the same day the incident occurred; namely, 18 July 2014?

MR MILAZZO: Yes. That's what she says.

MR POWELL: Well, may I say I don't know that that's exactly perfectly clear from all of the information that can be gleaned; namely, that the notes were created on 18 July. I think there's an interpretation that they weren't created; that is, the entirety of the note on the 21st until - - -

MS KELLY: Well, so what's your objection?

MR POWELL: - - - 22 July. It's not fair to put to the witness that they were created on the 18th when they may have been created several days later; that is, on the 22nd.

MS KELLY: Well, that wasn't - - -

MR BESANKO: I'm happy to frame the question differently.

MS KELLY: Yes.

MR MILAZZO: The question was fine. He said [Witness J] said she created them on the 18th.

MS KELLY: She did, yes.

MR BESANKO: And I was drawing a distinction between the portions of the document - - -

MS KELLY: Yes.

MR BESANKO: - - - because that's what I understood her evidence.

MS KELLY: I will allow the question.

MR BESANKO: But I will change - - -

MS KELLY: I think [Witness J] was very clear they were created on the 18th, Mr Powell. I allow the question.

MR BESANKO: Can you think of a reason why [Witness J] would have created a note on 18 July 2014 where she records you as having said:

See how cold my hands are?

Placed your hands in the vicinity of [Witness L's] breasts and engaged in sexual innuendo if that did not happen on that day?

MR POWELL: Well, I object to that. Mr Milazzo can't possibly know what was in [Witness J's] mind and why she thought to create the note and is not in a position to comment on that.

MS KELLY: He has commented on just about everything else. So I will allow the question.

MR POWELL: Thank you.

MR BESANKO: Can you think of a reason - - -

MR MILAZZO: Can I think of a reason?

MR BESANKO: - - - why [Witness J] would have created that note on that day setting out that those things happened if they didn't, in fact, happen?

MR MILAZZO: No, I can't. That's why I don't think the note was created on that day.

MR BESANKO: You think it was created later, do you?

MR MILAZZO: I do. I'm not saying that [Witness J] is being deliberately untruthful when she says she now believes it was but, no, I don't think it was.

MR BESANKO: Well, I take it if – I withdraw that.

MR MILAZZO: Well, I know it to be inaccurate. So I don't think she did it on the day and the last sentence in the first part of the note doesn't suggest to me it was done on the day:

I was feeling uncomfortable about the incident later that afternoon, I called [Witness M] for advice.

She wasn't cross-examined about this stuff. So I don't know. But, no, I don't think she did on the day.

MR BESANKO: Well, assume she did it on 22 July?

MR MILAZZO: On the Saturday?

MR BESANKO: She's a - - -

MR MILAZZO: I think it was created when her memory of the incident was unclear - - -

MR BESANKO: Well, the 22nd isn't a Saturday, is it? The 18th was a Friday.

MR MILAZZO: - - - because her recording of the incident is wrong.

MR BESANKO: Right. So just to be clear: you dispute her account as given under the heading, Notes Of Incident In Lift With Cleaner?

MR MILAZZO: I do. That's my explanation for it being inaccurate. But, in answer to your question, if she did it on the 18th, it would have been accurate but I know it's not accurate. So that's my response.

Later, he was asked again whether he would defer to Witness J's notes of what happened and his answer was:

> Look, even if something happened yesterday, all you can remember is your own perceptions and they're inevitably incomplete so it's an impossible question to answer but I have a clear recollection of enough to know what I did, what I intended to do, why I was doing it.

Finally, the Magistrate was cross-examined about what Witness L had told Witness J in July 2014. His evidence was:

> MR BESANKO: Is it the case that, in your view, [Witness L] was mistaken or lying when she told [Witness J] this in July of 2014.
>
> MR MILAZZO: Yes. It is.
>
> MR BESANKO: Well, I suppose the other possibility is that [Witness J] has either mistakenly transcribed what [Witness L] told her or made the note up.
>
> MR MILAZZO: That's a possibility.
>
> MR BESANKO: Aren't each of those possibilities inherently unlikely?
>
> MR MILAZZO: Not to my mind.

In our reasons earlier the Panel has found that Witness M was told about the allegations of Witness L including, in particular, the allegation of prior similar incidents no later than 25 July 2014. In making that finding the Panel referred to Exhibit A7, the notes made by Witness M of agenda items in preparation for a meeting with the then Chief Magistrate which was held on 25 July 2014. The note Exhibit A7 made by Witness M makes that clear.

For this reason, even accepting that the Magistrate's submission that Witness J's notes purportedly made on 18 July 2014 were in fact created in part or in whole subsequent to 18 July 2014, the Panel has accepted that by no later than 25 July 2014, the substance of the allegations made by Witness L in her evidence before the Panel including, in particular, the allegation of prior incidents had been reported to both Witness J and Witness M. The suggestion of a conspiracy between the two witnesses, Witness J and Witness L, which arose for the first time at the conclusion of the hearings, apparently in response to a remark made by the Chair during submissions, is a very serious allegation to make.

Even if it is accepted that Witness J made some edit to her notes after 18 July 2014, it cannot affect her credibility as to the substantive allegations of Witness L reported to Witness M on 25 July 2014.

The Magistrate's further submission that if the substance of the allegations now made by Witness L had been reported in the manner contended for in the evidence of Witness J and Witness L, then logically the matter could not have been

resolved in the way the Courts Administration Authority ultimately determined to deal with the matter, that is, to do nothing, cannot be accepted.

In the first place the evidence of Witness M when asked about the note she created on 25 July 2014 as to the seriousness of the matter reported said:

> Again, I do not – it's eight years ago that I wrote this. I do not have a specific recollection. My assumption is that, having regard to the whole gamut of potential allegations of sexual harassment, my assessment was that this was at the lower end of the scale of that gamut. However, from an OH&M perspective, I did not consider that what had been reported to me was something that could be ignored and that there was an obligation to do something.

It is also plainly evident from all of the evidence which the Panel has heard and accepted that the incident in the lift was reported to the employer of Witness L and that there was discussion between Witness L and at least Witness J and possibly Witness M about the matter in July 2014. It is not for this Panel to criticise the actions or inaction of the Courts Administration Authority at that time, particularly in light of the uncontested evidence that at that time Witness L was adamant that she did not wish to make a formal complaint.

It is for these reasons that the Panel is satisfied that it is not necessary to resolve the issue of the date of creation of Witness J's notes on 18 July 2014 any further, given that the Panel is satisfied that the notes were made at the latest by 25 July 2014. In light of that finding, the Panel does not consider the exact date of creation is crucial to the resolution of the credibility of any witness.

Postscript

For the sake of completeness the Panel records the following events which began on 18 October 2022, 24 hours prior to the scheduled publication of the Panel's findings of fact and reasons.

On Tuesday, 18 October 2022 the Panel received a copy of an email from the Magistrate's solicitors to counsel assisting which was sent at 9.34am on 18 October 2022.

That email made the following request:

> I have been asked to request a copy of the email sent from Chief Magistrate Hribal to the Judicial Conduct Commissioner which attached the Chief Magistrate's letter to the JCC dated 13 May 2021 which first reports "an historic incident involving Magistrate Milazzo from 18 July 2014" and also attaches [Witness J's] chronology and contemporaneous notes."

Following that request, the Panel read the following correspondence ultimately at the request of both counsel assisting and the Magistrate's solicitors:

- Email from counsel assisting to the Magistrate's solicitors dated 18 October 2022 at 4.53pm (setting out the application to reopen and a submission).

- Email from counsel assisting to the Magistrate's solicitors dated 18 October 2022 at 5.00pm (attached to that email was a copy of an email from Ms Ly to the Magistrate's solicitors dated 4 November 2021 at 3.32pm).

- Email from counsel assisting to the Panel dated 19 October 2022 at 3.19pm (enclosing a letter from the Magistrate's solicitors to counsel assisting dated 19 October 2022 at 3.15pm).

- Email from counsel assisting to the Panel dated 19 October 2022 at 6.14pm (enclosing a letter from the Magistrate's solicitors to counsel assisting which counsel assisting received 54 minutes before 6.14pm).

- Email from counsel assisting to the Panel dated 19 October 2022 at 6.16pm (email chain including from Magistrate's solicitors to counsel assisting at 6.06pm and email from counsel assisting to the Magistrate's solicitors at 5.37pm).

The Panel then held an urgent meeting at 7.00pm on 19 October 2022 in which we resolved to reject the submission of counsel assisting to receive electronic versions of […]1 and […]2 into evidence and noting the further submissions consequential upon that application from the Magistrate's solicitors in the correspondence referred to above.

The purpose of this postscript is to make it clear that the findings made by the Panel have been made without reference to any of the material which emanated from counsel assisting and the Magistrate's solicitors set out above in this postscript.

At the meeting at 7.00pm the Panel resolved to publish its findings of fact without any variation consequent on the receipt of that material.

The Panel stands by its finding in Part 3.6 that even if Witness J was mistaken in her evidence as to the date she made the notes, they must have been made by no later than 25 July 2014.

The Panel confirms that in reaching its conclusion on the facts it has had reference only to the transcript of evidence, exhibits and written and oral submissions made by counsel assisting, the Magistrate's solicitors and Witness C's solicitors.

3.7 Professor Robyn Young

3.7.1 The Evidence

Professor Robyn Louise Young was called to give evidence in this inquiry concerning her opinion that the Magistrate has autism spectrum disorder ('ASD') and how this disorder may be relevant to explain the conduct alleged against him.

Professor Young is an academic, now head of the School of Psychology at Flinders University and a recognised expert in the diagnosis and treatment of persons with ASD. There was no challenge to the Professor's qualifications.

At the request of the Magistrate's lawyers, Professor Young interviewed Magistrate Milazzo on 24 August 2021. In her report dated 30 August 2021 she expressed the opinion that the Magistrate has ASD based on clinical assessment and against clinical criteria set out in the Diagnostic and Statistical Manual for Mental Disorders, 5th Edition. She reiterated this in the testimony she gave in her appearance before the Panel on 15 September 2022:

> MR BESANKO: Now, in your first report, the one dated 30 August 2021, you diagnosed Mr Milazzo as suffering from autism spectrum disorder, or ASD, and as I understood your evidence from earlier today, you maintain that diagnosis having heard Magistrate Milazzo give evidence on Tuesday.
>
> DR YOUNG: Yes, I do.
>
> MR BESANKO: And to be clear, you diagnose him as suffering from ASD. You haven't expressed the opinion that he exhibits symptoms that are consistent with ASD.
>
> DR YOUNG: No, I diagnosed him with autism, and I just – if I may, I've never used the word "suffering" from autism. He has autism spectrum disorder.

The panel does not dispute this diagnosis

In a subsequent report dated 9 September 2021, and in response to a specific question as to whether that diagnosis would compromise the Magistrate's functions as a judicial officer, Professor Young expressed the opinion that:

> I am of the opinion that having autism would not compromise Mr Milazzo's ability to function as a Judicial Officer. This opinion is validated by the fact that Mr Milazzo has been able to fulfill his duties for decades without accommodations or assistance. It is his behaviour in social settings that has led to the complaints now before him.[30]

She again reiterated this in the testimony she gave in her appearance before the Panel on 15 September 2022, which is line with the evidence provided by Witnesses CW2, CW3, CW4, CW5 and CW6:

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[30] Report of Professor Robyn Young dated 9 September 2021 at 1.

MR BESANKO: You have expressed the view in this report that having autism would not compromise Mr Milazzo's ability to function as a judicial officer.

DR YOUNG: Correct.

MR BESANKO: And I think you gave evidence this morning – indeed, after the break this morning – that you continue to adhere to that view.

DR YOUNG: Yes.

It was apparent that at the date of both the first and second reports in August and September 2021 the Professor had not been apprised of the specific allegations against the Magistrate, a fact which the Professor readily acknowledged in cross-examination at the hearing.

In a further report dated 5 September 2022, again in response to specific requests, the Professor addressed various aspects of the Magistrate's conduct observed by some of the witnesses in this inquiry and some of the character witnesses on behalf of the Magistrate.

In that third report Professor Young also addressed specific aspects of allegations made in the statements of Witnesses A, B, C, D, E, F, H, I, J, K, L and M as well as aspects of the character references of Witnesses CW1, CW2, CW3, CW4, CW5 and CW6.

In oral evidence at the hearing Professor Young adhered to the views that she had expressed in all three reports tendered at the inquiry.

A fair summary of the Professor's opinion is gleaned from the remarks in her last report of 5 September 2022:

> … However, to summarise, Magistrate Milazzo is a man with autism spectrum disorder (ASD) who appears to be trying to fit in within the context of the legal profession. It is possible, that because of his status, junior staff were not prepared to question him or comment on behaviour they considered inappropriate. For example, [Witness J] (11 August 2022; Item 3 paragraph 25-26) states [Witness L] was, "not prepared to take on a Magistrate", and she , "could not win against a Magistrate". In addition, senior staff either turned a blind eye to it, ostracised him or avoided him. It is unfortunate that in his role as a judge, his peers have either accepted him because he was a generous warm-hearted man who went out of his way to help people, or if they did perceive his behaviour to be inappropriate and/or creepy, rather than speak to him about it, they chose to ostracise him and avoid inviting him to social events. Further, senior staff simply advised junior staff to avoid him. It is my opinion that if the inappropriateness of his behaviour had been explained to him explicitly, and the impact his behaviour had on other people clarified, then Magistrate Milazzo would have been able to modify his behaviour. When the inappropriateness of his behaviour has been brought to his attention, he has been mortified. Those who know him well, believe that Magistrate Milazzo does "not like to offend" and if he "had offended anyone he would take it very seriously" (see Book 2, Item 1 [Witness CW1], paragraph 23-24.[31]

[31] Report of Professor Robyn Young dated 5 September 2022 at 2.

Professor Young also adhered to the views which she had expressed in her third report dated 5 September 2022 in which she expressed the view that most, if not all, of the allegations against the Magistrate could be understood in the context of his ASD. In her oral evidence Professor Young reiterated this:

> MR BESANKO: Could I ask you to, please, turn over to page 23 of your first report. On page 23 you have said, as I read it, in answer to question 1 that you were of the belief that much of his behaviour – I'm sorry, much of his inappropriate behaviour could be understood better within the context of an understanding of autism.
>
> DR YOUNG: Yes.
>
> MR BESANKO: When you say "his inappropriate behaviour" in answer to question 1 are you speaking generally or are you referring to the behaviour you identified in the letter from the Attorney-General that was enclosed with the letter of instructions?
>
> DR YOUNG: Yes. Both.

The Panel accepts that this is consistent with previously noted abundance of evidence of the Magistrate displaying a pattern of unintentionally inappropriate behaviour in situations where he had no desire to cause harm or embarrassment and where, had he become conscious of doing so, he would have wished to apologise.

In her third report Professor Young expressed the view that it is apparent that Magistrate Milazzo will often comment on matters or make observations that interest him even if they are socially inappropriate. In this context she used as an example one of the allegations made by Witness L:

> It is possible that once he becomes more familiar with a person, he mistakes the nature of the relationship (see criterion A3) and may make a socially inappropriate observations such as, for example, the perkiness of someone's breasts. This relates specifically to A3 criteria indicating that people with autism have, "difficulties adjusting behaviour to suit various social contexts".[32]

Professor Young's opinion here stands somewhat in contrast to other observations made by her about the Magistrate's insight into the appropriateness of his behaviour and his inability to put himself in the shoes of others and appreciate how they might think and feel. For example, in her first report she made the following observation:

> … He did not like having to meet the expectations of people for whom he worked who had their own agendas and he didn't like trying to accommodate them. He noted that he did not mix well with other barristers. He noted that he would upset them with "strange behaviours". He noted that during interactions with his co-workers he would say something inappropriate that seemed to sabotage the interaction. He would try and engage in the banter and feel as though he was joining in; yet his comment might have taken things too far, or

[32] Report of Professor Robyn Young dated 5 September 2022 at 20.

> have been inappropriate and offensive without intent. Mr Milazzo seemed intolerant of political correctness. He said that he did things which he deemed as harmless yet had offended. What was intriguing for me during this interaction is that despite Mr Milazzo often learning that he had done something that was perceived as inappropriate, his inability to appreciate this at the time, even after this having been explained to him. Thus there remains a degree of naivety that is in stark contrast to what one might think he should understand based on his intellect and position as well as an appreciation of his current charges.[33]

In cross-examination she was specifically asked about this topic of his insight into the appropriateness of his behaviour as well as the likelihood of Mr Milazzo continuing to say inappropriate things in social and work settings. Her answers were:

> MR BESANKO: On page 11 of your report, so we'll just turn over the page, you have said that you found it intriguing, that despite often Mr Milazzo learning that he'd done something that was perceived as inappropriate, he did not have the ability to appreciate this at the time.
>
> DR YOUNG: Yes.
>
> …
>
> MR BESANKO: Is it your opinion that Mr Milazzo is going to continue to say inappropriate things by reason of his ASD?
>
> DR YOUNG: Yes.
>
> MR BESANKO: He will continue to say inappropriate in his interactions with people in a social setting?
>
> DR YOUNG: It is possible; if he's not educated, yes.
>
> MR BESANKO: And will he say inappropriate things in the future in his interactions with people in a work setting?
>
> DR YOUNG: It is possible.
>
> MR BESANKO: And is this because of the naivety you've referred to on page 11 of your first report?
>
> DR YOUNG: Yes, it is.
>
> MR BESANKO: You might recall that Mr Milazzo himself thought that there was a possibility that he might say inappropriate things in the future and that was just about the last thing he said in his evidence on Tuesday.
>
> DR YOUNG: Right.
>
> MR BESANKO: Do you recall that?

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[33] Report of Professor Robyn Young dated 30 August 2021 at 11.

DR YOUNG: I've forgotten that, but now you remind me, I – I vaguely have a vague recollection.

MR BESANKO: Well, I wanted to ask you whether this acknowledgement at the end of his evidence demonstrated a degree of insight into the appropriateness of his behaviour that is inconsistent with a naivety that you describe on page 11 of your report?

DR YOUNG: No, it's not. He's been educated through this process that he's made mistakes. I guess he didn't know he was making mistakes at the time and therefore he may make mistakes in the future and I guess that's a possibility. The insight has been taught to him. He's not unable to be educated and he's been educated now that some of his behaviour has been perceived as inappropriate.

Later Professor Young clarified that by her statement that the Magistrate can make mistakes and behave in an inappropriate manner that may be misinterpreted by others, she was not meaning to convey that objectively inappropriate conduct thereby became acceptable because of ASD. Her answer to that question was:

MR BESANKO: At the top of page 24 in answer to the question identified by (i) you've said in the last sentence of your answer that:

Mr Milazzo can make mistakes and behave in an inappropriate manner that may be misinterpreted by others.

DR YOUNG: Yes.

MR BESANKO: And by that do you mean that Mr Milazzo's subjective intentions might be misunderstood by others?

DR YOUNG: Yes.

MR BESANKO: You are not there suggesting that objectively inappropriate conduct becomes acceptable because of Mr Milazzo's ASD.

DR YOUNG: No. I say to my clients regularly it's an explanation. It's not an excuse. And I also say to them, "If you make the same mistake twice then it's not okay."

Having expressed this, Professor Young acknowledged that people with ASD understand right from wrong and are as capable as anyone of choosing to engage in behaviour that they know is wrong:

MR BESANKO: Just to be clear, people with autism know right from wrong?

DR YOUNG: Yes.

MR BESANKO: And they are capable of choosing to engage in behaviour that they know is wrong when they engage in it?

DR YOUNG: Yes.

MR BESANKO: Similarly, they are capable of choosing to engage in behaviour that they know is inappropriate when they engage in it.

DR YOUNG: Yes.

MR BESANKO: So it could be that Mr Milazzo knew he was acting in an objectively inappropriate way when he spoke to [Witness L], assuming he did speak to her, about her breasts?

DR YOUNG: Yes.

MR BESANKO: And is it the case that you can't say for sure what his intention was when he was engaging in that alleged conduct?

DR YOUNG: No, I can't.

Similarly, she confirmed that they are capable of choosing to engage in behaviour which they know is inappropriate when they engage in it, including that of a sexual nature:

MR POWELL: Yes. I think it is the case that persons with ASD are capable, are they not, of committing acts and making statements that are knowingly and deliberately ones that are sexually suggestive or sexually offensive.

DR YOUNG: Yes, they are.

MR POWELL: In other words, they're not in a special category of immunity.

DR YOUNG: No.

MR POWELL: And in that regard, they're no different than anyone else in the community.

DR YOUNG: Correct.

Professor Young adhered to her view that most of the allegations were explicable on the basis and in the context of the diagnosis of autism spectrum disorder. In her view, putting it all together, "it just makes more sense to me that this is an autistic man who has misunderstood the nature of some of the relationships and that was not his intent".

However, in cross-examination, she acknowledged that it is possible that some of his behaviour may not have been attributable to his condition of ASD:

MR BESANKO: But, of course, on other occasions it may not be due to his autism.

DR YOUNG: Possible.

MR BESANKO: And you can't say one way or the other whether a particular instance of objectively inappropriate behaviour by Mr Milazzo was due to, as in, caused by Mr Milazzo's ASD.

DR YOUNG: No, I can't.

MR BESANKO: That the most you can do is say that a particular instance of inappropriate behaviour is consistent with his ASD, agreed?

DR YOUNG: Agreed.

This point was reiterated in further oral evidence by Professor Young:

MR BESANKO: Right. And just so I am clear I take it from what you've said that when you were taken to each of the passages of evidence by Mr Powell this morning, that is, the passages of Mr Milazzo's evidence about each of the eight matters that have been referred to the panel for inquiry report – the effect of your evidence is that that conduct, if it's found to be the conduct that was engaged in by the panel, is consistent with a – a diagnosis of ASD.

DR YOUNG: Yes.

MR BESANKO: You're not saying anything more than the conduct is consistent with ASD.

DR YOUNG: No.

MR BESANKO: Another explanation is that Magistrate Milazzo intended to behave in a sexually inappropriate way.

DR YOUNG: Yes.

MR BESANKO: And that explanation is equally possible.

DR YOUNG: Not in my opinion it's not equally possible. But it is possible.

Which the Panel notes she clarified in further testimony:

MR POWELL: Dr Young, it was raised with you that your opinion – at least in part – was this. That Mr Milazzo's conduct was consistent with your diagnosis of autism spectrum disorder. Do you recall that was raised with you - - -

DR YOUNG: Yes.

MR POWELL: - - - a short time ago?

DR YOUNG: Yes, I do.

MR POWELL: And do you recall then that this was put to you. That there's another explanation equally open and that is that he intended to act in an inappropriate way. Do you recall that that - - -

DR YOUNG: I do.

MR POWELL: - - - was raised with you? And do you recall that you responded in this – or approximately this way: In my opinion that's not equally possible that he intended to act in an inappropriate way. Do you recall that response?

DR YOUNG: That's my – I do. I do.

MR POWELL: What did you mean by that?

DR YOUNG: To me this – these explanations are more understandable within the context of autism than they are in other – it doesn't – to me, some of it doesn't make sense that someone would go to grope someone's breasts in a lift with someone present. So when I read it – and if you read this within the context of autism it makes sense to me that there was no intent. And not only that. I made these initial assumptions or comments about his behaviour before reading the affidavits of everyone else and one thing we do know about people's personality is it's stable across time and this behaviour is inconsistent with what other people are saying. People can imagine him getting on someone's lap because he's a fun, sort of, guy and they do know that he sometimes did things that were inappropriate. So reading all of that and putting it all together it just makes more sense to me that this is an autistic man who has misunderstood the nature of some of the relationships and that was not his intent.

Professor Young indicated that individuals with ASD can learn appropriate social skills through education:

II. Whether, having regard to my diagnosis, there is any potential to learn appropriate social skills to reduce the impact of the usual social problems associated with these difficulties and in what ways?

I often equate the learning of social skills for an autistic person to the learning of a second language; one can be taught a second language but the older one is the more difficulty they will have. Mr Milazzo has autism, and he has had limited intervention. Further, he has had very limited feedback about the inappropriateness of some of his behaviour. It is perhaps unfortunate that given his role, people may have accommodated his behaviour rather than informing him. so that he may learn from his mistakes. It is my strong belief that Mr Milazzo meant no harm, but his intentions may be misperceived by those unfamiliar with autism. Autistic people can be taught social skills that are not intuitive to them. Research suggests these skills are best learnt through modelling, reinforcement and repetition. Rules for behaviour and etiquette have to be explicitly taught, with no room for ambiguity. The difficulty with teaching such skills is the difficulty generalising the rule across multiple contexts.[34]

Professor Young expanded on this in her testimony:

MR POWELL: So you've mentioned treatment of children.

DR YOUNG: Yes.

MR POWELL: Just dealing with Mr Milazzo, a mature-aged man - - -

DR YOUNG: Yes.

MR POWELL: - - - are you saying he could benefit?

[34] Report of Professor Robyn Young dated 30 August 2021 at 26.

DR YOUNG: Absolutely. I mean, I don't think I'd stick him in a hula hoop. I think he knows social boundaries. But I was interested in the degree of difficulty that he did have when I showed him that community extract about how other people were thinking, and he's socially motivated, which is great. He wants to be out in the community and he wants to have friends, and I think that he just needs a bit of education and support in how to do that appropriately. So that might come in the form of group therapy; it might come from individual therapy; it might come from us directing him to read some books. There's a book called The Hidden Curriculum, which is really good for autistic people. It would enable him to read some of the difficulties that autistic people have in understanding the social curriculum, and all of those things would benefit him greatly.

Professor Young, while previously indicating that Mr Milazzo could continue to say inappropriate things, could learn with education to minimise the risk of inappropriate behaviour despite him being 68 and close to retirement:

MR BESANKO: In light of what you've said in this paragraph, that is, the paragraph in answer to the second question – is it your view that there is very little prospect that Mr Milazzo will learn the appropriate social skills to avoid acting inappropriately in the workplace?

DR YOUNG: No, that's not my view.

MR BESANKO: Mr Milazzo is over 68 now.

DR YOUNG: Yes.

MR BESANKO: Is it your view that it is unlikely that he will learn to avoid behaving inappropriately on occasion before he turns 70?

DR YOUNG: No. I believe he can learn how to behave. I believe he has learned through this process. And as I said earlier, there is a possibility that he still could make some mistakes, yes.

MR BESANKO: But just so I'm clear, it's your view that he can learn the necessary skills to avoid or at least minimise a risk of him acting inappropriately in the next 20 months?

DR YOUNG: Yes.

However, the Panel notes that Professor Young's assessment in her first report indicated that her clinical assessment of the Magistrate's condition was that of one "Requiring Substantial Support", which she clarified in her testimony:

MR BESANKO: Could I just ask one other question about 23 – page 23 of your first report – and I'm going back up to the top of the page. You've said that Mr Milazzo partially meets one of the criterion and I don't want to ask you about the criterion. But you've gone on to say in the shaded box that Mr Milazzo has met three of the four criteria in the DSM-5 classification system and then you've said that Mr Milazzo has been tiered as a level 2 in this area: (requiring substantial support) - - -

DR YOUNG: Yes.

MR BESANKO: What does "requiring substantial support" mean in this context?

DR YOUNG: Yes. There's only three levels that you can classify a person. Level 1 is requiring support 2. Level 2 is requiring substantial support and level 3 is requiring – very substantial support. That's consistent with the DSM-5 classification and it would be unusual for us to – when someone has got a new diagnosis level 1 support – because it's my opinion based on the information I had available to me – he needs education and he needs – because it's an early diagnosis for him he would need more support at this time and that's transient. That would change across time and given people's circumstances at any one time we would classify level 1, level 2, level 3 depending on the level of support they required at that time. And given the situation that he was in the difficulties that it, obviously, caused in his workplace I rated him as level 2.

It is also noted that Professor Young felt that measures could be put in a workplace to better accommodate individuals with ASD by education of colleagues:

MR POWELL: And then just one other matter. I asked you about the things that might be done for Mr Milazzo. Are there, on the other side of the coin, things that can be done in a workplace to better assist and better accommodate persons with ASD?

DR YOUNG: Yes. Our experience is if we explain to people in the workplace or – I go out to schools and educate teachers; obviously, in relationships, educate the other person. If there's an understanding of autism among his colleagues and hopefully they would be better informed to, I guess, respond to him in situ and explain to him that that behaviour is not appropriate, and he would benefit form that. So if his colleagues were aware of his diagnosis, that would be helpful. But then, of course, that's up to him to decide if he wants that, but just general community awareness is a good thing.

MR POWELL: Yes, and that's something that could operate within his workplace, effectively?

DR YOUNG: Absolutely.

However, in her 3rd report, she acknowledged the significant barrier of power differential in the workplace preventing junior staff being able to respond in this manner:

> It is possible, that because of his status, junior staff were not prepared to question him or comment on behaviour they considered inappropriate. For example, [Witness J] (11 August 2022; Item 3 paragraph 25-26) states [Witness L] was, "not prepared to take on a Magistrate", and she , "could not win against a Magistrate".[35]

[35] Report of Professor Robyn Young dated 5 September 2022 at 2.

In cross-examination the Magistrate was asked about his acceptance of Professor Young's diagnosis of ASD as being an explanation of his conduct:

MR BESANKO: Do you think Professor Young's diagnosis explains the conduct that you had accepted that you engaged in towards the women the subject of the eight matters before the panel?

MR MILAZZO: Yes.

MR BESANKO: Is it your belief now - - -

MR MILAZZO: When you say the eight matters, I don't think it really would explain me chasing around after [Witness L] and engaging constantly about her breasts. I think I would need a higher level of dysfunction to do that. But the rest of it, yes.

MR BESANKO: I'm sorry. My question was deliberately framed by reference to what you have accepted your conduct was not - - -

MR MILAZZO: Okay. Does it explain - - -

MR BESANKO: - - - the allegations.

MR MILAZZO: Well, I don't know that it necessarily explains the behaviour as such, but it explains the way it has been interpreted. Yes. The report at the end explains how there is a tendency for there to be a double misunderstanding. I misunderstand the people I interact with, and they misunderstand why I'm behaving the way I am because they don't get me either. So there's a mutual misunderstanding. And I think that certainly helps a lot in explaining why [Witness C] felt the way she did during that dinner.

Under cross examination, the Magistrate qualified that there are limits to his acceptance of the condition being a cause for his behaviour:

MR BESANKO: And is it the case that you believe your condition at least explains the way you have accepted you have behaved towards these women?

MR MILAZZO: Well, it helps explain it. It's not a total explanation, but it helps.

MR BESANKO: And I think you said earlier that you don't - - -

MR MILAZZO: I don't place a great deal of emphasis on it. My legal team seem to be a bit more absorbed with my condition than I am.

The Magistrate confirmed that he had not sought treatment and made comment regarding his acceptance of such treatment and its benefit given his age and closeness to retirement:

MR BESANKO: Have you received any treatment from anyone for your autism spectrum disorder since Professor Young made her diagnosis in her first report?

MR MILAZZO: No.

MR BESANKO: Is there a reason why you have not received any treatment?

MR MILAZZO: Well, the only treatment available, as I understand it, is a form of group therapy that help people who's condition is acute enough manage in social settings. I haven't been offered it. I'm nearly 70. I'm a year off retirement. I've managed my condition all my life. I don't – yes, I don't – I don't imagine that treatment over 12 months is going to make a great deal of difference.

MR BESANKO: So just to be clear you - - -

MR MILAZZO: I don't feel as though - - -

MR BESANKO: Sorry.

MR MILAZZO: I don't feel the need.

Further to this under cross-examination:

MR BESANKO: Returning to the topic I was asking you about at the end of yesterday, namely, Professor Young's diagnosis, you gave evidence that you have not received any treatment for your ASD since you read Professor Young's first report last year.

MR MILAZZO: Yes.

MR BESANKO: Is it the case you've not sought any treatment for your ASD?

MR MILAZZO: It is, but I – I'm not sure what you mean by treatment. The condition isn't treatable at many levels; it's manageable by my learning to behave appropriately. Now, I – I learn on an ongoing basis, but I haven't been formally – I haven't attended group sessions or been formally, as you call, treated.

MR BESANKO: Well, I think - - -

MR MILAZZO: It's not curable with a pill.

MR BESANKO: Yes.

MR MILAZZO: No.

MR BESANKO: I think you gave evidence yesterday that you understood that the recommendation made by Professor Young in her first report was that treatment – and that's my word – could consist of group therapy.

MR MILAZZO: No, that wasn't in the report. That was what I understood treatment to be. She was asked if it was treatable. She said that – she likened treating people like me to learning a new language and the younger they did it, the easier it was. And then just spoke generally on that topic. There wasn't really any dissection of what treatment would be. I mentioned group therapy, because when I saw her – or in the report she spoke about people that came to see her and things they said, in a group I think.

MR BESANKO: And is group therapy not something that interests you?

MR MILAZZO: Well, as I say, I've been living with the condition now for nearly 70 years. I learn all the time from my interactions with people, how I impact upon them. I learnt quite a lot, as I indicated, when I heard [Witness C's] evidence. No, I haven't investigated it.

MR BESANKO: You don't have any interest in group therapy.

MR MILAZZO: I say I haven't investigated it. I don't really know what it involves. If I was advised to have it and told it would have a significant impact and it was a good thing to do, I'd do it.

MR BESANKO: But unless and until that occurs, it's not your intention to explore the possibility of group therapy.

MR MILAZZO: As you've raised it, I'll speak to Professor Young and see what she says.

3.7.2 Conclusion: Professor Young's Evidence

The Panel accepts the diagnosis of autism spectrum disorder made by Professor Young. The Panel agrees, to paraphrase Professor Young, that to make a judgment of one's capacity to be an officer of the court based on autism alone is superficial and offensive to anyone with autism, particularly those involved in the law. In this respect the Panel accepts that the diagnosis does not compromise the Magistrate's ability to carry out in a competent fashion the duties of a judicial officer in court.

The Panel also accepts that with respect to some of the Magistrate's behaviour as described by some of the witnesses in this inquiry, that the diagnosis does help to explain a number of comments and observations made by the Magistrate on topics which interest him.

It is important however to note that Professor Young was not prepared to go so far as to say that inappropriate conduct is made acceptable because of a diagnosis of ASD and that persons diagnosed with ASD are as capable as anyone else of choosing to engage in right or wrong behaviour, including behaviour which might constitute sexual harassment.

Professor Young adhered to the view that ASD could help explain his behaviour, however she qualified that view by acknowledging that some of his behaviour may not be attributable to ASD and that an alternative explanation could be that the Magistrate did intend to behave in a sexually inappropriate way.

Professor Young acknowledged that there is a risk that the Magistrate could continue to say inappropriate things. However, education or some form of treatment could help even before the statutory age of retirement of 70, to minimise the risk of inappropriate behaviour, although Professor Young assessed him as requiring "substantial support" so that this could still occur.

Professor Young said that measures could be put into place in the workplace to better accommodate individuals with ASD by educating colleagues of such

persons. She acknowledged that this would be difficult in the case of the Magistrate given that there is a significant power differential in the Magistrate's workplace between magistrates and staff.

The Panel notes that at some stage Professor Young was invited to comment on specific allegations made by specific witnesses to this inquiry and presented her observations and opinions in a letter to the Magistrate's solicitors dated 5 September 2022, which was exhibited at the inquiry. The Panel has placed little reliance on the opinions expressed by Professor Young with respect to specific allegations in that report. Much of the contents of the third report of 5 September 2022 contained expressions of opinion, speculation and other observations which the Panel considers went beyond the area of expertise of this witness.[36]

[36] By way of example her comments with regard to complaints 3, 4 and 8 were:

> Complaint 3 may have been a statement of what Magistrate Milazzo thought was a fact, that is, a vagina is designed for a penis. It is possible that he was asking out of curiosity rather than making any judgement. …
> …
> "I hope he fulfils you", is another usual comment open to interpretation sexual or otherwise. Once again commonly seen in autistic people.
> …
> "I bet he doesn't fulfill you, does he?". Either way this is said, this is an odd random comment but consistent with someone with autism trying to make small talk unsuccessfully.
> …
> … If it was Magistrate Milazzo's intent to "grope" a person's breasts in a lift, it is unlikely that this would occur in the presence of others. A more plausible explanation is that this was the behaviour of an autistic man with no understanding of how his behaviour would be perceived by others – he would assume they had the same perspective as his – which was either an attempt at humour or to rub a person's arms to keep them warm. I am unsure of Magistrate Milazzo's account of the incident. Persons with autism often avoid eye-contact so may look down. This may be perceived as looking at her breasts.

Part 4: Conclusion

The Panel concludes from the whole of the evidence, including the evidence of the Magistrate's own character witnesses, that the incidents which were the subject of this inquiry occurred against the background of other inappropriate behaviour exhibited by the Magistrate over an approximate period of eight years.

Each of the complaints the subject of this inquiry considered in isolation would, apart from complaint 7 recounted by Witness K, constitute inappropriate conduct of a sexual nature at the lower end of the scale of objective seriousness.

However, the Panel has accepted evidence that inappropriate conduct with sexual connotations occurred in relation to four women over a period which spanned nearly eight years.

Each of these women was in a subordinate position to the Magistrate. Witness A was a junior lawyer performing the role of research assistant in the Magistrates Court. Witness C was a junior lawyer performing the role of associate to a District Court Judge. She had never met the Magistrate before the night in question. Witness G was an employee in one of the registries at the Courts Administration Authority. Witness L was a cleaner employed in the Courts Administration Authority at the time. In the light of the Panel's finding that the incident involving Witness L did not occur in isolation but occurred against the background of prior similar conduct over a period of time, the Panel considers that the complaint of Witness L together with the complaints of Witness C are the most serious of the complaints made against the Magistrate.

The Panel notes that in respect of these two complaints the Magistrate has denied the most telling aspects of each of the accounts given by Witness C and Witness L. For this reason the Panel concludes that the Magistrate has not expressed any genuine understanding of or insight into his behaviour towards them.

There is no doubt that the Magistrate was aware of and had read each of the editions of the *Guide to Judicial Conduct* published by the Australasian Institute of Judicial Administration Incorporated from time to time. Specifically he was cross-examined about that document and acknowledged that he had read each edition of the Guide when it was published.

The Panel notes that chapter 2.3 of the 3rd Edition relevantly states:

> Judges should remember that many members of the public regard judges as a privileged group because of their remuneration and entitlements, and because of the nature of the judicial office. They are likely to expect that a judge will be especially vigilant in observing appropriate standards of conduct, both publicly and privately.
>
> Judges must conform to the standard of conduct required by law and expected by the community. They must treat others with civility and respect in their public life, social life and working relationships. It goes without saying that Judges must not engage in

> discrimination or harassment (including sexual harassment) or bullying. In relation to these matters, Judges must be particularly conscious of the effect of the imbalance of power as between themselves and others, especially their Chambers staff, Court staff and junior lawyers.
>
> [Footnote omitted]

The Magistrate acknowledged that he was aware of the high standard expected of judicial officers and that sexual harassment is unacceptable.

There is no evidence that the Magistrate sought any assistance, education or treatment for ASD before the commencement of this inquiry. Even after obtaining the diagnosis of Professor Young in 2021, the Magistrate has not sought any assistance.

The Magistrate was equivocal about his acceptance of the diagnosis of ASD as being a cause of his behaviour. He did not rule out accepting education and treatment however the Panel notes that there is no evidence that he has commenced any such education. As the Panel noted when commenting on the evidence of Professor Young, the Magistrate has demonstrated limited insight into the inappropriateness of his behaviour, particularly his behaviour towards Witness C and Witness L. The Panel notes that his denial of the most damning aspects of Witness C and Witness L's evidence amounts to a denial that he engaged in any inappropriate conduct with sexual connotations in relation to either witness.

Part 5: Opinion as to Whether Removal of the Magistrate is Justified

5.1 Introduction

The Panel's findings of fact and reasons, comprising Parts 1 to 4 inclusive of this report, were published to the Magistrate's solicitors and to counsel assisting the Panel on Thursday, 20 October 2022.

As had been previously foreshadowed, on that date the Panel requested submissions in writing from both counsel for the Magistrate and counsel assisting as to the opinion that the Panel should form as to whether removal of the Magistrate is justified. The Panel invited submissions to be provided by the close of business on Thursday, 27 October 2022.

The Panel and the Magistrate's solicitors received the submission from counsel assisting the Panel on Monday, 24 October 2022. The Panel received the Magistrate's submission on Thursday, 27 October 2022. Copies of these submissions are appended as Schedule 1 and Schedule 2 respectively to this report. Both submissions have been carefully reviewed by the Panel.

Paragraphs 3 and 4 of the Magistrate's submission are addressed in Part 5.4 below.

5.2 The Principles Which Should Govern the Formation of the Panel's Opinion

The Act does not expressly set out the matters concerning the conduct of a judicial officer that would justify removing the judicial officer from office, nor does it expressly set out the standard against which a judicial conduct panel is to assess those matters in forming its opinion as to whether removal of the judicial officer is justified. Section 25(2) simply states that the Panel must set out in its report whether removal of the judicial officer is justified. To be clear, no test for removal is identified in the Act, nor does the Act specify a standard against which a panel's findings as to the matters referred to it for inquiry and report is to be assessed.

The *Magistrates Act 1983* (SA) likewise does not expressly set out a threshold that must be met before a magistrate can be removed from office by the Governor, nor does it lay down any standard against which the findings as to the matters concerning the magistrate must be assessed by either a judicial conduct panel inquiring into and reporting on those matters when forming the opinion it is required to form under section 25(2)(b) of the Act, or the Governor when determining whether to remove the magistrate from office pursuant to section 26(1) of the Act.

The Act however does provide some guidance as to what should inform the panel's opinion as to whether removal of the magistrate from office is justified.

Section 3 of the Act provides that the objects of the Act are to enhance public confidence in the judicial system and to protect the impartiality and integrity of the judicial system by, amongst other things, enhancing the existing mechanisms for removal of judicial officers where they are unwilling or unable to appropriately discharge their duties.

It is apparent from the section that Parliament intended the provisions of the Act to strike a balance between enhancing public confidence in the judicial system and protecting the independence and impartiality of the judicial system by enhancing existing removal procedures. The Panel accepts that there is a balance to be struck between the maintenance of public confidence in the judicial system against the need to protect the independence of the judiciary, including the Magistrates Court.

The Panel notes that the words in section 3 requiring the panel to consider when forming its opinion whether the magistrate is unable or unwilling to appropriately discharge his duties are of broad import. However, it accepts the submission of counsel assisting (paragraph 29) that to rely on that provision alone would result in the test for removal of a magistrate being narrower than the test for removal of a Federal judge under section 72 of the *Commonwealth of Australia Constitution Act*.

The Panel has had regard to the various publications of the Australasian Institute of Judicial Administration Incorporated, *Guide to Judicial Conduct*, and to the test stated in the first report of the Parliamentary Judges Commission of Inquiry (1989).[37] These are conveniently summarised in the submission of counsel assisting at paragraphs 31-38. The Panel accepts and agrees with the summary of the principles contained in counsel assisting's paragraphs 41 and 42.

In particular, the Panel has had regard to the test therein stated that 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.

In the Panel's opinion there is no reason to treat the conduct of the Magistrate in any way different to the test propounded for judges.

The fact that the composition of the judicial conduct panel requires the inclusion of lay member who is not a judicial officer or a legal practitioner

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[37] See e.g. Parliamentary Commission of Inquiry, Parliament of the Commonwealth of Australia, *Special Report Dealing with the Meaning of 'Misbehaviour' for the Purposes of Section 72 of the Constitution* (1986) at pp. 18, 19, 32 and 45; Constitutional Commission, Parliament of the Commonwealth of Australia, *Final Report of the Constitutional Commission: Volume 1* (1988) at p. 403; Parliamentary Commission of Inquiry, Parliament of the Commonwealth of Australia, *First Report of the Parliamentary Judges Commission of Inquiry* (1989) at [1.5.7]. The relevant extracts are set out by The Hon. James Thomas AM, *Judicial Ethics in Australia* (3rd ed., 2009, LexisNexis Butterworths Australia) at [3.4] and [3.7].

reinforces the Panel's conclusion that it should apply community standards when forming an opinion as to whether the findings made by it justify the removal of the Magistrate.

The Panel accepts that the removal of a sitting judicial officer is exceptional, however it also notes that there is a significant public interest in maintaining a very high standard of behaviour amongst judges and magistrates, both in and out of the courtroom, and therefore public confidence in the justice system. Right thinking members of the community expect judges and magistrates to behave to a very high standard, not just in their courtrooms but also in the workplace and the community.

The principle summarised in the Magistrate's submission at paragraph 35 and the exposition with follows are not accepted for the following reasons:

(a) The principle so stated and expounded has no authority to support it.

(b) It concentrates solely on the effect of a judicial officer's conduct on the officer's ability to discharge the in-court judicial function.

(c) It ignores the effect of the conduct on the person to whom it is directed.

(d) It takes no account of the high standards of conduct required of a judicial officer;

(e) It ignores in particular **Value 4: Propriety** of the *Bangalore Principles of Judicial Conduct 2002* relied on (*inter alia*) by the Magistrate in formulating the principle, namely that "propriety, and the appearance of propriety are **essential** to the performance of **all the activities of a judge**". (Emphasis added)

(f) It misconstrues the effect of section 87 of the *Equal Opportunity Act 1984* (SA) in a number of respects. In the Panel's view, reading section 87(1) together with the provisions of sub-section (9) it is evident that it was unlawful for (the Magistrate) to subject to sexual harassment (as defined) … a person with whom he (worked) while in attendance at a place that (was) a workplace of both the persons (in relation to every complaint) and in circumstances when the Magistrate was … aware that the other person was a fellow worker (as defined).

(g) It assumes that the only driving force of the Magistrate's conduct was his condition of autism spectrum disorder and that the reasonable person would have knowledge of that condition and its effect. However, that is a condition of which not even the Magistrate or anyone else was aware until Professor Young's diagnosis and about which even the Magistrate expressed some doubt. How the reasonable person is to obtain such knowledge remains a mystery.

(h) Most importantly, the submission makes no reference to and apparently ignores the findings not only as to the effect that the conduct did have on the respective complainants, but as to the significant findings recorded by the Panel in Part 3.7.2 (Conclusion: Professor Young's Evidence) and Part 4 (Conclusion) relating to the likelihood of further similar conduct.

(i) It seems to assume that the only relevant "duties" of the Magistrate are those performed in court. However, the duties of a judicial officer extend to the maintenance of appropriate standards of conduct particularly in relationships with those with whom the judicial officer must work and associate with outside the courtroom.

(j) It places undue emphasis on the Magistrate's subjective intention as a necessary element in proof of conduct which constitutes sexual harassment.

5.3 The Application of the Principles

At the forefront of the submission of counsel assisting (paragraph 44) as to the reasons justifying the opinion that the Magistrate's removal from office would be justified is the finding recorded at page 14 of this report that the Magistrate was "prone to make out of court comments of a sexual nature to work colleagues which could, in the case of some hearers, cause distress and offence".

To base an opinion that the Magistrate's removal from office is justified on that finding would not be in accordance with the Act, and the Panel wishes to make clear that, save in respect of one complaint, it does not rely on that finding as a reason for forming its opinion.

The Panel's function is limited to investigating complaints referred to it by the Attorney-General. In this case there were eight such complaints and it is the Panel's findings in respect of those eight matters only which will justify its opinion. The finding relied on by counsel assisting was made and was based on the facts referred to in Part 3.1.2, being observations made by Witnesses B, J, H, I and L and to character witnesses CW1, CW3, CW4 and CW6. In relation to complaints 1 to 7 inclusive, the Panel considered that such evidence, and it would include all the evidence referred to in Part 3.1.2, was admissible not by way of proof of other complaints not the subject of the investigation but as indicative of the character of the Magistrate in assessing the value and reliability of his own evidence. To rely on it in respect of those complaints for any other purpose would be to rely on evidence which is not the subject of the complaints being investigated.

In relation to complaint 8, however, the evidence of Witness L as to other occasions of a similar nature was admissible as evidence of "any other matter concerning the conduct of the judicial officer in the course of its dealing with the

referral from the Attorney-General",[38] being evidence of the context in which complaint 8 occurred and of the seriousness of that complaint as it affected Witness L.

The Panel refers to its earlier reasons for findings of fact. The Panel has found that the Magistrate engaged in inappropriate conduct with sexual connotations in relation to four different women over a period of some years.

As the Panel has already noted, each of those women was in a subordinate position to that of the Magistrate.

The Panel is of the opinion that the conduct proved against the Magistrate, particularly in respect of complaints 3, 4, 5, 6 and 8, is not consistent with the Magistrate's obligation to uphold the status and reputation of the judiciary. It is precisely the type of conduct that a reasonable, fair minded member of the public would perceive as likely to diminish public confidence in, and respect for, the judicial office.

The Magistrate is now 68 years old. He has been diagnosed as having autism spectrum disorder.

The Panel acknowledges the current focus in the community on rightfully increasing the understanding and support for individuals with ASD. The Panel has also accepted that in the Magistrate's case, the diagnosis is consistent with the previously noted abundance of evidence of the Magistrate displaying a pattern of unintentionally inappropriate behaviour and making comments on matters that interest him even if they are socially inappropriate.

However, the Panel does not believe that the diagnosis of ASD mitigates the Magistrate's level of responsibility in such serious cases of inappropriate behaviour with strong sexual connotation toward subordinates. As Professor Young indicated, inappropriate conduct is not made acceptable because of a diagnosis of ASD, and those with ASD are as capable as anyone else of choosing to engage in right or wrong behaviour, including behaviour which might constitute sexual harassment. Professor Young also acknowledged that some of the behaviour may not be attributable to ASD and that an alternative explanation could be that the Magistrate did intend to behave in a sexually inappropriate way.

In addition, to necessarily tie a diagnosis of ASD to a reduced culpability or as an excuse for the Magistrate's pattern of making comments of a sexually inappropriate nature is presumptuous and discriminatory to those in the community with ASD.

Beyond this, although education and treatment may assist in preventing recurrences of any further incidents of inappropriate behaviour on the part of the

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[38] *Judicial Conduct Commissioner Act 2015* (SA) section 23(1).

Magistrate, the Panel notes, for the reasons it expressed earlier in this report, that the prospects of that happening in the next 18 months are not good.

This is because the Magistrate himself has not expressed any genuine remorse in respect of the three most serious allegations and has in effect denied outright any improper conduct in the form of sexual harassment in relation to either of those witnesses.

The Panel acknowledges that there is no question about the competence of the Magistrate in discharging his in court judicial duties. However, the Panel notes that a judicial officer has obligations to conduct himself appropriately at all times, particularly in respect of junior staff, chambers staff and junior lawyers.

The Panel notes that all of the conduct proved against the Magistrate occurred in the workplace either in court related or informal settings related to staff who were junior to the Magistrate.

For this reason the Panel is of the view that the Courts Administration Authority would not be able to discharge its duty of care to all employees if the Magistrate is permitted to return to the workplace.

For these reasons it is the Panel's opinion that removal of the Magistrate is justified.

5.4 The Magistrate's Submission, Paragraphs 3 and 4

The Panel does not accept the submission that the Magistrate should be supplied with a copy of the report before it is submitted to the Attorney-General. The Panel considers that the requirements of natural justice have been fulfilled by affording the Magistrate the opportunity to make submissions as to the opinion it should form as a result of the Panel's findings of fact published to the Magistrate. It has taken those submissions into account.

The implicit complaint that the Magistrate has been given only seven days within which to provide submissions on what was said to be "the most critical part of the inquiry" is, in the Panel's view, disingenuous because as we make clear, the Panel has obligations under section 25 of the Act.

More importantly, the Magistrate and his legal representatives have been in possession since 2021 of all of the allegations which inform the critical findings made by the Panel.

Section 25 of the Act makes it clear that once completed, the Panel is obliged to provide the report to the Attorney-General and to provide copies of the report to the Judicial Conduct Commissioner, the two individual complainants identified as such (Witness A and Witness C), to the Magistrate and to the relevant jurisdictional head (the Chief Magistrate). Copies of the report are being delivered to all relevant parties at the same time.

The Panel's expressed opinion is no more than that. The Governor has a discretion to exercise as to whether or not she acts on the opinion[39] and removes the Magistrate from office. Provision of the report to the Attorney-General does not prevent the Magistrate from either:

(a) Making representations to the Governor as to whether the Magistrate should be removed from office, or

(b) Taking judicial review proceedings to prevent further action being taken on the report if so advised.

Dated the 2nd day of November 2022

Signed: __[P Kelly]_____

Patricia Kelly SC

Presiding Member

Signed: __[DJ Bleby]_____

The Honourable David Bleby SC

Signed: __[CHC Moy]_____

Dr Chris Moy

[39] *Judicial Conduct Commissioner Act 2015* (SA) section 26(1).

Schedule 1

IN THE MATTER of the *Judicial Conduct Commissioner Act 2015* (***Act***)

and

IN THE MATTER of Magistrate Simon Hugh Milazzo, a judicial officer (**Magistrate Milazzo**)

and

IN THE MATTER of an inquiry by a Judicial Conduct Panel (**Panel**) into and report on the matters concerning the conduct of Magistrate Milazzo pursuant to s 23 of the Act

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SUBMISSIONS ON THE OPINION THAT THE PANEL SHOULD FORM PURSUANT TO SUBSECTION 25(2)(b) OF THE ACT

A. Introduction

1. On 24 June 2022 the Attorney-General constituted the Panel. Pursuant to s 23(1) of the *Act*, the Panel is required to inquire into and report on the matters concerning Magistrate Milazzo that have been referred to it by the Attorney-General. The matters referred to the Panel by the Attorney-General were set out in the letter from the Judicial Conduct Commissioner to the Attorney-General dated 10 June 2021.

2. Pursuant to s 25(1) of the *Act*, the Panel must, at the conclusion of its inquiry, provide a report to the Attorney-General, and pursuant to s 25(2) that report must set out: (1) the Panel's findings of fact; (2) the Panel's opinion as to whether removal of Magistrate Milazzo as a judicial officer is justified; and (3) the reasons for the Panel's conclusion.

3. The Panel has completed its inquiry into the matters referred to it by the Attorney-General. Under cover of a letter from the Chair of the Panel dated 20 October 2022, the Panel provided its findings of fact in connection with those matters to Magistrate Milazzo's legal representatives. That letter and those factual findings were also sent to me.

4. When providing its factual findings, the Chair indicated that those factual findings were final, but invited Magistrate Milazzo to make any submissions he may wish to make on what opinion the Panel should form about whether Magistrate Milazzo's removal from office is justified, for the purposes of s 25(2), in writing by close of business on Thursday 27 October 2022.

5. The Panel has not expressed any view about what opinion it should form for the purposes of s 25(2)(b) of the *Act* in its factual findings; instead, it has called for submissions about this question, in light of its factual findings. This approach of providing its final findings of fact to Magistrate Milazzo and inviting submissions on what opinion the Panel should form for the purposes of s 25(2)(b) of the *Act* was decided by the Panel at the first directions held by the Panel, on 9 August 2021, following submissions advanced on behalf of Magistrate Milazzo.

6. To assist the Panel, I provide these submissions on the question of what opinion the Panel should form for the purposes of s 25(2)(b) of the *Act*, given the factual findings that the Panel has made. I provide these submissions in advance of the 27 October deadline set by the Panel to enable Magistrate Milazzo to address my submissions, should he wish to do so, although of course the Panel may not accept my submissions, whether he addresses them or not.

B. The relevant legislation and principles

7. Magistrate Milazzo presently holds the office of a magistrate. He is not a judge. Pursuant to s 9(1)(e) of the *Magistrates Act 1983* (SA) (***Magistrates Act***), a magistrate may only be removed from office by the Governor, being the Governor with the advice and consent of Executive Council,[1] pursuant to the provisions of the *Act*. Subsection 9(1)(e) of the *Magistrates Act* sets out the only statutory power to remove a magistrate from office. It directs attention to the *Act*.

8. The *Act* applies to both magistrates and judges; both magistrates and judges are "judicial officers" for the purposes of the *Act*.[2] However, the process for removing them is different. Pursuant to s 26(1) of the *Act*, a judicial officer who is a magistrate may only be removed from office by the Governor. By contrast, a judicial officer who is a judge may be removed from office pursuant to the *Constitution Act 1934* (SA) (***Constitution Act***), or any other Act or law that permits the removal of the judge, whether a judicial conduct panel has been appointed or not.[3] Put another way, unlike a judge, a magistrate is not removed by the Governor following an address of both Houses of Parliament but is instead removed by the Governor, on advice from, and with the consent of, Executive Council.

9. I pause to emphasise two things that are apparent from s 26(1) of the *Act*, when read with s 9(1)(e) of the *Magistrates Act*.

10. ***First***, a magistrate may only be removed from office by the Governor following the expression of the opinion by a judicial conduct panel that the removal of the magistrate from office is justified; the Governor may not remove a magistrate from office unless the Panel has expressed the opinion that removal of that magistrate is justified. If a judicial conduct panel expresses the opinion that removal is not justified, the Governor cannot then proceed to remove the magistrate from office notwithstanding the panel's opinion.

11. ***Secondly***, the Governor retains a discretion not to remove a magistrate from office even if a judicial conduct panel has expressed the opinion that the magistrate be removed from office: the use of "may" in s 26(1) makes this clear.

12. It follows that the decision whether to remove a magistrate from office is made by the Governor (in reality the Executive), but only following the expression of the opinion by a judicial conduct panel that removal is justified, which opinion the Governor may or may not accept, and the decision of the Governor on the question of whether to remove a magistrate (and indeed the Panel's findings and opinion) is laid open to political and public scrutiny by the obligation imposed on the Attorney-General by s 25(4) of the *Act* to cause a copy of the judicial conduct panel's report to be laid before both Houses of Parliament.

13. Accordingly, if the Panel forms the opinion that Magistrate Milazzo's removal from office is justified, the Governor may remove him from office pursuant to s 26(1) of the *Act*, but only in that event, and the Governor (the Executive) may decide not to remove him even if the Panel expresses the opinion that removal is justified.

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[1] See s 21 of the *Legislation Interpretation Act 2021* (SA).
[2] See the definitions of "judicial officer" and "judicial office" in s 4(1) of the *Act*.
[3] Neither s 26(2) nor anything else in the *Act* limits s 75 of the *Constitution Act* when it comes to the removal of judges: see s 5(1) of the *Act*.

14. The *Act* does not expressly set out the "matters concerning the conduct of a judicial officer" that would justify removing the judicial officer from office, nor does it expressly set out the standard against which a judicial conduct panel is to assess those matters in forming its opinion as to whether removal of the judicial officer is justified, it being recalled that a panel is appointed to inquire into and report on "any matters concerning the conduct of a judicial officer" that have been referred to it by the Attorney-General, as well as any other matters that arise in the course of its dealing with the referral.[4] Subsection 25(2) simply states that the Panel must set out in its report whether removal of the judicial officer is justified. Subsection 26(1) provides that subject to s 26(2) the Governor may remove the judicial officer from office if a judicial conduct panel concludes that removal of that judicial officer is justified.

15. In other words, no test for removal is identified in the *Act*, nor does the *Act* specify a standard against which a panel's findings as to the matters referred to it for inquiry and report is to be assessed. In other words, the *Act* does not state expressly that a judicial officer may only be removed from office in certain circumstances, beyond that a judicial officer other than a judge may only be removed following a report from a judicial conduct panel in which the panel expresses the opinion that removal is justified, and that a judge is to be removed in accordance with the *Constitution Act* or any other Act or law that provides for removal. Nor does the *Act* expressly state that a panel's findings are to be assessed against a particular standard, for example, the view of right-thinking members of the community. To be clear, the Act does not expressly specify that a judicial officer, including a magistrate, may only be removed for proved misbehaviour or incapacity, or that a judicial conduct panel, when forming its opinion under s 25(2)(b), is to determine whether in its opinion removal is justified by reference to whether the conduct as found by it constitutes misbehaviour or incapacity, let alone that it must do so by reference to a particular standard.

16. I observe that Part 4 of the *Constitution Act* does not set out a threshold that must be met before a judge of the Supreme Court can be removed, save that such a removal can only be effected by the Governor following the address of both Houses of Parliament; s 74 of the *Constitution Act* provides that the Commissions of all judges of the Supreme Court shall be and remain in full force until their retirement according to law or their removal under s 75, while s 75 provides that it shall be lawful for the Governor to remove any judge of the Supreme Court upon the address of both Houses of Parliament. This is different from the *Commonwealth Constitution*, which provides in s 72 that federal judges cannot be removed except by the Governor-General in Council, on address from both Houses of Parliament in the same session for "proved misbehaviour or incapacity", and s 53 of the *Constitution Act 1902* (NSW), which likewise provides for the removal of the holder of a judicial office in that State by the Governor, on address from both Houses of Parliament in the same session, on the ground of "proved misbehaviour or incapacity."

17. The *Magistrates Act* likewise does not expressly set out a threshold that must be met before a magistrate can be removed from office by the Governor, nor does it lay down any standard against which the findings as to the matters concerning the magistrate must be assessed by either a judicial conduct panel inquiring into and reporting on those matters, when forming the opinion it is required to form under s 25(2)(b) of the *Act*, or the Governor when determining whether to remove the magistrate from office pursuant to s 26(1) of the *Act*. Further, it does not provide that magistrates only hold office during their "good behaviour". Nor does the *Act*.

[4] Section 23(1) of the *Act*.

18. I have said that there is no express statement of the circumstances when a magistrate may be removed from office, or the standard against which the Panel's findings as to the matters referred to it for inquiry and report must be assessed for the purposes of expressing an opinion about removal or making a decision to remove, in the *Act*, or otherwise, beyond s 26 of the *Act*. To be clear, there is also nothing in the Act, or otherwise, that in my submission implicitly lays down authoritatively either the circumstances when a magistrate may be removed or the standard against which the Panel's findings is to be assessed. However, there are provisions in the *Act* which provide guidance on these matters. I address these below.

19. Whilst it is the Governor, or in reality the Executive, that must decide whether to accept any opinion expressed by the Panel that Magistrate Milazzo be removed from office, such that it is the Executive that must determine what the relevant test for removal is and the standard against which the Panel's findings must be assessed (accepting that this will only occur if the Panel is of the opinion that removal is justified), it may be accepted that in forming its opinion as to whether removal is justified, and providing its reasons for forming such an opinion, as required by s 25(2)(c) of the *Act*, the Panel needs to consider an appropriate test for the removal of Magistrate Milazzo from office and explain why its findings about the matters referred to it do or do not justify his removal in light of this test. An opinion as to whether removal is justified can only be formed if the matters inquired into are assessed against the circumstance(s) in which removal would be justified and there is an assessment of the factual findings about those matters against that circumstance or those circumstances.

20. It should be observed at this juncture that because there is no legislative statement of when a magistrate may be removed from office, or the standard against which the findings about the matters is to be assessed, the Executive may adopt a different test or apply a different standard in coming to its conclusion as to whether to accept a recommendation by the Panel that removal is justified. It may also reach a view that is different from the Panel's whilst applying the same test and standard as that applied by the Panel. Nothing the Panel does in forming an opinion that removal is justified can bind the Executive in its consideration of and decision as to whether to accept the opinion and remove Magistrate Milazzo from office.

21. I should also state, by way of clarification, that I have been drawing a distinction between the "test" for removal and the "standard" to be applied in determining whether the "test" is met. I do not mean, by the drawing of this distinction, to submit that there is necessarily a bright line between the "test" for removal and the "standard" to be applied in assessing whether the "test" is met. Rather, I am endeavouring to draw a convenient distinction between a legislative or constitutional provision that sets out the circumstances in which a magistrate may be removed, like, for example, a provision that states that a magistrate can only be removed for "proved misbehaviour or incapacity" and a provision which states that in determining whether to form the opinion that removal is justified the Panel (or the Governor) must assess the findings as to the matters inquired into against what right-thinking members of the community would think, or what the magistrate's peers would think, or both, or some other standard. The two may overlap. As it happens the *Act* does not lay down either.

22. What test or standard should the Panel apply in determining whether to form the opinion that removal is justified?

23. As was observed by the Solicitor-General on behalf of the Judicial Conduct Commissioner in *A Judicial Officer v Judicial Conduct Commissioner*,[5] historically magistrates were "public

[5] [2022] SASCA 42.

servants" who only held office at the pleasure of the Executive Government.[6] This would appear to be why, under the *Act*, a magistrate is removed by the Governor on advice and with the consent of Executive Council, and not Parliament.

24. However, it is apparent from the *Magistrates Act*, and the *Magistrates Court Act 1991* (SA), that the Magistrates Court is a court of record that exercises judicial power, and that magistrates now have security of tenure similar to, but not the same as, that enjoyed by judges of the Supreme and District Courts. Accordingly, the independence and impartiality of the magistracy is to be maintained. In order to preserve the independence and impartiality of the magistracy, the removal of a magistrate from office should be considered exceptional.[7]

25. That said, it must be recalled that "less stringent conditions" are necessary to secure the independence and impartiality of magistrates, given that the Magistrates Court is an inferior court that is subject to the supervisory and appellate of the Supreme Court.[8] Moreover, Chapter III of the *Commonwealth Constitution*, and more specifically s 72, does not provide the minimum requirements for the independence and impartiality of the Magistrates Court.[9]

26. In these circumstances, and having regard to the absence of any express statement to this effect in the *Act*, the Panel need not come to its opinion as to whether removal is justified on the assumption that Magistrate Milazzo should, let alone can, only be removed from office for "proved misbehaviour or incapacity."

27. However, the *Act* does provide some guidance on what should inform the Panel's opinion as to whether removal of Magistrate Milazzo from office is justified.

28. ***First***, it provides in s 3 that the objects of the Act are to "enhance public confidence in the judicial system and to protect the impartiality and integrity of the judicial system" by, amongst other things, "enhancing the existing mechanisms for removal of judicial officers where they are unable or unwilling to appropriately discharge their duties." It is apparent from this legislative statement as to the purpose of the *Act* that Parliament intended the provisions of the *Act* to strike a balance between enhancing public confidence in the judicial system and protecting the independence and impartiality of the judicial system (which system includes the Magistrates Court), by, amongst other things, enhancing existing removal procedures. Thus, when forming its opinion, the Panel should consider the balance to be struck the maintenance of public confidence in the judicial system against the need to protect the independence of the judiciary, including the Magistrates Court.

29. ***Secondly***, it also emerges from s 3 that the Panel should consider, when forming its opinion, whether Magistrate Milazzo is "unable or unwilling to appropriately discharge [his] duties". However, these are words of broad import. Indeed, "appropriately" means simply in a manner that is suitable or proper in the circumstances. These words are not to be interpreted as a statement of legislative intent that a judicial officer should only be removed for inappropriate in-court behaviour or competency, or where the judicial officer cannot perform

[6] See at [247] per Livesey P.

[7] See, in the context of judges, *Bruce v Coles* (1998) 45 NSWLR 163 at 166 per Spigelman CJ (with whom Mason P, Sheller and Powell JJA agreed).

[8] See *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146 at [63] per McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ. See also *A Judicial Officer v Judicial Conduct Commissioner* [2022] SASCA 42 at [248] per Livesey P.

[9] See e.g. *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, in particular at [36] – [38] and [41] per Gleeson CJ, at [65] per Gummow, Hayne and Crennan JJ and at [255] per Heydon J.

his or her judicial duties competently and appropriately prospectively, irrespective of any prior conduct. To construe the *Act* in such a manner would see the test for removal of a magistrate being narrower than the test for removal of a federal judge under the *Commonwealth Constitution*, having regard to the broad meaning that has been given to "proved misbehaviour" in s 72,[10] in circumstances where no test or standard is prescribed by the *Act* and one of the expressly stated objects of the *Act* is to enhance public confidence in the judicial system; such a narrow construction would be inconsistent with both the broad language used in s 3 and the stated purpose of enhancing public confidence in the judicial system. It would also be inconsistent with the fact that judicial conduct panels are appointed to inquire into and report on "matters concerning the conduct of a judicial officer", which self-evidently captures past conduct. Indeed, in most cases it will be past conduct rather than future intent (about which there can be no certainty) that will justify removal.

30. I interpolate to observe that "misbehaviour" in the context of s 72 is not confined to conduct of a criminal nature, and extends to pre-appointment behaviour and misconduct outside of judicial conduct.[11] Indeed, The Hon. James Thomas AM stated in *Judicial Ethics in Australia*[12] at [3.10] that: "…I do not think it will ever again be seriously suggested that a judge can do anything at all outside official duties so long as it does not breach the criminal law without being able to be brought to account for it."

31. As to what behaviour, is captured by "proven misbehaviour", I draw the Panel's attention to the various statements identified by The Hon. James Thomas AM stated in *Judicial Ethics in Australia*[13] at [3.4] and [3.7]. Specifically, I note the following.

32. The applicable test was stated in the Parliamentary Commission of Inquiry, Parliament of the Commonwealth of Australia, *First Report of the Parliamentary Judges Commission of Inquiry* (1989), to be as follows:[14]

> "…*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*".

33. In the Parliamentary Commission of Inquiry, Parliament of the Commonwealth of Australia, *Special Report Dealing with the Meaning of 'Misbehaviour' for the Purposes of Section 72 of the Constitution* (1986) Sir George Lush expressed the test as follows:

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[10] See e.g. Parliamentary Commission of Inquiry, Parliament of the Commonwealth of Australia, *Special Report Dealing with the Meaning of 'Misbehaviour' for the Purposes of Section 72 of the Constitution* (1986) at pp. 18, 19, 32 and 45; Constitutional Commission, Parliament of the Commonwealth of Australia, *Final Report of the Constitutional Commission: Volume 1* (1988) at p. 403; Parliamentary Commission of Inquiry, Parliament of the Commonwealth of Australia, *First Report of the Parliamentary Judges Commission of Inquiry* (1989) at [1.5.7]. The relevant extracts are set out by The Hon. James Thomas AM, *Judicial Ethics in Australia* (3rd ed., 2009, LexisNexis Butterworths Australia) at [3.4] and [3.7].

[11] The Hon. James Thomas AM, *Judicial Ethics in Australia* (3rd ed., 2009, LexisNexis Butterworths Australia) at [3.7] – [3.11].

[12] (3rd ed., 2009, LexisNexis Butterworths Australia).

[13] (3rd ed., 2009, LexisNexis Butterworths Australia).

[14] At [1.5.7].

> *"The word 'misbehaviour' in s 72 is used in its ordinary meaning, and not in the restricted sense of 'misconduct in office'. It is not confined, either, to conduct of a criminal nature.*
>
> *Judges…cannot be protected from the public interest which their office tends to attract. If their conduct, even in matters remote from their work, is such that it would be judged by the standards of the time to throw doubt on their own suitability to continue in office, or to undermine their authority as judges or the standing of their courts, it may be appropriate to remove them."*

34. Sir Richard Blackburn stated:

> *"'Proved misbehaviour' means such misconduct, whether criminal or not, and whether or not displayed in the actual exercise of judicial functions, as, being morally wrong, demonstrates the unfitness for office of the judge in question."*

35. The Hon. Andrew Wells stated:

> *"The word 'misbehaviour' must be held to extend to conduct of the judge in or beyond the execution of his judicial office, that represents so serious a departure from standards of proper behaviour by such a judge that it must be found to have destroyed public confidence that he will continue to do his duty under and pursuant to the Constitution."*

36. As The Hon. James Thomas AM observed at [3.7], these views were fortified by the Constitutional Commission (comprising Sir Maurice Byers, Professor Enid Campbell, Sir Rupert Hamer, EG Whitlam and Professor Leslie Zines), which stated in its final report in 1988 that:

> *"It is clear to us, as it was to many others, including the Advisory Committee that conduct which warrants removal of a judge should include:*
>
> *(a) misconduct in carrying out the duties of office; and*
>
> *(b) any other conduct that, according to the standards of the time, would tend to impair public confidence in the judge or undermine his or her authority as a judge."*

37. The "Advisory Committee" comprised Justice D F Jackson, Professor Crawford, Justice Gummow, R C Jennings QC, Justice Kennedy and Justice McGarvie.

38. The Hon. James Thomas AM has also set out what the "Gibbs Commission", which was established to inquire into conduct of Justice Vasta in Queensland, stated the test for the removal of a Supreme Court judge should be, at [3.12]. Relevantly, that Commission stated:

> *"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.

The members of the Commission therefore are required to apply community standards to their task of forming an opinion as to whether any behaviour of Mr Justice Vasta warrants his removal from office as a Judge of the Supreme Court. The Commission 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 pharisaic an approach, would imperil the independence of the judiciary, which would be eroded if a judge might too readily be removed from office. Moreover, there may be judicial misbehaviour which ought not to be condoned, and indeed may be deserving of censure, even severe censure, but which would not warrant the removal of a judge from office. Questions of degree may be involved, and minds may differ in making what is in effect a moral and social judgment on such a matter."

39. These statements were not made in the context of a consideration of the meaning of "proved misbehaviour" in s 72 of the *Commonwealth Constitution*.

40. ***Thirdly***, the composition of judicial conduct panels, and in particular the requirement in s 21(3) of the *Act* that judicial conduct panels include a lay member who is not a judicial officer or a legal practitioner, reinforces the conclusion that the Panel should apply community standards when forming an opinion as to whether the findings made by it justify the removal of Magistrate Milazzo from office.

41. Having regard to these statements, and the provisions of the *Act*, including the objects set out in s 3, in my submission the Panel should, for the purposes of forming its opinion under s 25(2)(b) of the *Act*, consider whether its findings are such that right-thinking members of the community would regard the fact of the matters found by it as being inconsistent with the continued performance by Magistrate Milazzo of his judicial duties, assessed against present standards. If the Panel was of the view that right-thinking members of the community would regard the fact of the matters found as being inconsistent with the continued performance by Magistrate Milazzo of his judicial duties, he would, in my submission, be considered to be unable or unwilling to discharge his duties as a magistrate appropriately, and the Panel would be justified in recommending his removal from office. The conduct that has been engaged in by him, as found by the Panel, must be of sufficient seriousness that right-thinking members of the community would consider that in light of it having occurred he is unfit to hold office because public confidence in the justice system would be undermined or diminished if he was to be permitted to continue to discharge his judicial duties.

42. The standard that should be applied is that of the right-thinking member of the community, according to the standards of the time, namely the present. Whilst removal of a sitting judicial officer is exceptional, there is significant public interest in maintaining a very high standard of behaviour amongst judges and magistrates, both in and out of courtroom, and therefore public confidence in the justice system. Right-thinking members of the community expect judges and magistrates to behave to a very high standard, not just in their courtrooms but also in the workplace and in the community.

C. Whether the removal of Magistrate Milazzo from office is justified

43. The Panel has made findings which in my submission should lead the Panel to the opinion that Mr Milazzo's removal from office is justified. Indeed, in my submission, it is difficult to see how the Panel could form the opinion, based on the findings that it has made, that his removal from office is not justified. This is so for the following reasons.

44. ***First***, the Panel has found that Magistrate Milazzo "was prone to make out of court comments of a sexual nature to work colleagues which could, in the case of some hearers, cause distress and offence": at page 14 of its factual findings. Right-thinking members of the community would, in my submission, regard the fact that Magistrate Milazzo was prone to make out of court comments of a sexual nature which could cause distress and offence to be inconsistent with the continued performance of his judicial duties. This is particularly so in circumstances where the Panel has accepted Magistrate Milazzo's diagnosis of autism spectrum disorder (**ASD**) and found, on the basis of Professor Young's evidence, that there is a risk that Magistrate Milazzo could continue to say inappropriate things in the future: see pages 58, 61 and 71 of its factual findings). This is in no way to suggest that right-thinking members of the community would discriminate against Magistrate Milazzo because of the mere fact of his condition of ASD. Rather, right-thinking members of the community would consider that it is the risk of future inappropriate behaviour, coupled with the past pattern of out of court comments of a sexual nature to work colleagues, as found by the Panel, which renders him unfit to continue to hold office.

45. ***Secondly***, the Panel has accepted Witness C's evidence about the comments made by Magistrate Milazzo at the dinner and in the courthouse following the dinner, and rejected Magistrate Milazzo's evidence to the contrary, and found that the comment "I bet he doesn't fulfil you, does he?" and the statement "I know what you did on the weekend. Confess your sins to me; confess" had sexual undertones: see pages 25 and 27-28. Right-thinking members of the community would, in my submission, regard the fact that Magistrate Milazzo had made multiple uninvited comments with sexual undertones to a young female associate he had just met, including a comment made in the court building, to be conduct inconsistent with his continued performance of judicial duties.

46. ***Thirdly***, in my submission right-thinking members of the community would regard the findings the Panel has made in connection with Matter 6 as being inconsistent with the continued performance of Magistrate Milazzo's judicial duties. Right-thinking members of the community would regard conduct involving a judicial officer walking into a professional meeting in the court building that he had not been invited to attend and sitting on the lap of a female staff member in the presence of two young female associates without seeking permission or being invited to do so, and touching her left shoulder and neck as if to massage it, as being inconsistent with the continued performance of judicial duties by him.

47. ***Fourthly***, the findings that the Panel has made in connection with the "lift incident" undoubtedly justify removal on their own: see pages 47 and 48. It is difficult to see how it could be said that right-thinking members of the community would not consider that a judicial officer placing his hands in a cupped like way close to (within an inch or so) of a cleaner's breasts in a lift in the court building, during work hours and whilst the cleaning was working, and whilst the judicial officer was looking at her breasts and making remarks that had sexual innuendo behind them, to be inconsistent with the continued performance of his judicial duties, particularly given the Panel's further findings that Magistrate Milazzo "intentionally engaged in conduct of a sexual nature" (i.e. he knew he was engaging in conduct in the lift

that was of a sexual nature), and its findings that the conduct was "seriously inappropriate, unprofessional, unbecoming and amounted to sexual harassment." The Panel's description of this conduct is apt, and it warrants the formation of an opinion that removal is justified, irrespective of the findings made by the Panel in connection with the other matters alone or in combination.

48. ***Fifthly,*** at least in combination with the "lift incident", the Panel's finding that Magistrate Milazzo made remarks of "a sexually suggestive nature concerning breasts generally" to Witness L before and after the "lift incident" justifies removal: see page 46.

49. Sexual harassment has no place whatsoever in any workplace, let alone in a courthouse by a sitting judicial officer. The Hon. James Thomas AM describes it as an abuse of power.[15] Moreover, as the Panel has observed at pages 73 and 74 of its factual findings, the most recent iteration of the Guide to Judicial Conduct published by The Australasian Institute of Judicial Administration Incorporated (***Guide***) states that "[i]t goes without saying that Judges must not engage in discrimination or harassment (including sexual harassment) or bullying." This is undoubtedly correct, and in my submission reflects the views of right-thinking members of the community, having regard to present standards.[16]

50. ***Sixthly***, even if right-thinking members of the community would not regard any of the findings made in connection with each of the matters referred to the Panel for inquiry and report, including those identified above, as being inconsistent with Magistrate Milazzo's continued performance of his judicial duties, when considered individually, they would, when viewed collectively, cause right-thinking members of the community to hold the view that they (the findings as to conduct) are in fact relevantly inconsistent.

51. By way of elaboration, the Panel has found that Magistrate Milazzo engaged in inappropriate conduct with sexual connotations behind it in relation to four women over a period of nearly 8 years, and that he knew that at least some of that conduct was conduct of a sexual nature: see also page 73. This conduct was engaged in by him against the background of other inappropriate conduct: see page 73. The conduct was directed toward women who were in a subordinate position to him, and the Panel has found that it is not satisfied that Magistrate Milazzo has any genuine understanding of or insight into his behaviour: see pages 73 – 74.

52. When the findings of the Panel as to each of the matters referred to it for inquiry and report (other than in connection with Matter 7) are viewed in this context and together, there can be little doubt that right-thinking members of the community would hold the view that the fact of the conduct is inconsistent with his continued performance of judicial duties. Public confidence in Magistrate Milazzo and the justice system would be undermined, if not significantly eroded, if Magistrate Milazzo was to continue to discharge judicial duties, in light of the Panel's findings, considered collectively. He is, by virtue of the Panel's findings, unable or unwilling to discharge his duties appropriately. Such a conclusion is further reinforced by the Panel's finding, based on Professor Young's opinion, that Magistrate Milazzo may engage in inappropriate behaviour in the future: see pages 61 and 71.

53. ***Finally***, the Panel has in my submission made adverse reliability and, importantly, adverse credibility findings against Magistrate Milazzo in connection with Matters 4, 5 and 8: see pages

[15] The Hon. James Thomas AM, *Judicial Ethics in Australia* (3rd ed., 2009, LexisNexis Butterworths Australia) at [4.41].

[16] For the avoidance of doubt, the standards were no different in 2012 or 2014. It is not the case that sexual harassment was acceptable in 2012 or 2014 but not in 2020 (when the Guide was published) or 2022.

25-26, 28, 45 – 47 and 74 of its factual findings. In my submission, right-thinking members of the community would consider the fact of adverse reliability and credibility findings being made against any judicial officer to render that judicial officer unfit to hold judicial office; right-thinking members of the community could not have the high degree of confidence that is needed in the judicial officer, as an officer of the justice system, to sit in judgment on and make findings about the credibility and reliability of members of the community when they themselves have been the subject of adverse reliability and credibility findings in an inquiry into their conduct.

54. If the Panel was to determine that Magistrate Milazzo should only be removed for proven misbehaviour or incapacity, the findings made by the Panel should nonetheless lead it to the conclusion that his removal from office is justified, having regard to the manner in which the expression "proven misbehaviour" in the *Commonwealth Constitution* has been interpreted, and the seriousness of the findings the Panel has made.

55. Ultimately, however, it is a matter for the Panel whether it considers right-thinking members of the community would regard the fact of the matters found by it as being inconsistent with the continued performance by Magistrate Milazzo of his duties, and the Panel may reject my submissions and consider that, whilst serious and deserving of censure, in all the circumstances right-thinking members of the community would not consider the conduct as found to be inconsistent with Magistrate Milazzo's continued performance of judicial duties.

56. Magistrate Milazzo may draw to the Panel's attention its finding at page 15 that Magistrate Milazzo never discriminated in any way against people of different sexual orientation (which is to be taken as a finding as to his intent), and the finding at page 73 that viewed in isolation the complaints "constitute inappropriate conduct of a sexual nature at the lower end of the scale of objective seriousness". He may also point to the Panel's acceptance of the diagnosis of Professor Young, and the finding at page 71 that "with respect to some of the Magistrate's behaviour as described by some of the witnesses in this inquiry, that the diagnosis does help to explain a number of comments and observations made by the Magistrate on topics which interest him."

57. However, it is apparent that this general finding at page 73 is qualified by the specific finding at pages 47 and 48 in connection with the "lift incident", and the finding at page 71 about the explanation provided by Professor Young's diagnosis is qualified both in terms of the conduct it relates to and by the subsequent observation made by the Panel at page 71, by reference to Professor Young's evidence, that inappropriate conduct is not made acceptable because of a diagnosis of ASD. The fact remains that inappropriate conduct of a sexual nature has been engaged in by Magistrate Milazzo over a period of nearly 8 years in respect of multiple women. Right-thinking members of the community would consider that, in light of these findings, and notwithstanding the matters identified in [56] above, Magistrate Milazzo is not fit to continue to discharge judicial duties and, therefore, hold judicial office.

58. Magistrate Milazzo's conduct, as found by the Panel, demonstrates an unfitness to hold judicial office.

D. Conclusion

59. In light of the findings made by it, the Panel should form the opinion, pursuant to s 25(2)(b) of the *Act*, that Magistrate Milazzo's removal from office is justified.

60. Lastly, I observe that I have provided copies of Chapters 3 and 4 of The Hon. James Thomas AM's book and the various iterations of the *Guide* to Magistrate Milazzo's legal representatives. Indeed, I cross-examined Magistrate Milazzo about the *Guide*, and the Panel has made findings about Magistrate Milazzo's awareness of it at pages 73 and 74 of its factual findings.

Date: 24 October 2022

T A Besanko
Jeffcott Chambers
Counsel assisting the Panel

Schedule 2

IN THE MATTER of the Judicial Conduct Commissioner Act 2015 **(Act)**

and

IN THE MATTER of Magistrate Simon Hugh Milazzo, a judicial officer **(Magistrate Milazzo)**

and

IN THE MATTER of an inquiry by a Judicial Conduct Panel **(Panel)** into and report on the matter concerning the conduct of Magistrate Milazzo pursuant to s 23 of the Act

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THE MAGISTRATE'S SUBMISSIONS ON THE OPINION THAT THE PANEL SHOULD FORM PURSUANT TO SUBSECTION 25(2)(b) OF THE ACT

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1. We note that the magistrate has been given 7 days within which to provide written submissions on what is now the most critical part of the inquiry, requiring us to absorb and critique a 74-page document containing a catalogue of adverse findings. We further note that the submissions of Counsel Assisting were provided to the magistrate on Monday last, 24 October 2022.

2. We invite the attention of the Panel to an error which has crept into the findings, at page 5: the penultimate paragraph is, with great respect, factually incorrect. Counsel for the Magistrate had to withdraw from the inquiry in July because the Panel insisted on resuming the inquiry in July when neither senior nor junior counsel was available because of pre-existing court commitments, and despite indicating that they were available in August and September. Counsel having withdrawn, and other counsel having been briefed, the Panel did not resume the inquiry until September.

3. We respectfully submit that the Panel should, having completed its report provide a copy of the report to the Magistrate **only** in the first instance, so that he can determine whether he should exercise his right to seek judicial review before any report is provided to the A-G (s 25 (1)) or a copy promulgated to others (the complainants, the Commissioner and the head of jurisdiction) (s 25 (3)).
   It is in the highest degree improbable that the Parliament, contemplating as it does that a "*decision under this Act*" may be judicially reviewed in the Court of Appeal (s 29 (1)),

would intend that the report of the Panel be provided to the A-G (*a fortiori*, copies to the other nominated recipients) *even where* it is subject to Judicial Review, the result of which may be the quashing of the report.

4. It would, it is submitted, make a mockery of the process if an impugned/challenged report were circulated before it were determined to be a valid report; i.e., a report within the meaning of the Act.

The Statutory Framework

5. A magistrate is appointed by the Governor pursuant to s 5, *Magistrates Act, 1983*.

6. A magistrate is not subject to removal from office only on an address to the Governor by both Houses of the Parliament (as is the case for a Supreme Court Judge or a District Court Judge). A magistrate is subject to removal from office by the Governor in accordance with the *Judicial Conduct Commissioner Act 2015*.

7. Section 25 of the *Judicial Conduct Commissioner Act 2015* provides that *"if a judicial conduct panel concludes that removal of a [magistrate] is justified, the Governor may remove the [magistrate] from office."* This provision would seem to contain an implied negative stipulation (*"but not otherwise")* conditioning the Governor's power of removal upon a panel conclusion.

8. Where a judicial conduct panel (JCP) is appointed (s 21), it must inquire into the conduct of the judicial officer referred to it by the A-G, and must conduct that inquiry in accordance with ss 23, as aided by 24. These sections are the subject of discussion by the Court of Appeal in *A Judicial Officer v the Judicial Conduct Commissioner et anor* [2022] SASCA 42. At the conclusion of the inquiry, the JCP must provide a report to the A-G setting out the panel's findings of fact, the panel's opinion, with reasons, as to *"whether removal of the judicial officer is justified*" (s 25). The JCP is not asked and is not given power to determine if any lesser disciplinary action would be justified. Its sole task is 'binary'.

9. No provision is made in the legislation for the JCP to express its opinion on any intermediate position – such as, that the conduct might not be in conformity with proper judicial conduct, but justifies disciplinary action that falls short of removal. An opinion that the conduct justifies disciplinary action short of removal, is an opinion that the

conduct does not justify removal, and yet the binary nature of the opinion required may, unless recognized, and resisted, attract reasoning that overlooks that intermediate position.

10. The Act does not identify any set of principles or standards by which the conduct of the judicial officer is to be judged for the purpose of forming the opinion required of the JCP by s 25 (2) (b). This task is left to the JCP.

11. It is an express object of the Act to enhance *"the existing mechanisms for removal of judicial officers where they are unable or unwilling to appropriately discharge their duties":* s 3 (1) (c).

12. The Act does not identify the "*duties*" to which that object is directed. That task also is left to the JCP.

13. The duty imposed on the JCP under sec 23 (1) is to *"inquire into, and report on, matters concerning the conduct of a judicial officer*" (s 23 (1), and it can be inferred from what is to be included in the report to the Attorney-General (s 25) that the conduct is to be inquired into for the purpose of expressing an opinion on the binary issue (removal justified or not justified). Accordingly, it may be concluded that the conduct, once made the subject of findings, is to be examined for two reasons: *first*, to determine whether the conduct as found is, or is not, in conformity with proper judicial conduct; and *secondly*, if it is not proper, to determine whether, it justifies removal. As will later be contended, not all improper judicial conduct will justify removal. And the second stage is not about the conduct as such, but about what the conduct says about the 'inability or unwillingness' of the judicial officer to discharge their duties.

14. The legislature expects the JCP to identify conduct that is improper *and* justifies removal.

15. It is the task of the JCP to determine by what standards or principles conduct may be adjudged "*improper*", and by what standards and principles *improper* conduct may justify *removal*. Two steps are involved: has there been improper conduct? If so, does it justify removal – or, in constitutional terminology, does the improper conduct amount to "*misbehaviour*"? The analogy is with a finding of professional misconduct against a legal

practitioner which may attract disciplinary action but not necessarily removal from the Roll.

16. Nothing turns on the terms chosen, so long as they serve to distinguish between the standard by which the judicial conduct is to be assessed and characterised, and the test for removal which is then brought to bear on the conduct, once assessed and characterised.

Step 1: Improper Judicial Conduct

The Bangalore Principles of Judicial Conduct, 2002

17. The Bangalore Principles emerged from an initial meeting of a group of Chief Justices (the Judicial Integrity Group) in April 2000 (with Justice Michael Kirby as rapporteur) which expanded into a conference of chief justices and senior judges from over 75 counties of both common law civil law systems over the ensuing 2 years. Among other things it contains a statement of principles "*intended to establish standards for ethical conduct of judges*" and "*designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct*" upon the assumption that "*judges are accountable for their conduct to appropriate institutions established to maintain judicial standards*". The statement is based on six "*fundamental and universal values*": independence, impartiality, integrity, propriety, equality, competence and diligence.

18. Each statement begins with the general principle, and develops it with a series of explanatory propositions, some of which are set out below:

Value 1: Independence

Principle: Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

Value 2: Impartiality

Principle: Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

Value 3: Integrity

Principle: Integrity is essential to the proper discharge of the judicial office.

Value 4 - Propriety

Principle: Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge.

4.1 A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

4.2. As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.

.....

4.6 A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.

Value 5: Equality

Principle: Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.

5.1 A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ("*irrelevant grounds*").

Value 6: Competence And Diligence

Principle: Competence and diligence are prerequisites to the due performance of judicial office.

.....

6.7 A judge shall not engage in conduct incompatible with the diligent discharge of judicial duties.

19. At its 4th meeting in Vienna, Austria, in October 2005 the Judicial Integrity Group agreed to prepare a *Commentary* on the Bangalore Principles of Judicial Conduct. In September 2007, UNODC published the Commentary – a 175-page document – in English.[1]

[1] https://www.judicialintegritygroup.org/images/resources/documents/BP_Commentary_Engl.pdf

20. The following appears at paragraph 19 of that Commentary:

> ***Not every transgression warrants disciplinary action***
>
> 19. While the principles of judicial conduct are designed to bind judges, it is not intended that every alleged transgression of them should result in disciplinary action. Not every failure of a judge to conform to the principles will amount to misconduct (or misbehaviour). Whether disciplinary action is, or is not, appropriate may depend on other factors, such as the seriousness of the transgression, whether or not there is a pattern of improper activity, and on the effect of the improper activity on others and on the judicial system as a whole.

The disciplinary action here referred to is to be contrasted with the binary task assigned to the JCP, the dangers of which have already been adverted to.

The Latimer House Guidelines

21. In 2004, the Commonwealth Heads of Government affirmed a set of Guidelines on good practice governing relations between the Executive, Parliament and the Judiciary, in the promotion of good governance, the rule of law and human rights (the *Latimer House Guidelines*), which specify the Commonwealth Principles on the accountability of and relationship between the three branches of Government.[2]

22. Section V of the Guidelines **(Judicial and Parliamentary Ethics)** included the following:

1. Judicial Ethics

(a) A Code of Ethics and Conduct should be developed and adopted by each judiciary as a means of ensuring the accountability of judges;
(b) the Commonwealth Magistrates' and Judges' Association should be encouraged to complete its Model Code of Judicial Conduct now in development;[3]
(c) the Association should also serve as a repository of codes of judicial conduct developed by Commonwealth judiciaries, which will serve as a resource for other jurisdictions.

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[2] http://www.worldlii.org/int/other/ComSecDecl/2003/1.html; see also, Chief Judge, Dr John Lowndes, Judicial Independence and Judicial Accountability at the coalface of the Australian Judiciary, at 34ff https://localcourt.nt.gov.au/sites/default/files/judicial_independence_and_judicial_accountability_at_the_coalface_of_the_australian_judiciary_.pdf

[3] A note was added to the Guidelines as **Note 11:** *"Following discussion of the Guidelines, it has been accepted by the Working Group that a "uniform" Model Code of Judicial Conduct is inappropriate. Judicial Officers in each country should develop, adopt and periodically review codes of ethics and conduct appropriate to their jurisdiction. The CMJA will promote that process in its programmes and will serve as a repository for such codes when adopted."*

23. ***The AIJA Guide to Judicial* Conduct:** this was published by the Council of Chief Justices of Australia and New Zealand, and the Australasian Institute of Judicial Administration Inc. It is now in its 3rd editions (2017).

24. Chapter 2 commences:

> *"2 Guiding Principles*
> *The principles applicable to judicial conduct have three main objectives:*
> - *To uphold public confidence in the administration of justice;*
> - *To enhance public respect for the institution of the judiciary; and*
> - *To protect the reputation of individual judicial officers and of the judiciary.*
>
> *Any course of conduct that has the potential to put these objectives at risk must therefore be very carefully considered and, as far as possible, avoided. There are three basic principles against which judicial conduct should be tested to ensure compliance with the stated objectives. These are:*
>
> - *Impartiality;*
> - *Judicial independence; and*
> - *Integrity and personal behaviour.*
>
> *These objectives and principles provide a guide to conduct by a judge in private life and in the discharge of the judge's functions. If conduct by a judge is likely to affect adversely the ability of a judge to comply with these principles, that conduct is likely to be inappropriate."*

25. Then follows, at section 2.3, the following:

> **2.3 Conduct generally and integrity**
>
> .....
>
> In this area, *"there can be few absolutes since the effect of conduct on the perception of the community depends on community standards that may vary according to place or time"*. (Canadian Judicial Council, Ethical Principles for Judges (1998) at 14). *Judges should be experienced in assessing the perception of reasonable fair-minded and informed members of the community in deciding whether conduct is or is not likely to diminish respect in the minds of such persons. Within that framework, however, there are some precepts which, as a guide to judicial behaviour, are not controversial:*
>
> - Intellectual honesty;
> - *Respect for the law and observance of the law* (although a judge like any other citizen, through ignorance or error, may well commit a breach of a statutory regulation which will not necessarily reflect adversely on judicial integrity or competence);
> - Prudent management of financial affairs;
> - Diligence and care in the discharge of judicial duties; and
> - *Discretion in personal relationships, social contacts and activities.*

It is the last of these precepts that is likely to cause the most difficulty in practice. As a general rule, it permits a judge to discharge family responsibilities, to maintain friendships and to engage in social activities. But it requires a judge to strike a balance between the requirements of judicial office and the legitimate demands of the judge's personal life, development and family. *Judges have to accept that the nature of their office exposes them to considerable scrutiny and to constraints on their behaviour that other people may not experience. Judges should avoid situations that might reasonably lower respect for their judicial office or might cast doubt upon their impartiality as judges.* They must also avoid situations that might expose them to charges of hypocrisy by reason of things done in their private life. *Behaviour that might be regarded as merely "unfortunate" if engaged in by someone who is not a judge might be seen as unacceptable if engaged in by a person who is a judge and who, by reason of that office, has to pass judgment on the behaviour of others.*

Some specific situations are addressed in Chapters 4, 5 and 6.

26. By resolution of the Council of Chief Justices of Australia and New Zealand in November 2020, the following paragraph was added in the place noted above:

> "*Judges must conform to the standard of conduct required by law and expected of the community. They must treat others with civility and respect in their public life, social life and working relationships. It goes without saying that Judges must not engage in discrimination or harassment (including sexual harassment) or bullying. In relation to these matters, Judges must be particularly conscious of the effect of the imbalance of power between themselves and others, especially their Chambers staff, Court staff and junior lawyers.*"

27. ***The Equal Opportunities Act* 1984:** Relevant provisions are as follows:

> **87—Sexual harassment**
>
> (1) It is unlawful for a person to subject to sexual harassment—
>
> (a) a person with whom he or she works; or
>
> (b) a person who is seeking to become a fellow worker,
>
> while in attendance at a place that is a workplace of both the persons or in circumstances where the person was, or ought reasonably to have been, aware that the other person was a fellow worker or seeking to become a fellow worker.
>
> .....
>
> (6a) It is unlawful for a judicial officer [4] to subject to sexual harassment a judicial or non-judicial officer, or a member of the staff, of a court *of which the judicial officer is a member.*
>
> .....

[4] "judicial officer" means a member of a court or tribunal (s 5 (1))

(6b) Subsection (6a) does not apply in relation to anything said or done by a judicial officer in court or in chambers in the exercise, or purported exercise, of judicial powers or functions or in the discharge, or purported discharge, of judicial duties (but conduct occurring in such circumstances may be the subject of a complaint under the *Judicial Conduct Commissioner Act 2015*).

.....

(9) For the purposes of this section—

(a) a person "sexually harasses" another (the "person harassed) if—

(i) the person makes an *unwelcome* sexual advance, or an unwelcome request for sexual favours, to the person harassed; or

(ii) engages in other *unwelcome* conduct of a sexual nature in relation to the person harassed,

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated; and

(b) "conduct of a sexual nature" includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing; and

(c) a person "works with another" if both carry out duties or perform functions, in whatever capacity and whether for payment or not, in or in relation to the same business or organisation; and

(d) a person "works for" an authority if he or she carries out duties or performs functions, in whatever capacity and whether for payment or not, in or in relation to that authority; and

(e) "workplace" means a place (including a ship, aircraft or vehicle) at which a person works or attends in connection with the person's work.

[emphasis added]

28. Conduct is "*unwelcome*" if it was not solicited or invited by the employee and the employee regarded the conduct as undesirable or offensive.[5] "*Horseplay*" is not immune from characterisation as "*sexual conduct*" and is not regarded as relevant to the question whether the conduct amounts to "*sexual harassment*" as defined in the Act.[6]

29. Of more immediate relevance is the key element of the definition of "*sexual harassment*" – the required response of the hypothetical reasonable person. It must be shown that "*having regard to all the circumstances*" the reasonable person "*would have anticipated that the person harassed would be offended, humiliated or intimidated.*"

30. For the same reasons as developed in relation to the test for "*misbehaviour*" (see below) it is submitted that in at least the case of allegation 1 & 2 (Witness A), allegation 6 (Witness G), allegation 7 (Witness K), and allegation 8 (Witness L), the "*reasonable person*" who is to anticipate the reaction of the 'complainants' for the purpose of s 87 (9) (a) will have regard to the magistrate's ASD condition as one of the "*circumstances*" they are to "*have regard to*", and will conclude as a result, that the conduct in those circumstances cannot be anticipated to have the specified response. The facts as found sustain the conclusion that on these occasions, the recipients were not "*offended, humiliated or intimidated*".

31. Moreover, s 87 does not apply at all to allegations 4 & 5 (Witness C): the conduct did not take place at a "*workplace*" (as defined), or in relation to someone with whom he worked (subsec (1)), and Witness C was not a member of the staff of a court of which the magistrate was a member (subsec (6a)). In the case of allegation 5, Witness C and the magistrate were not "*in attendance at a place that is a workplace of both*" (subsec (1)), and again, she was not a member of the staff of the court of which the magistrate was a member.

32. It is accepted that the magistrate's liability or non-liability under s 87 is not determinative of "*misconduct*", but it is relevant (see the AIJA *Guide to Judicial Conduct*).

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[5] *Aldridge v Booth* (1988) 80 AL:R 1,5
[6] *Vitality Works Australia PL v Yelda (No 2)* (20221) 105 NSWLR 403 (CA), at [36]

Step 2: Misbehaviour

33. We have chosen the constitutional term "*misbehaviour*" to distinguish it from a breach of judicial ethics - the "*improper conduct*" to which Step 1 is directed – but as already noted, the *terminology* is not intended to have any function other than to distinguish it from Step 1.

34. Here the question is whether, in all the circumstances, the improper conduct justifies **removal**.

35. Subject to the exposition that follows, the principle may be expressed in this way:

> Removal of a magistrate is only justified if it is clearly and fairly concluded that, the improper conduct/misconduct is **so serious that a reasonable and fair-minded member of the community, properly informed,** would cease to have confidence in that magistrate's ability properly to perform the judicial function.
>
> Conversely (and ignoring any onus of persuasion):
>
> Removal of a magistrate is not justified if, notwithstanding the improper conduct/misconduct, **a reasonable and fair-minded member of the community, properly informed,** would continue to have confidence in that magistrate's ability properly to perform the judicial function.

36. This statement is, however, inadequate unless it is further expounded.

37. *First*, removal will only be justified where the conduct demonstrates an underlying attitude or disposition which would cause the reasonable and fair-minded member of the community to lose confidence in - that is, would seriously compromise - the judicial officer's ability or willingness to discharge his judicial duties with independence, impartiality and integrity, doing right to all manner of persons according to law without fear or favour, affection or ill-will.

38. Thus, for example, a public statement by a judge denigrating in insulting, derogatory and aggressive terms the honesty and trustworthiness of *all* residents in a district (say, Davoren Park) discloses conduct *"so manifestly and profoundly destructive of the concept of the impartiality, integrity and independence of the judicial role that public confidence*

would be sufficiently undermined to render the judge incapable of executing the judicial office".[7] Similarly, a judicial officer who conducted himself or herself off the bench in such a disrespectful or discriminatory way as to demonstrate that they lacked an underlying respect for persons regardless of *"race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes."*

39. Had the allegations against Murphy J of interference in judicial proceedings on behalf of a "*mate*" been proved, they would have been capable of demonstrating an underlying lack of respect for the law and for the integrity of the judicial process wholly inconsistent with the character and disposition expected of a judicial officer under our system of public justice.[8]

40. A judicial officer who not only fails to disclose to the parties a commercial relationship with counsel for one of the parties, but also, when challenged, fails to make material disclosure of the nature of the relationship which is incompatible with his continuing to hear the case, engages in conduct capable of demonstrating a similar underlying lack of respect for the law and for the integrity of the judicial process.[9]

41. In other words, improper conduct will only amount to misbehaviour justifying removal when it reveals something about the underlying character or disposition of the judicial officer that is manifestly inconsistent with the due performance of the judicial function under our system of public justice.

42. *Secondly,* the assessment of the reasonable and fair-minded member of the community, must be properly informed. This is further addressed below.

43. The above statements of principle are to be derived from the following.

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[7] *R (New Brunswick Judicial Council) v Moreau-Bérubé* [2002] SCR 249, 261-4
[8] *Parliamentary Commission of Inquiry Re the Hon Mr Justice Murphy: Ruling on the Meaning of "Misbehaviour"* (1986) 2 Aust Bar Rev 203
[9] compare, *Wilson v A-G et ors* [2010] NZHC 1678; [2011] 1 NZLR 399 (HC)

44. **The Bangalore Principles of Judicial Conduct, 2002:**

> ***Independence of the Judiciary: Discipline, Suspension and Removal***
> [18] Judges shall be subject to suspension and removal *only for reasons of* incapacity or *behaviour that renders them unfit to discharge their duties*. [emphasis added]

45. **The Latimer House Guidelines, 2004:**

> ***Judicial Accountability: (a) Discipline***
>
> (i) In cases where a judge is at risk of removal, the judge must have the right to be fully informed of the charges, to be represented at a hearing, to make a full defence and to be judged by an independent and impartial tribunal. Grounds for removal **should be limited to**:
> (A) inability to perform judicial duties; and
> (B) **serious misconduct**.
> (ii) In all other matters the process should be conducted by the chief judge of the courts;
> (iii) Disciplinary procedures should not include the public admonition of judges. Any admonition should be delivered in private, by the chief judge
> [emphasis added]

46. **AIJA Guide to Judicial Conduct (3rd edition):**

> ***Conduct generally and Integrity***
>
> In this area, "*there can be few absolutes since the effect of conduct on the perception of the community depends on community standards that may vary according to place or time*". (Canadian Judicial Council, Ethical Principles for Judges (1998) at 14). Judges should be experienced in assessing the perception of **reasonable fair-minded and informed members of the community** in deciding whether conduct is or is not likely to diminish respect in the minds of such persons

47. **First Report of the Parliamentary Judges Commission of Inquiry (into the behaviour of the Hon Mr Justice Vasta, Queensland Supreme Court), 1989**

> [The Rt Hon Sir Harry Gibbs, the Hon Sir George Lush, and the Hon Michael Helsham]:
>
> [1.5.7] The Commission believes that the most useful guidance to a decision whether behaviour would warrant the removal of a judge is to be had from the "*Special Report*" of the Parliamentary Commission of Inquiry dated 5 August1986 which deals with the meaning of misbehaviour for the purpose of s 72 of the Constitution.[10] It is true that in that report the Commissioners were dealing with a statutory provision whereas in this instance the Commission is dealing with custom or convention adopted here along with the British system of parliamentary government and the separation of powers. However, having read the report of the 5 August 1986, this Commission states its view that in Australia, at any rate in Queensland, misbehaviour

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[10] *Parliamentary Commission of Inquiry Re the Hon Mr Justice Murphy: Ruling on the Meaning of "Misbehaviour"* (1986) 2 Aust Bar Rev 203

of a judge as defined and adopted in that report does not differ from the kind of behaviour that would warrant the removal of a Judge of the Supreme Court …

[1.5.8] Much of the reasoning expressed in the report of 5 August 1986 … is applicable in the present case. The Commission adopts it. It is content to set out three passages from that report

(i) Sir George Lush said (at p18):[11]

"Judges … cannot, however, be protected from the public interest which their office tends to attract. If their conduct, even in matters remote from their work, is such that it would be judged by the standards of the time to throw doubt on their own suitability to continue in office, or to undermine their authority as judges opr the standing of their courts, it may be appropriate to remove them."

(ii) Sir Richard Blackburn said (p 32):[12]

"The material available for solving this problem of construction suggests that 'proved misbehaviour' means such misconduct, whether criminal or not, and whether or not displayed in the actual exercise of judicial functions, as being morally wrong, demonstrates the unfitness for office of the judge in question."

(iii) Mr Wells said (p 45):[13]

"Accordingly, the word 'misbehaviour' must be held to extend to conduct of the judge in or beyond the execution of his judicial office, that represents so serious a departure from standards of proper behaviour by such a judge that it must be found to have destroyed public confidence that he will do his duty under and pursuant to the constitution."

[1.5.9] The Commission therefore expresses its view that 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 as a judge, then the judge has fallen below the standard demanded of members of the judiciary. [14]

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[11] (1986) 2 Aust Bar Rev 203, 210
[12] Ibid, at 221
[13] Ibid, at 230
[14] For reasons developed later, the reference in this paragraph to "right thinking members of the community" has been abandoned as introducing degrees of moral censure depending on which section of the public is resorted to for the model, and is therefore no longer appropriate

48. Embedded in all the formulations set out above is the employment of some such hypothetical person "*as a means of describing a standard applied by the court*":[15]

49. But the critical characteristic of this "*anthropomorphic conception of justice*" [16] in the attempt to define or describe 'misbehaviour' is the knowledge possessed by this hypothetical member of the community, however described. There is every reason to adopt the approach followed in another area of the law where *perception* is decisive: the fair-minded, informed and reasonable member of the community who is engaged to assess the appearance of judicial bias. The parallels could be described as compelling.

50. And there is authoritative support for such a formulation.

51. In *Wilson v A-G et ors*,[17] a Full Court of the NZ High Court noted a number of formulations from the common law jurisdictions around the world, including:

    51.1. The *Parliamentary Commission of Inquiry* into the conduct of Murphy J;[18]

    51.2. *Hearing of the Report of the Tribunal to the Governor of the Cayman Islands – Madame Justice Levers (Judge of the Grand Court of the Cayman Islands*,[19] where the Privy Council[20] in its Advice said: [21]

    > *"the test is whether the confidence in the justice system of those appearing before the judge or the public in general, with knowledge of the material circumstances, will be undermined if the judge continues to sit."*
    > [emphasis added]

    51.3. *R (New Brunswick Judicial Council) v Moreau-Bérubé*,[22] where the Supreme Court of Canada upheld a decision of the New Brunswick Judicial Council recommending removal of the judge by the Governor of the Province. The Council had concluded that –

    > *"a reasonable and well-informed person would conclude that the misconduct of the judge has undermined public confidence in her and would have a reasonable apprehension that she would not perform her*

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[15] *Home Ltd v The Common Services Agency* [2014] UKSC 49; [2014] 4 All ER 210; [2014] WLR (D) 351, per Lord Reed. At [3]
[16] *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696, 728 (Lord Radcliffe)
[17] *Wilson v A-G et ors* [2010] NZHC 1678; [2011] 1 NZLR 399 (HC)
[18] at [59], [64]
[19] *Hearing of the Report of the Tribunal to the Governor of the Cayman Islands – Madame Justice Levers (Judge of the Grand Court of the Cayman Islands* [2010] UKPC 24
[20] Lord Phillips, Lord Saville, Lady Hale, Lord Mance, Lord Judge, Lord Kerr, Dame Janet Smith
[21] at [50]
[22] *R (New Brunswick Judicial Council) v Moreau-Bérubé* [2002] SCR 249

> *duties with the impartiality that the public is entitled to expect from a judge."*[23]
> [emphasis added]

Speaking for the Court, Arbour J said:[24]

> *"In discharging its functions, the Council must be acutely sensitive to the requirements of judicial independence, and it must ensure never to chill the expression of unpopular honestly held views in the context of court proceedings. It must also equally be sensitive to the reasonable expectations of an informed dispassionate public that holders of judicial office will remain at all times worthy of trust, confidence and respect."*
> [emphasis added]

52. Critically, therefore, the **properly informed** hypothetical reasonable person would know of Simon's diagnosed ASD and its significance for ordinary social exchanges and assess his conduct accordingly - in consequence of which, it is submitted, his conduct does not reveal anything about his underlying character or disposition that could be seen as manifestly inconsistent with the due performance of the judicial function under our system of public justice. It is significant that the magistrate was unaware of his condition until Professor Young's diagnosis, and that according to her unchallenged opinion, his tendency to misread the social context and sometimes to speak or behave inappropriately in a social setting is an element of his condition that can be remedied by specific training – which has already commenced with his experience of this inquiry.

53. In this respect, while the distinction between misconduct and misbehaviour may sometimes be a question of fact and degree,[25] the necessary protection of judicial independence[26] requires that removal be reserved for misconduct that is so serious that it strikes at the heart of judicial legitimacy (public confidence in the judiciary).

54. As the Gibbs Inquiry into the conduct of Mr Justice Vasta noted:

> On the other hand, to adopt too stringent a standard, or too pharisaic an approach, would imperil the independence of the judiciary, which would be eroded if a judge

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[23] at 264 [12]
[24] at 291 [72]
[25] *Wilson v A-G et ors* [2010] NZHC 1678; [2011] 1 NZLR 399 (HC), at [64]; see also: *Hearing of the Report of the Tribunal to the Governor of the Cayman Islands – Madame Justice Levers (Judge of the Grand Court of the Cayman Islands* [2010] UKPC 24, at [39]
[26] Section 3 of the *Judicial Conduct Commissioner Act 2015* provides that "the objects of the Act are to enhance public confidence in the judicial system and to protect the impartiality and integrity of the judicial system" by (inter alia) providing a fair process for dealing with complaints "that recognises and protects judicial independence"

might too readily be removed from office. Moreover, there may be judicial misbehaviour which ought not to be condoned, and indeed may be deserving of censure, even severe censure, but which would not warrant the removal of a judge from office. Questions of degree may be involved, and minds may differ in making what is in effect a moral and social judgment on such a matter.

55. As it was put by the Privy Council[27] in its *Hearing on the Report of the Chief Justice of Gibraltar*:[28]

> *"So important is judicial independence that removal of a judge can only be justified where the shortcomings of the judge are so serious as to destroy confidence in the judge's ability properly to perform the judicial function."*
> [emphasis added]

56. This echoes an Australian formulation in *Parliamentary Commission of Inquiry Re the Hon Mr Justice Murphy*: [29]

> *"so serious a departure from standards of proper behaviour ... that it must be found to have destroyed public confidence that he will do his duty under and pursuant to the constitution."*

57. Or, as recently retired High Court Justice, Geoffrey Nettle, concluded, also referring to the meaning of 'proved misbehaviour' in 72 of the Constitution:

> *"the relevant conception of 'misbehaviour' is one of behaviour that renders a judge unsuitable a repository of federal judicial power. ... Previous experience in this country[30] and abroad[31] points to the conclusion that the standard of such misconduct must be calibrated to the gravity of the process and, therefore, grave."* [32]

58. On the knowledge properly to be attributed to the well-informed reasonable member of the public, it cannot reasonably be concluded that the magistrate's conduct reveals any underlying characteristics or dispositions which would cause that representative of the public to lose confidence in his ability to perform his judicial function.

59. The largely unspecified course of conduct alleged by Witness L to the extent that anything is known – or proved - about these exchanges, informed in large part by his diagnosed condition - a tendency to speak what others might perhaps only think – reveals only an attempt to engage socially with those in and around the workplace as work

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[27] Lord Phillips, Lord Hope, Lord Rodger, Lady Hale, Lord Brown, Lord Judge Lord Clarke
[28] *Hearing on the Report of the Chief Justice of Gibraltar* [2009] UKPC 43, at [31]
[29] *Parliamentary Commission of Inquiry Re the Hon Mr Justice Murphy: Ruling on the Meaning of "Misbehaviour"* (1986) 2 Aust Bar Rev 203
[30] The article refers to *Parliamentary Commission of Inquiry Re the Hon Mr Justice Murphy*
[31] The article refers to: *R (New Brunswick Judicial Council) v Moreau-Bérubé* [2002] SCR 249; *Hearing on the Report of the Chief Justice of Gibraltar* [2009] UKPC 43; *Hearing of the Report of the Tribunal to the Governor of the Cayman Islands – Madame Justice Levers (Judge of the Grand Court of the Cayman Islands* [2010] UKPC 24; *Wilson v A-G et ors* [2010] NZHC 1678; [2011] 1 NZLR 399 (HC); The Bangalore Principles of Judicial Conduct, 2002; the Latimer House Guidelines 2004
[32] Nettle, *Removal of Judges from Office*, (2021) 45 MULR 241, 286

colleagues, and without pulling rank. In that respect it is ironic that what seems to be put against him is that he exploited a power imbalance.

60. On the contrary, however, the magistrate's preference to put aside the power imbalance and to engage with staff as members of the same team has been a mark of his service as a magistrate, and as a managing magistrate.
This picture emerging from the evidence is one of a committed magistrate who has gone out of his way to be inclusive, and to eschew rank. He is the one who has visited the registry staff to make sure they feel valued, and to provide an avenue of communication up the chain if there were problems of administration or the like that were not being attended to. In the same way, and for the same purpose, he befriended staff and associates, making them welcome, showing professional interest in them, and supporting them. He had a name within the magistracy for taking on more judicial work to relieve a colleague who was stressed from pressure of work or personal troubles.

61. His judicial work has been exceptional both for quality and volume. Professor Young rejects any suggestion that the magistrate is not fit for judicial office by reason of incapacity, namely ASD. There has never been a suggestion that his courtroom conduct has been other than exemplary, or that his judgment has been distorted in any way.

62. None of the complaints arose from the conduct of the Magistrate's role as a judicial officer. None of the complaints were anything to do with his conduct in the courtroom or in the exercise of any judicial activity. There is no suggestion that the Magistrate's judicial duties or decision making was in anyway adversely affected by his social behaviour.

63. None of the Magistrate's behaviour towards any of the complainants was planned. It's plain that the incidents the subject of the complaints were spontaneous interactions with court staff in which no forethought had been given by him to what would be said, or how he might act, or how he would behave.

64. The comments he made, and the conduct in which he engaged, arose from the context of the various interactions in which he found himself. This is to emphasise that the Magistrate's behaviour wasn't premeditated.

65. The Magistrate submits that his conduct was the result of the dysfunction he experienced in social settings, and this was brought about by his autism spectrum disorder (ASD).

66. As to the Magistrate's state of mind, it's plain that his conduct wasn't predatory. He made no request of any complainant. He didn't pressure or pursue, or seek to groom or encourage, any of the complainants.

67. It should be noted that despite the allegations, the Magistrate appeared to be well liked – even by some of the complainants.

68. Consistent with the findings of the Panel, Magistrate Milazzo is a judicial officer who, although recently diagnosed, has faced the challenges of having ASD all of his life. Despite the challenges presented by the disorder and some setbacks, he qualified as a legal practitioner and had a successful career as a barrister and has served the community as a Magistrate for approximately 15 years.

69. Despite his ASD and the consequent level of social dysfunction, with the exception of the complaints before the Panel, on every other level, he has exhibited exemplary qualities as a judicial officer.

Character witnesses

70. The findings of the Panel, in relation to the 8 complaints must be placed in the context of the Panel findings and the undisputed evidence in relation to those qualities. Indeed, each of the character witnesses spoke frankly about their experiences with the Magistrate, including some of his *"inappropriate"* behaviours. The character witnesses have placed these behaviours in context of their assessment of his character as a whole, allowing the Panel, with respect, to properly conclude that:

> *"Each of Witnesses CW2, CW3, CW4, CW5 and CW6 were unanimous in their undisputed views that the Magistrate was a hard worker, and a conscientious magistrate with an excellent knowledge of the law, especially in the civil jurisdiction of the Magistrates Court.*
>
> *Typical of those views is that of Witness CW2 who said:*
>
> *I would say without reservation that Simon is regarded by the Civil Magistrates as an excellent lawyer who discharges his judicial duties responsibly, fairly, and expertly. ... He has a wide reputation for being a hard worker. ... He is known for his depth and breadth of legal knowledge.(p12)*
>
> *Similar views were expressed by Witnesses CW3,13 CW4,14 CW5,15 and CW6.16 He was always willing to assist other magistrates as mentor and supervisor, was generous with his time, approachable, and assisted litigants with patience, understanding and compassion. "*
> *(p.11/12)*

71. Beyond the summary above, the character witnesses accepted by the Panel also attested to the Magistrate's many personal qualities which he brought to the bench, and which enhances his reputation and skills in administering and serving justice and the rule of law.

These include:

71.1. "took time to invest in me as a friend and colleague"
"free with his knowledge and experience"
"inclusive, supportive and compassionate and understanding"
"very sensitive"
"not sexist, transphobic or homophobic"
Witness CW1

71.2. "kind and generous of nature"
Witness CW2

71.3. "approachable, empathetic and supportive"
Witness CW3

71.4. "unhesitating generosity"
"positive attitude"
"sage advice … not only about legal matters"
"insightful"
"genuinely concerned and interested in helping both me as a fellow Judicial Officer and the litigants."
"kind and generous"
"empathetic, genuinely interested and caring"
Witness CW4

71.5. "respect he would show litigants …deal with them with patience understanding and compassion"
"approachable" "easy to get along with"
"treats you as a human being not a subordinate"
"an excellent Judicial Officer and a good man"
Witness CW5

71.6. "caring and sensitive"
Witness CW6

72. Inter alia, the Panel adopts the analysis of witness CW3:

> *"Witness CW3, while expressing surprise at complaints 4 and 5 if they occurred, also said that in that witness' experience the Magistrate "has not always had an appropriate filter" and "There have been occasions when, in open conversation amongst several people, I have heard Simon make remarks or innuendo of a nature that may cause offence. I consider such comments to have been an awkward attempt at humour rather than seeking to cause discomfort or illicit any other response from those present" (p.13 para 1)*

And concludes:

"...that there is abundant evidence of the Magistrate displaying a pattern of unintentionally inappropriate behaviour in situations where he had no desire to cause harm or embarrassment and where, had he become conscious of doing so, he would have wished to apologise. Such expressions as "would genuinely distress him if he thought he caused someone offence or upset them" were repeated by all the witnesses who gave character evidence, and by some several times.

Whatever may have been the reason for, or explanation of, the Magistrate's behaviour described above, the fact remains, and the Panel accepts that the Magistrate was prone to making out of court comments of a sexual nature to work colleagues which could, in the case of some hearers, cause distress and offence.

He may well have wished not to offend and to apologise if he became aware of having done so. However, if the complainants' evidence is accepted, a recurring theme in all the complaints that are the subject of this Report is an apparent failure on the part of the Magistrate to consider at the time the effect his words or actions might have had on the person or persons concerned. (p.14 paras 2,3 &4)"

73. It is submitted that *"unintentionally inappropriate behaviour"* when considering his ASD and weighed with the Magistrate's other qualities does not provide a basis for removal.

Complaints 1, 2 & 3: Witness A

74. Indeed, complaints 1, 2 and 3 are examples of instances in which, at first blush, it may appear that the Magistrate was homophobic, and prone to making homophobic comments, and yet in the context:

"The Panel accepts the evidence of the Magistrate, and of other witnesses, that he never discriminated in any way against people of different sexual orientation. He had such people as friends and indeed Witness A was one of the court staff he regarded as a work friend." (p.15 para 4)

This is consistent with CW1's evidence that he was "not sexist, transphobic or homophobic."

75. The 3 counts relating to witness A are also significant in that she had, as found by the Panel "*...a friendly, mentor-like relationship which she did not consider unusual ....*

There was no evidence of any sexual attraction of the Magistrate to Witness A." (p.15 para 2 & 3)

76. Despite not having an actual memory of the events the subject of the complaints he did not challenge witness A's version of events

> *"The Magistrate did not question the accuracy of the events the subject of complaints 1 and 2 as described by Witness A. The observation he made about the genitalia being anatomically correct was a remark he made to many visitors to whom he had shown the statuette."*
> *p.16 para 2 & 3).*

77. Complaint 3 relates to words used by the Magistrate which were:

> *" ... in her view, "outrageous" and came across as homophobic.*
> *(p.16 para 2 & 3).*
>
> In the context of his ASD, and consistent with the findings of the Panel, the words used were clearly not intended to be homophobic and clearly not intended to be hurtful or disrespectful to Witness A.

78. Witness B was in the room when this incident took place. Her evidence helps to put the conversation into context as she had witnessed other conversations between the Magistrate and Witness A around witness A's sexuality. The Panel notes:

> *"... On those occasions she considered that the Magistrate appeared to be genuinely curious about witness A's sexuality and was interested in understanding it."(p.16 para 5)*

79. Each complaint dealt with subject matter which the Panel describes as "*sexual in nature*" (see p73 para 2), for example, the sexual preferences of Witness A (complaint 1), the anatomical correctness of an artwork (complaint 2), and a discussion relating to sexual preferences (complaint 3).

80. None of them, complaints 1,2 or 3, involved any allegations which were sexually predatory or prurient in nature.

81. In relation to complaints 1 and 2:

> *"Witness A herself did not complain at the time about either of these two incidents, although she thought they were a "bit weird"." (p.16 para 3)*
>
> With respect to complaint 2, Dr Young referred to the Magistrate's comment as typical of the "script" commonly resorted to by persons with ASD.

82. While a power imbalance existed, none of the 3 complaints by Witness A involved any circumstances of the Magistrate taking advantage of that power imbalance.

83. None of the complaints 1,2 or 3 were brought to the Magistrate's attention at any time prior to being advised of them by the JCC, and so, in the context of his ASD, his opportunity to learn from them was delayed until they were brought to his attention. During the Panel hearing the Magistrate:

> *"...did say however, that it distressed him that possibly he spoke to Witness A as she remembers."*
> *(p.17 para 3)*

Complaints 4 & 5: Witness C

84. The Magistrate submits that the nature of the dinner at Ian's Western, and his behaviour on this occasion, cannot be taken to reflect adversely on his ability to carry-out his judicial role diligently, professionally, and competently.

85. Witness D regarded the dinner as a *"semi-professional'* occasion (Reasons at page 18.3). For his part, the Magistrate saw this as a social occasion, and it's submitted, it was open for him to hold this view. This was an after-work gathering at a local hotel, to which he'd been invited by colleagues, and where alcohol would be consumed. The occasion, however, was a far-cry from any engagement by the Magistrate in his role as a judicial officer. This is not to excuse or minimise the conduct the Panel has found, but to emphasise the effect of ASD on the Magistrate's behaviour in social settings.

86. Despite the passage of time, and the absence of any intervening thought about the dinner, the Magistrate has not sought to impugn Witness C's credibility, or to dispute her account in its entirety.

87. The Magistrate submits that the comments alleged by Witness C were not ones of intent. In other words, the comments attributed to him did not reveal any present intention to engage in any inappropriate conduct.

88. The Panel has found that the conduct the subject of complaint 5 (Reasons at page 27.3) indicates that the Magistrate continued to exhibit a particular interest in C. This interest, however, wasn't clandestine, but occurred during daytime work hours, at the courthouse, and in the immediate presence of Witness F. This reflects a lack of perception by the Magistrate about the nature of his remarks and, in particular, a lack of perception about how these remarks would be received by others.

89. Despite the finding that the Magistrate continued to display a particular interest in Witness C, this was limited to his chance interactions with her at the courthouse. His

conduct was plainly unsettling for her, but it wasn't predatory. He didn't pursue her, or encourage her, or seek to instigate any further unwanted contact.

90. This conduct consisted of no more than comments, and they were isolated to the time and place where they occurred.

91. It is consistent with the Panel's findings, and the Magistrate submits, that he at no time intended to offend C, or to cause her to feel uncomfortable or distressed. The Magistrate submits that there was nothing calculated at all about his conduct in complaint 5. His comments were hapless, and the product of his ASD condition, and the result of his inability to perceive the reactions of others in a social setting. The Panel, it seems, has not found otherwise.

Complaint 6: Witness G

92. Witness G was another witness who enjoyed a good working relationship with the Magistrate:

> *"... her relationship with Mr Milazzo was no different from that which she had with other magistrates. She described that as being a good working relationship but not a relationship with someone with whom she would socialise." (p.29 para 1)*

93. Witness G, having known the Magistrate, properly and honestly conceded that:

> *"...she appreciated that the approach may have been done in a friendly manner rather than a sexual manner, but that it was still unpleasant." (p.29 para 6)*
> She was not offended, humiliated or intimidated.

94. Unlike any of the other complaints, 1,2,3,4,5 and 8 (excluding from consideration complaint 7 owing to the Panel's findings and intimations at p33 para 2), Complaint 6 was brought to the Magistrate's attention at the time, and in responding to this complaint he accepted his behaviour was inappropriate, and he showed insight as indicated by the Panel's findings which note that the Magistrate:

> *"...accepted that the behaviour was inappropriate. He did not intend it to be so, but it was "a bit reckless ... I don't think I thought it through quite enough to be honest".(p34) On 2 October 2019 the then Supervising Magistrate, at his request, spoke to Mr Milazzo about the incident. The Magistrate's immediate response was "I fucked up. I realise it was inappropriate. I went across the line". (p.30 para 4)*

95. The Panel has found the behaviour the subject of Complaint 6 to be "*sexual in nature*", and while the act of sitting on someone's lap and massaging their shoulder, in front of witnesses, may have this character, the behaviour, in the context of Complaint 6, may also

be seen as spontaneous, unthought out horseplay or tomfoolery, which was regretted and never repeated.

96. The overriding characteristic of this behaviour was that it was not intended to be sexual and was not interpreted to be sexual by Witness G.

Complaint 7: Witness K

97. We note the Panel's findings in relation to Complaint 7, namely:

> *"The worst that can be said about this conduct is that the Magistrate yelled at Witness K over the telephone, for which he then immediately apologised. In the Panel's view this complaint can have no influence on any ultimate recommendation to be made as to removal or otherwise of the Magistrate from office." (p.33 para 2)*

In consequence we make no further submission in relation to it.

Complaint 8: Witness L

98. The Panel has made particular findings against the Magistrate about the nature of his conduct towards Witness L in the 'lift incident' (at pages 47.9 to 50.1). As for his subjective state of mind, it is submitted that the Magistrate at no time intended to offend Witness L, or to cause her to feel uncomfortable or distressed. As for the other complaints, the Magistrate submits that there was nothing calculated at all about his conduct towards Witness L.. His conduct was the unfortunate result of his ASD condition, and the result, in particular, of his inability to perceive the reactions of others.

99. From the outset of the proceedings in this matter, the Magistrate has maintained that Witness L's allegations of comments said to have been made to her by the Magistrate over a number of years have lacked the necessary particularity to establish a complaint against him.

100. It has been submitted that this absence of particularity undermines the reliability and credibility of these allegations and has also prevented the Magistrate from addressing and refuting the allegations in any meaningful way.

101. To be clear, Witness L has never been able to provide with adequate detail the number of occasions on which comments were made, or specifically where or when any particular comment was made, or, with the exception of a 1 or 2 imprecise examples, what in fact was said on each or any one of these occasions.

102. The absence of sufficient detail appeared from the outset in Witness L's statement to the JCC (7 June 2021, Exhibit A1), and was continued in her evidence in the hearing before the Panel on 6 September 2022.

103. Based both on the statement of Witness L and her evidence before the Panel in the hearing, no confident finding could be made about the number of occasions on which it was said that comments were made. Witness L could only estimate that they were made about once per month during her employment from about October 2012 up to February 2020, apart from 2 years during which the Magistrate was working in Port Augusta. This represents a period of over 60 months, and the opportunity, based on Witness L's evidence, for the making of over 60 comments by the Magistrate. The state of the evidence, however, did not allow for a finding by the Panel about any single incident.

104. When asked during the hearing about **where** these comments were made, Witness L was unable to be specific or, in particular, to nominate the location for any particular comment, and said (at page 115):

> "[redacted] :
> *It was either in the lift or the hallway, out the front of the toilets on Level 5, that area, or Level 1, because his court was Level 1 that he used to go to."*

105. On the topic of **when** any comments were made, Witness L, in her statement (at para. 7), said:

> *"There was no particular pattern to his behaviour, these comments occurred day and night, whilst alone, and with others in the nearby vicinity. It didn't seem to matter."*

106. This statement, however, was contradicted by Witness L in her evidence during the hearing (at pages 115-116):

> *"Mr Besanko: Do you recall the time of day when he said those sorts of remarks?*
> [redacted] *: It was morning shift.*
> *Mr Besanko: It was during the morning shift.*
> [redacted] *: Yes.*
> *Mr Besanko: Do you have any recollection of him saying things about breasts during the afternoon shift that he worked?*
> [redacted] *: No, not really.*
> *Mr Besanko: So it was exclusively morning.*
> [redacted] *: Yes, he was rarely there in the afternoon."*

107. As for whether anyone was present when comments were said to have been made, Witness L said, in her statement (at para. 7), that comments were made *"whilst alone, and with others in the nearby vicinity. It didn't seem to matter."*

108. This statement was in conflict, however, with evidence given in cross-examination during the hearing (p. 116):

> *"[redacted] :*
> *I don't recall anyone being present but if there was somebody walking past they never said anything, so."*

109. On the topic of **what** in fact was alleged to have been said on these occasions, Witness L, in her statement, said (at para. 5), among other things:

> *"He would talk about breasts all the time, making comments such as "if you're cold, I can warm them up". He would talk about my breasts, anyone's breasts really. His language was crude. One day he said to me "you must be younger than what you are because your boobs are perky".*

110. In her evidence before the Panel she said, among other things: (page 115)

> *"Mr Besanko: Did Magistrate Milazzo identify whose breasts he was referring to when he had these interactions with you?*
> *[redacted] : No. No one particular person or anything like that, so ...*
> *Mr Besanko: Did you understand him to be referring to anyone's breasts in particular?*
> *[redacted] : No, no one in particular just – yeh. Made me uncomfortable.*
> *Mr Besanko: Can you remember any specific remark that Magistrate Milazzo made about ...*
> *[redacted] : It's too long ago. I don't recall."*

111. As for any comments made by the Magistrate after July 2014, Witness L said (pages 132-133):

> *"Mr Besanko: What interactions did you have with him after the lift incident?*
> *[redacted] : Just seen him in the corridors and stuff.*
> *Mr Besanko: But when you said you saw him in the corridors, do you mean the staff areas at the...*
> *[redacted] : Yes.*
> *Mr Besanko: ... Adelaide Magistrates Court Building.*
> *[redacted] : That's correct.*
> *Mr Besanko: And what interactions did you have with him after the lift incident in July 2014?*
> *[redacted] : Just the same as what was before.*
> *Mr Besanko: When you say the same as what was before.*
> *[redacted] : Same sort of talk as beforehand. Nothing any different.*
> *Mr Besanko: Did he continue to refer to breasts?*
> *[redacted] : Yes.*
> *Mr Besanko: What sort of things did he say?*

[redacted]: *Just – it's asking that sort of detail is just too hard. It's so long ago and I don't recall. And I don't want to say something that I don't remember.*

Mr Besanko: Can you recall anything about whether anybody else was present when he made these remarks?

[redacted]: *Only if they were walking past.*

Mr Besanko: Do you have a memory of any specific comment that was made after July 2014 by Magistrate Milazzo about breasts?

[redacted]: *No.*

Mr Besanko: Is it fair to say that the extent of your recollection is that you had interactions with Magistrate Milazzo after July 2014 where he mentioned breasts and those interactions occurred in the staff areas of the Adelaide Magistrates Court building, but beyond that you don't have a recollection of...

[redacted]: *Correct.*

Mr Besanko:... any further details.

[redacted]: *Correct."*

112. Witness L's evidence in cross-examination was as follows:
(page 151)

"Ms Powell: And the crude comments were about your breasts?

[redacted]: *Both. Mine and other peoples. Anyone's breasts. Anyone's.*

Ms Powell: Well, what do you mean these other people ...

[redacted]: *No.*

Ms Powell: ... who was he talking

[redacted] *It was just breasts.*

Ms Powell: ... about breasts?

[redacted]: *No. Just breasts, so I assume other people."*

113. And continuing (on page 152.15):

"Ms Powell: Well, help me, please, about what you say these comments were.

[redacted] *I can't give you a defined answer.*

Ms Powell: You have no memory at all?

[redacted]: *No, it's not that I don't have a memory; I said I can't give you a defined answer.*

Ms Powell: Well can you give me a general answer?

[redacted]: *It's cold today. Your breasts are perky. That sort of stuff.*

Ms Powell: You referred to those things about your breasts. I'm asking about what he said about other people's breasts.

[redacted]: *I can't give you an answer on that.*

Ms Powell: Neither specific nor general?

[redacted]: *No."*

114. The state of this evidence has resulted in a lack of information available to the Panel on which to formulate any other than a general finding on this issue. No findings have been made about specifically what was said on any, let alone each, of multiple occasions, or specifically where or when any of these particular incidents occurred.

115. The unsatisfactory state of this evidence is reflected in the Panel's findings on this topic at p. 46.9:

> *"The Panel accepts the evidence of Witness L that both before and after the lift incident the Magistrate made remarks of a sexually suggestive nature concerning breasts generally."*

116. In the Magistrate's submission, this generalised finding relies, for the most part, on an acceptance of uncertain, contradictory, and imprecise evidence of Witness L. As is apparent, the Panel's reasons make no reference to the detail of any single incident on which this finding is based.

117. The Magistrate's submission is that the unsatisfactory state of the evidence, and the paucity of factual findings in the Panel's reasons on this issue, prevents any reliance on this allegation in the Panel's consideration of any recommendation to be made pursuant to section 25 of the Act.

118. The Magistrate makes the following further submissions about the evidence and the Panel's findings: -

118.1. As for the other complainants, the allegations of Witness L did not permit any finding by the Panel that the Magistrate engaged in any premeditated or predatory conduct towards her. She resiled from the suggestion in her statement that he "would follow me around" during her evidence in the hearing. She said as follows (at pages 176-177):

"Ms Powell: ...I'm suggesting to you that he didn't follow you around in every meeting whether on level 5, level 1 or, indeed, where the library is on level 4 or the sheriff's offices are on level 2. Anytime you passed by him was just accidental and there was no...

[redacted] *: It was absolutely accidental when we first...*

Ms Powell: No following you anywhere?

[redacted] *: He would follow. As I said before, it was only like to the lifts or –*

Ms Powell: So you're accepting...

[redacted] *Or if we – those...*

Ms Powell: ...it wasn't an intentional chasing you?

[redacted] *It wasn't intentional follow. No, no.*

Ms Powell: No. I'm suggesting to you that it was just passing in your place of working, a perfectly normal and expected way, and you're saying that's right. Is that the position?

[redacted] *: Can you repeat that?*

Ms Powell: It was just a normal passing of people in their mutual workplace and in a completely unintentional way.

[redacted] *: It was completely unintentional.*

Ms Powell: Your meetings with Mr Milazzo?

[redacted] *: Yes."*

118.2. In its reasons (page 43.4) the Panel makes some general and favourable observations about the evidence of Witness L. Included in this is the observation that her evidence *"as to other similar events both before and after the lift incident, while less than precise, except for one or two instances, was supported by the expressions of concern about some weaknesses in the Magistrate's conduct referred to in Part 3.1 of this Report."* The *"weaknesses in the Magistrate's conduct"* is a reference, for the most part, to the evidence of the character witnesses about his behaviour. There is no allegation, however, in any of the character evidence, of the making of overtly sexualised comments of the type alleged by Witness L. In fact, Witness L appears to stand alone in this regard, and no positive finding to the contrary has been, or is capable of being, made by the Panel. The Panel's reasons appear to suggest that comments deemed by the character and others witnesses to have been inappropriate, were the same or similar to the comments alleged by Witness L. The Magistrate submits that his reasoning is not open on the evidence.

118.3. As for the other complaints, the Panel's findings regarding Witness L do not reflect that the performance by the Magistrate of his role as a judicial officer, or his decision making, was, or is, adversely affected by the conduct alleged in this complaint.

118.4. The Panel has found that "the Magistrate intentionally engaged in conduct of a sexual nature towards Witness L" (page 47.9). The Panel has not found, however, that this conduct was intended to cause harm, distress or embarrassment to Witness L. The Panel appears to have acknowledged that this conduct was part of a "pattern of unintentionally inappropriate behaviour in situations where he had no desire to cause harm or embarrassment, and which would distress him if he knew that he did." (page 44.9)

118.5. There has been no finding by the Panel that the Magistrate sought to pursue or engage with Witness L beyond their chance encounters in the courthouse. In her evidence before the Panel (pages 135-136), Witness L said that she never saw the Magistrate socially and never interacted with him outside the court building.

Dr Young

119. With regard to the evidence of Dr Young, the Panel's findings permit, and the Magistrate makes, the following submissions.

120. The Magistrate has, and for the whole of his life has had, ASD. The Panel has accepted this diagnosis. (page 71.2)

121. It is important to note the uncontested evidence that the Magistrate was only recently diagnosed with ASD.

122. It is important to note that ASD is a condition which impacts on the ability of persons to act appropriately in social settings.

123. The diagnosis does not compromise the Magistrate's ability to carry-out in a competent fashion the duties of a judicial officer in court. This finding by the Panel is reinforced by:
    - the performance of these duties without complaint for approximately 15 years, and without accommodations or assistance;
    - the apparent reliance placed on M by his colleagues for his expertise and for his assistance;
    - the high esteem in which he is held by colleagues;
    - his selection for managerial roles within the magistrate's court;
    - his endorsement by the Chief Magistrate in about March 2021 as suitable for the role of auxiliary master in the District Court;
    - the high regard in which he is held by those who know him personally and of his abilities as a magistrate.

124. The Magistrate's ASD has left him prone, in social settings, to the possibility of making comments or engaging in behaviour that is socially unacceptable or inappropriate.

125. While allowing for the possibility that some of the Magistrate's behaviour may not be attributable to ASD, Dr Young maintained that the best explanation (not merely an equal explanation) for his conduct was that this was best explained within the context of his ASD. The Magistrate submits that the Panel's findings about the lift incident does not exclude the influence of ASD on his conduct.

126. In the Magistrate's submission, the evidence before the Panel supports this view.

127. The Magistrate submits that Dr Young was clear about the potential for him to benefit from treatment and education (Reasons at page 66.5). Her evidence on this topic was as follows (page 606):

> *"Mr Powell: ...what can you say about the treatment or the education that might be available for Mr Milazzo?*
> *Dr Young: Well, the groups that we run are very educational for people with*

autism and people without autism. It gives you insight into the difficulties that they
might experience.... So the primary approach would be one of education, and as I said, the stop, the think, the do. I think Mr Milazzo could benefit from that.
He might think this is going to be funny, but maybe stop and think about it and think
that, "Okay, this is my thinking, but someone else's thinking might be different from
that." So I think even with the diagnosis and that revelation, which he hadn't had
prior to my meeting, is certainly treatment, if you like, in terms of getting a better
understanding of how people are perceiving his behaviour.
...
Mr Powell: Just dealing with Mr Milazzo, a mature-aged man - - -
Dr Young: Yes.
Mr Powell: - - - are you saying he could benefit?
Dr Young: Absolutely.... I think he knows social boundaries....He wants to be out in the
community and he wants to have friends, and I think that he just needs a bit of education and support in how to do that appropriately. So that might come in the
form of group therapy; it might come from individual therapy; it might come from
us directing him to read some books. There's a book called The Hidden Curriculum,
which is really good for autistic people. It would enable him to read some of the
difficulties that autistic people have in understanding the social curriculum, and all of
those things would benefit him greatly."

128. Dr Young was equally clear that the Magistrate's social interactions in the workplace could be improved by a process of educating those he worked with about his condition, and about how to deal with and react to him. This would include staff of all levels and working in all areas of the courthouse.
Her evidence on this topic was as follows (page 607):

"Mr Powell: You adhere to your view that Mr Milazzo, with the diagnosis, is a magistrate that can function effectively as a judicial officer?
Dr Young: Yes, I do.
Mr Powell: And then just one other matter. I asked you about the things that might be done for Mr Milazzo. Are there, on the other side of the coin, things

that can be done in a workplace to better assist and better accommodate persons with ASD?
Dr Young: Yes. Our experience is if we explain to people in the workplace or – I go out to schools and educate teachers; obviously, in relationships, educate the other person. If there's an understanding of autism among his colleagues and hopefully they would be better informed to, I guess, respond to him in situ and explain to him that that behaviour is not appropriate, and he would benefit form that. So if his colleagues were aware of his diagnosis, that would be helpful. But then, of course, that's up to him to decide if he wants that, but just general community awareness is a good thing.
Mr Powell: Yes, and that's something that could operate within his workplace, effectively?
Dr Young: Absolutely."

This would address the 'power imbalance' identified by the Panel between magistrates and staff. It would not be difficult to educate staff in the same way as colleagues. As an alternative, it would not be difficult to have a system whereby junior staff could report any inappropriate conduct to a manager, and for conduct by the Magistrate to be addressed in this way.

129. The Magistrate is open to receiving treatment and education.

Submissions in reply to Counsel Assisting's submissions

130. Counsel Assisting proposes that the test for removal is:

> [41] … Whether its findings are such that **right-thinking members of the community** would regard **the fact of the matters found by it** as being inconsistent with the continued performance by the Magistrate of his judicial duties, assessed against present standards. If the Panel was of the view that right-thinking members of the community would regard **the fact of the matters found** as being inconsistent with the continued performance by the Magistrate of his judicial duties, he would be considered to be unable or unwilling to discharge his duties as a magistrate appropriately.
> **The conduct that has been engaged in by him, as found by the Panel**, must be of **sufficient seriousness** that right-thinking members of the community would consider that in the light of it having occurred he is unfit to hold office because public confidence in the justice system **would be undermined or diminished** if he was to be permitted to continue to discharge his duties,
>
> [42] Right thinking members of the community **expect judges and magistrates to behave to a very high standard** not just in their courtrooms but also in the workplace and in the community.

131. For the reasons set out in this submission, this is an incomplete test, and unless elaborated, leads to an erroneous analysis.

132. Counsel Assisting makes eight submissions in seeking to apply his test to the facts. In relation to each his proposed analysis is, with respect, erroneous for reasons that are common to all. It is proposed to address the common errors in relation to his First Point upon the basis that those criticisms apply to all 8 Points. In addition, discrete submissions are made with reference to each Point.

First Point: [C.44] – *"prone to make sexual comments to work colleagues"*

133. This is an erroneous analysis for the following reasons:

133.1. It asks the wrong question – which is, whether the conduct demonstrates an underlying attitude or disposition[33] which would cause the reasonable and fair-minded member of the community to lose confidence in - that is, would seriously compromise - the judicial officer's ability or willingness to discharge his judicial duties with independence, impartiality and integrity, doing right to all manner of persons according to law without fear or favour, affection or ill-will.

133.2. It adopts the standard of the "right-thinking" member of the community which has long since been abandoned as a proper reference point. It introduces a morally judgmental layer which permits the decision-maker to select from a collection of different moral attitudes within the community. The danger inherent in this is demonstrated by the apparent willingness of such a person to discriminate against the magistrate by failing to have regard to the magistrate's ASD condition when characterising the conduct.

133.3. The proper reference point is "the reasonable and fair-minded member of the community" who represents the lay participant in the justice system.

133.4. The proposed analysis fails to identify, and base the assessment on, any of the knowledge that is to be imputed to this "anthropomorphic conception of justice" [34] - which necessarily includes knowledge of:

- The magistrate's ASD condition, and the difficulties he experiences as a result in a social context;
- The magistrate's egalitarian view of all court staff as work colleagues, and his unwillingness to treat the power imbalance as defining work relationships;
- The magistrate's difficulty, fuelled by his ASD condition, in keeping work friendships distinct from social friendships, and his consequential sense that what he says is among and between friends;

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[33] *R (New Brunswick Judicial Council) v Moreau-Bérubé* [2002] SCR 249, 261-4
[34] *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696, 728 (Lord Radcliffe)

- The complete lack of any sexual intent (ie, predatory intent) in his comments;
- The fact that they are uttered in company and not privately;
- The fact that any tendency to make such comments can be controlled by a learned discipline which he is willing to undertake under the direction of Professor Young, and which his experience of the Panel Inquiry has, itself, contributed to;

133.5. As a result, and despite the denial, the assessment of the *"right-minded member of the community"* is plainly discriminatory.

133.6. If the proper test is applied, the reasonable and fair-minded member of the community with the appropriate knowledge attributed to that person, would not conclude that the conduct demonstrates any underlying attitude or disposition that can be expected to continue, and which is inconsistent with - that is, would cause the reasonable and fair-minded member of the community to lose confidence in (i.e., seriously compromise) - the judicial officer's ability or willingness to discharge his judicial duties in accordance with his oath.

134. The above failings are plainly apparent in the proposed assessment of these incidents. It is incomplete and erroneous.

135. It is submitted that, more to the point, the current focus in today's world should be on trying to understand and assist individuals with ASD.
It is of significance that our government has appointed a Minister for Autism in recognition of the fact that people with ASD ought to be represented, understood and given a "fair go". It follows that any reasonable and well-informed members of the community would have considerable tolerance of people with ASD and their limitations in social settings. Indeed, in light of the Panel's positive findings in relation to the Magistrate's character (refer to paragraph 70-73 herein) it is submitted that reasonable and well informed members of the community would, in the circumstances, have considerable sympathies, particularly in circumstances where his in-Court work is not affected by the social disorder, and further, where he has a strong reputation for considerable legal knowledge, excellence, kindness, patience and tolerance with co-workers and litigants.

Second Point: Allegations 4 & 5: Witness C [C.45]

136. Counsel assisting asserts in paragraph 45 that comments made by the Magistrate as described by Witness C are *"inconsistent with his continued performance of judicial duties."* Again, reasonable and well-informed members of the community are more likely to see the context of such comments as very important. All comments were made in the presence of a District Court Judge and a Magistrate and another court

officer at a small table where anyone was able to overhear if listening. The reasonable and well-informed members of the community would see the behaviour within the context of his ASD and show tolerance and understanding and accept there was no intention to offend. The Magistrate's behaviour consisted of words only, at no time did the Magistrate exhibit sinister or predatory behaviour, or an attempt to isolate the complainant from the group or an attempt to follow through on what the Panel found was an interest in her. This coupled with the fact that no one told him at the time, nor did anyone tell him any time after, that he had been inappropriate. From the evidence accepted from Professor Young this, in its very nature, deprived him of the opportunity, given his ASD, to immediately cease the behaviour and/or even, given his nature, apologising for it.

Third Point: Allegation 6: Witness G [C.46]

137. In relation to paragraph 46, Counsel assisting considers briefly sitting on the Associate's lap in the manner as accepted by the Panel is inconsistent with continued performance of judicial duties. Particularly in circumstances where the Associate herself considered that it may have been *"done in a friendly manner"* the primary characteristics of this incident are clearly an ill thought out spontaneous and immediately, once he was aware of her being upset, regret and distress.

Fourth Point: Allegation 8: Witness L (lift incident) [C.47]

138. Counsel assisting considers the findings in relation to the lift incident justifies removal on its own. The Panel's findings are clear. Any one of the eight complaints on their own can be seen at the lower end of the scale. It is clear they are not predatory; they are poorly thought out and, at the very least Magistrate Milazzo himself did not perceive the incident in the same way as the two other occupants in the lift. We refer to earlier submissions relating to Witness L herein.

Fifth Point: Allegations 8: Witness L (other occasions) [C.48-9]

139. In relation to paragraphs 49-52 the submission is made that there is no place for sexual harassment in any workplace. We wholly agree, however there are degrees of seriousness and those examples which are at the lowest end of the scale of seriousness must be seen in context. Moral culpability also lends important information to context. If the behaviours are caused by or at least contributed to by ASD, then it would lower the moral culpability and therefore the objective seriousness. In the modern day it is unthinkable the reasonable and well-informed members of the community would not approach the exercise of assessing the behaviours in such circumstances with compassion and understanding. It is, we submit, reasonable to infer that if each of the complainant's knew of the Magistrate's ASD at the time of the incident complained of

and were aware of the need (vis-à-vis Professor Young's evidence) to inform him of the inappropriateness of the behaviour, at the time, and the offence taken, there may well have never been further incidents and may never have been complaints resulting in a Panel hearing at all. The magistrate's capacity for genuine remorse and genuine concern at offending anyone is patently obvious in the findings of the Panel and through all of the evidence.

Sixth Point: combined conduct [C.50-52]

140. We refer to the submissions above as well as paragraphs 97 – 117.5 herein.

Seventh Point: Adverse reliability and credibility findings [C.53]

141. This is, with respect, a most dangerous submission, and made all the more dangerous by being factually incorrect.

142. It contains the implicit threat that a judicial officer who participates in a Panel inquiry in the knowledge that if another witness's account of events is preferred to his or hers, that will be conduct justifying removal. The proposition has only to be stated to be rejected. The Panel should reject it.

143. The truth is that the preference of a witnesses account over even the judicial officer's "vehement denial" cannot be regarded as conduct justifying removal: there may be all sorts of reasons (as here) why a denial may not be acted on without implying misconduct – a failure to conform to proper judicial conduct. In the absence of perjury, the proper discharge of one's oath as a witness – whether a judicial officer or not – is to tell the truth. That can only ever be the truth as the witness genuinely believes it to be. The preference of one account over another can never signal a failure to be true to that oath.

144. The fact is, the Panel has not made findings as the Magistrate's "credibility", and in particular has not anywhere held that the evidence of the magistrate was false to his knowledge. Indeed, had the Panel formed a view that such a finding was in the offing, it

would have been obliged to identify that to the magistrate as conduct being inquired into, and to accord the magistrate a fair opportunity to respond to it.[35]

145. Counsel assisting's submits at paragraph 53 that the Panel has made adverse reliability *"and, importantly, adverse credibility findings against Mr Milazzo in connection with matters 4, 5 and 8"*. It is then argued that this alone is grounds for removal. With respect to counsel assisting, his assertion is, we submit, incorrect. It is true that the Panel made factual findings which were contrary to the Magistrate's evidence in parts however, such findings were made largely as a result of the Magistrate's own frank admissions. The concessions made by the Magistrate were entirely appropriate. For instance, in relation to complaints 4 and 5 the Panel noted:

> *"as to the Magistrate's own evidence about this, the Magistrate conceded in evidence that he had not given any thought about the dinner in February 2018 for about three years until after it happened and that he did not remember any of the conversation word for word. Nor could he specially recall any of the words spoken. On his own evidence the Magistrate conceded that he had said something like "isn't she a lovely young woman".* (p.26, para.1).

Further, as to another comment which the Panel found was made, the Panel found that the Magistrate's *"...own evidence on this topic supports the account given ..."*

Again, the Panel finds that:

> *".. the Magistrate's own admission that he might have jokingly said words to the effect of "confess your sins" is consistent with the account given by Witness C".* (p. 27, para. 6).

A proper assessment of the findings in relation to Complaint 8 show that it was the Magistrate's evidence was, as the Panel stated:

> *"rendered unreliable by virtue of factors mentioned in part 3.1 of this report, namely that he displayed a pattern of unintentionally inappropriate behaviour in situations where he had no desire to cause harm or embarrassment and which would distress him if he knew he did. In those circumstances it's not surprising when confronted with evidence of such facts he might genuinely believe that he had not engaged in the conduct because that is not what he would have done or have wanted to do."* (p. 44, para. 5 and p. 45, para. 1)

The Panel does not make actual findings as to credibility – the do not make actual findings as to credibility - the closest they come is to opine *"another factor undermining his reliability, if not his credibility, was his vehement denial of the most serious aspects of Witness L's evidence."*

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[35] *Smith v the NSW Bar Association* (1992) 176 CLR 256

Indeed, where the Magistrate was faced with witnesses he knew and trusted e.g., in relation to Complaints 1, 2, 3, 6 and 7 even though he had no clear recollection of some aspects he was content to accept the witnesses' versions. This speaks far more loudly to positive attributes in his character and personality.

Eighth Point: ASD does not excuse [C.57]

146. This submission, with respect, displays the same misconceptions that mark the previous seven.

147. Submissions have already been made as to why the Panel's views of Witness L's evidence as to conduct on other occasions should not be taken into account for the purpose of coming to an opinion about removal.

148. Those considerations apart, it has never been the magistrate's case that his ASD condition is an *"excuse"* for the conduct found, and nothing is achieved by stating it. What it demonstrates, however, is the failure of the submissions of counsel assisting to engage at all with the critical step in the test for removal, which, as already explained in detail, requires an assessment of whether the reasonable and well informed member of the community would conclude that the conduct as found reveals an underlying disposition or attitude which would cause that member to lose confidence in the magistrate's ability or willingness to discharge his judicial duties in accordance with his oath. To speak of *"inappropriate conduct of a sexual nature over a period of 8 years in respect of multiple women"* is, with respect, a distortion of the facts, and a statement that overlooks the nature of the relationships in each case (*"multiple women"* actually means 4, and *"over 8 years"* includes the other occasion evidence of Witness L); the open and transparent circumstances in which each occurred; and the way in which those engagements would be seen by the reasonable and well informed member of the community having knowledge of the magistrate's ASD condition and its consequences for social engagement.

Jonathan Wells

Jeff Powell

Paul D'Angelo

27 October 2022