

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

**The Honourable Justice Robert Macfarlan  
The Honourable Acting Justice Arthur Emmett AO  
Mr Ken Moroney AO APM**

**26 March 2019**

**REPORT OF AN INQUIRY BY A CONDUCT DIVISION OF THE  
JUDICIAL COMMISSION OF NSW IN RELATION TO  
JUDGE PETER MAIDEN SC**

**REPORT OF AN INQUIRY BY A CONDUCT DIVISION OF THE  
JUDICIAL COMMISSION OF NSW IN RELATION TO  
JUDGE PETER MAIDEN SC**

**TABLE OF CONTENTS**

	Page
<b>THE DIVISION'S FUNCTIONS</b>	3
<b>THE PARTICULARS OF COMPLAINT</b>	7
<b>JUDGE MAIDEN'S PROFESSIONAL AND JUDICIAL CAREER</b>	10
<b>THE 2014 CONDUCT DIVISION INQUIRY AND REPORT</b>	11
<b>CONSIDERATION OF THE COMPLAINT</b>	13
A. Suspected impairment affecting performance of duties	14
B. Delay in delivery of judgments	14
C. Failure to adhere to an undertaking to the 2014 Conduct Division to report to the Chief Judge on a regular basis as to his general wellbeing and mental health condition	18
D. Failure adequately or at all to respond to communications from the Chief Judge and the Commission	19
E. Failure to undergo psychiatric examination required by the Commission	27
F. Failure to adhere to an undertaking to the Division to deliver reserved judgments	29
G. Failure to adequately take into account Ms Syngé's interests	30
H. Making false assertions in response to the complaint made by Ms Syngé	35
<b>MATTERS OF POSSIBLE EXCUSE OR MITIGATION</b>	36
Judge Maiden's depressive illness	36
Reading difficulties and other health issues	37
Judge Maiden's personality	48
<b>SUMMARY OF CONCLUSIONS CONCERNING THE COMPLAINT</b>	63
<b>PARLIAMENTARY CONSIDERATION OF THE REMOVAL OF JUDGE MAIDEN</b>	67

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

**The Honourable Justice Robert Macfarlan  
The Honourable Acting Justice Arthur Emmett AO**

**Mr Ken Moroney AO APM**

**26 March 2019**

**REPORT OF AN INQUIRY BY A CONDUCT DIVISION OF THE  
JUDICIAL COMMISSION OF NSW IN RELATION TO  
JUDGE PETER MAIDEN SC**

- 1 On 8 February 2017 the Honourable Justice Price, Chief Judge of the District Court of New South Wales, requested pursuant to s 39B(1) of the *Judicial Officers Act 1986* (NSW) (“the Act”), that the Judicial Commission of New South Wales (“the Commission”) investigate whether Judge Maiden SC of the District Court may have an impairment that affects the performance of his judicial duties. The Chief Judge stated in his reference that his opinion that Judge Maiden may have an impairment was founded upon his Honour’s “inability to deliver reserved judgments in a timely fashion”. The Chief Judge listed 13 then outstanding reserved judgments of Judge Maiden.
- 2 Following Judge Maiden’s failure to attend an examination by a psychiatrist engaged by the Commission, the Commission resolved on 10 April 2017 to deal with the reference as if Judge Maiden were the subject of a complaint (see s 39D(2) of the Act).
- 3 Subsequently, on 18 August 2017 and as confirmed on 13 November 2017, the Commission appointed the authors of this Report to be members of a Conduct Division of the Commission (“the Division”) for the purpose of

examining the complaint (s 22 of the Act) ("the Inquiry"). The Division thereafter investigated the complaint and held hearings in relation to it. Consistent with s 23(3) of the Act, the Division's examinations and investigations took place in private and pursuant to s 24(2) the Division determined that its hearings should be held in private, principally due to the personal nature of much of the medical evidence concerning Judge Maiden.

- 4 As authorised by s 31(1) of the Act, in addition to the matter the subject of the initial complaint, the Division examined other matters arising in the course of its investigations. These matters were described in Particulars of Complaint supplied to Judge Maiden's representatives on 12 November 2018. The Particulars were amended in limited respects on 11 February 2019.
- 5 A substantive hearing was held for the purposes of the examination on 12, 13, 14 and 25 February 2019. Ms K Stern SC and Ms G Wright appeared as Counsel Assisting the Division and Mr J Glissan QC appeared with Mr D Nagle for Judge Maiden. At the hearing, the Division received statements or reports from the Chief Judge, Judge Maiden, Dr Michael Diamond (a psychiatrist) and Dr Ian Wechsler (an ophthalmologist). These statements and reports were supplemented by oral evidence. In addition, a considerable number of documents were tendered.
- 6 For the reasons given in this report and summarised at [209] to [233] below we are of opinion that the complaint against Judge Maiden has been substantiated and that the matters the subject of the complaint could justify parliamentary consideration of the removal of Judge Maiden from his office as a judge of the District Court of New South Wales on the grounds of proved misbehaviour and incapacity.

## **THE DIVISION'S FUNCTIONS**

- 7 Sections 28, 29 and 41 of the Act relevantly provide as follows:

### **"28 Substantiation of complaint**

- (1) If the Conduct Division decides that a complaint is wholly or partly substantiated:
  - (a) it may form an opinion that the matter could justify parliamentary consideration of the removal of the judicial officer complained about from office, or
  - (b) it may form an opinion that the matter does not justify such consideration and should therefore be referred back to the relevant head of jurisdiction.
- (2) If it forms an opinion referred to in subsection (1) (b), the Conduct Division must send a report to the relevant head of jurisdiction setting out the Division's conclusions.
- (3) A report under subsection (2) may include recommendations as to what steps might be taken to deal with the complaint.

...

## **29 Reports to Governor**

- (1) If the Conduct Division decides that a complaint is wholly or partly substantiated and forms an opinion that the matter could justify parliamentary consideration of the removal of the judicial officer from office, it must present to the Governor a report setting out the Division's findings of fact and that opinion.
- (2) (Repealed)
- (2A) A copy of the report must be furnished forthwith to the Minister.
- (3) The Minister shall lay the report or cause it to be laid before both Houses of Parliament as soon as practicable after the report is presented to the Governor.

...

## **41 Removal of judicial officers**

- (1) A judicial officer may not be removed from office in the absence of a report of the Conduct Division to the Governor under this Act that sets out the Division's opinion that the matters referred to in the report could justify parliamentary consideration of the removal of the judicial officer on the ground of proved misbehaviour or incapacity.
- (2) The provisions of this section are additional to those of section 53 of the *Constitution Act 1902*."

8 Section 53 of the *Constitution Act 1902* (NSW) is relevantly in the following terms:

### **"53 Removal from judicial office**

- (1) No holder of a judicial office can be removed from the office, except as provided by this Part.
- (2) The holder of a judicial office can be removed from the office by the Governor, on an address from both Houses of Parliament in the same session, seeking removal on the ground of proved misbehaviour or incapacity.

....”

- 9 The *Judicial Officers Act* is “legislation of the highest constitutional significance for the rule of law in New South Wales. The independence of the judiciary is, to a very substantial degree, dependent upon the maintenance of a system in which the removal of a judicial officer from office is an absolutely extraordinary occurrence” (*Bruce v Cole* (1998) 45 NSWLR 163 at 166). There is no objects clause in the Act but the implicit purpose of the Act, insofar as it provides for the making and resolution of complaints about judicial officers, is to protect and promote public confidence in the judiciary and in the administration of justice in New South Wales, and to maintain appropriate standards in the New South Wales judiciary.
- 10 The Division’s jurisdiction under the Act is “entirely protective”, being designed to protect both the public (from judicial officers who are unfit or incapable of discharging the duties of their offices) and the judiciary (from unwanted intrusions into judicial independence).<sup>1</sup> In our view the concept of protection of the public extends to protection of the reputation of the relevant court and therefore the maintenance of public confidence in the administration of justice in New South Wales. As a result, misbehaviour of a judicial officer in the past is relevant in this context even if it is not foreseeable that the officer will repeat that misconduct or engage in other misconduct in the future.
- 11 In determining whether it should form the opinion referred to in s 28(1)(a) of the Act, the Division is required to have regard to the “gravity of the consequences flowing from” the formation of that opinion (*Bruce v Cole* at 190 citing *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-2). Nevertheless,

---

<sup>1</sup> See the report of the differently constituted Conduct Division which reported on an Inquiry in relation to Magistrate Dominique Burns (“the *Burns’ Report*”) at [3] and [4].

the Act “imposes a very low threshold for the formation of the ‘opinion’. It need only be that parliament *could consider* removal. Not that it *should* remove” (*Bruce v Cole* at 184). Whether parliament “should” consider removal of the judicial officer from office and whether it should resolve under s 53(2) of the *Constitution Act* to seek removal is a matter for parliament (*Bruce v Cole* at 202).

- 12 As in the *Burns’ Report*, this Division proceeds upon the basis that the term “misbehaviour” in s 53 of the *Constitution Act* ought to be given its ordinary meaning, namely, “to behave badly” (at [55]). There are degrees of seriousness of misbehaviour. Not all misbehaviour warrants, or may warrant, consideration of removal of a judge, much less removal itself. The formation by the Division of the statutory opinion is to be guided by community expectations and standards as to appropriate judicial behaviour. The Conduct Division is entitled to draw upon its own knowledge and expertise concerning judicial conduct in forming the opinion (*ibid* at 195).
- 13 As was also accepted in the *Burns’ Report* (at [69]-[70]), the term “incapacity” in the *Constitution Act* and the Act should be understood as referring to “incapacity to discharge the duties of judicial office in a manner that accords with recognised standards of judicial propriety” (citing the report of the Conduct Division in relation to Magistrate Jennifer Betts at [158]: “the *Betts’ Report*”). It therefore extends beyond physical or mental impairment caused by an identifiable disorder. In *Bruce v Cole*, the “relevant manifestation of incapacity [was] an inability to write judgments within an acceptable time” (at 191). That inability can, as it did in *Bruce v Cole*, arise from a personality trait of procrastination (*ibid*). As was said in the *Betts’ Report* at [165], “[p]ast incapacity, if proved, is relevant only insofar as it casts light on present and future capacity, or incapacity”. In the absence of a finding of misbehaviour, “there can be no proper basis for the formation of an opinion that [a judicial officer] could be removed because of his [or her] past conduct ... [r]emoval could only be a permissible option if [the judicial officer’s] incapacity remained extant at the time of the report” (*Bruce v Cole* at 175).

- 14 We add that we accept the view expressed in the *Burns' Report* that the same conduct is capable of demonstrating both misbehaviour and incapacity (at [52]).

## THE PARTICULARS OF COMPLAINT

- 15 The Particulars of Complaint supplied by Counsel Assisting the Division to Judge Maiden's representatives are to the following effect:
- A. *Suspected impairment that affects the Judicial Officer's performance of Judicial or Official Duties***
- 16 Under this heading, the Particulars state that "[i]t is suspected that the Judicial Officer is suffering from a psychiatric or medical impairment that affects his performance of judicial or official duties". The matters relied upon in support are identified as the matters particularised under the headings B to H below. In the course of the hearing before us, commencing with Counsel Assisting's opening address, the broader question was considered of whether Judge Maiden has a psychological impairment, arising out of his personality characteristics, that affects his performance of judicial duties (see the reference to the relevance of personality traits at [13] above).
- B. *Unacceptable delay in delivery of judgments***
- 17 The Particulars allege that Judge Maiden was guilty of unacceptable delay in the delivery of judgments. The Particulars identify 15 matters in which judgment was reserved for 12 months or longer, the longest delays being of 20 (twice), 21 (three times), 24, 33 and 34 months.
- 18 The Particulars also allege that four of these matters were listed for the delivery of judgment but that the listing was vacated without judgment being delivered.



**C. Failure to adhere to an undertaking to the 2014 Conduct Division to report to the Chief Judge on a regular basis as to his general wellbeing and mental health condition**

19 The undertaking was given to the differently constituted Conduct Division (“the 2014 Conduct Division”) which reported on 1 December 2014 that certain complaints concerning Judge Maiden were substantiated. It also reported that it had not formed the opinion that any of the matters examined could justify Parliamentary consideration of the removal of Judge Maiden from his judicial office. Undertakings given by Judge Maiden to the 2014 Conduct Division were relevantly as follows. The undertaking in paragraph (iv) relates to Particular C.

- “(iii) the undertaking by the Judge to comply with the 6 month treatment program advanced by Professor Mitchell and thereafter to continue with regular and ongoing psychiatric monitoring by Professor Mitchell or his nominee or replacement;
- (iv) the undertaking of the Judge to report to the Chief Judge on a regular basis as to his general wellbeing and mental health condition including to report any change to his treatment regime or attendance with health professionals;
- ...
- (vi) the undertaking of the Judge to discuss with the Chief Judge any change to or future working conditions that the Judge considers might exacerbate his mental health condition;
- (vii) the intention of the Judge to maintain around him a peer group of associates and other judges who are aware of his mental health problems and know him well enough to notify him of their observations as to any sign of mental health relapse.”

**D. Failure adequately or at all to respond to communications from the Chief Judge and the Commission**

20 Detailed particulars of the communications from the Chief Judge and the Commission relied upon are set out, including references to 12 written communications from the Chief Judge to Judge Maiden in the period from September 2016 to July 2017 to which Judge Maiden did not respond at all. The Chief Judge’s communications principally concerned Judge Maiden’s delays in delivering reserved judgments.

**E. *Failure to undergo psychiatric examination required by the Judicial Commission***

21 Following the letter dated 8 February 2017 from the Chief Judge to the Commission requesting under s 39B(1) of the Act that the Commission investigate whether Judge Maiden may have an impairment that affects the performance of his judicial duties, the Commission notified Judge Maiden that it required him to undertake an examination by a psychiatrist (s 39D). The Commission notified Judge Maiden of an appointment it had scheduled for him to see Dr Diamond. Judge Maiden did not however attend that appointment and did not provide any reason to the Commission for his non-attendance.

**F. *Failure to adhere to an undertaking to the Conduct Division to deliver reserved judgments***

22 In the course of this Division's investigations, Judge Maiden gave an undertaking to it to attend chambers during business hours in the period 12 March to 12 June 2018 and to complete all outstanding judgments by 12 June 2018 in relation to seven proceedings listed in a schedule, and to do so in the order listed in the schedule. The judgments were delivered, but not in the order listed in the schedule. The last four judgments were delivered in the period 6 to 8 June 2018.

**G. *Complaint of Lesley Synge***

23 This particular refers to a complaint made by Ms Lesley Synge, the victim of an alleged sexual assault, concerning the need for her to give evidence on more than one occasion at trials of the alleged offender presided over by Judge Maiden. The Particulars allege that Judge Maiden "demonstrated a lack of understanding of the judicial role by discharging a jury in a criminal sexual assault trial without sufficient regard to the complainant's needs".

**H. Making false assertions in response to the complaint made by Ms Synge**

- 24 This particular alleges that Judge Maiden made false statements to the Commission and to Dr Diamond in relation to Ms Synge's complaint, "with indifference to the truth" of those statements.

**JUDGE MAIDEN'S PROFESSIONAL AND JUDICIAL CAREER**

- 25 Judge Maiden was born in 1950. He commenced to work as an articled clerk in 1969 whilst he undertook legal studies, and was admitted as a solicitor in June 1974. During his articles and after his admission, he was involved in litigation, in particular in instructing counsel in criminal legal assistance cases. From 1975 to 1979 he worked in London, initially doing commercial conveyancing work and, later, mainly insolvency and general banking litigation.
- 26 On his return to Australia he acted as a solicitor advocate and then was admitted to the Bar in March 1981. He informed the Division that his practice as a barrister "initially involved crime but expanded to common law 'running down cases' for both plaintiff and defendant as well as appearing in most other jurisdictions". He said that his practice "developed into [a] circuit practice in Taree, Port Macquarie and Lismore in crime and civil".
- 27 He was appointed a judge of the District Court on 12 March 2012 after, as he described it, being "approached by former Chief Judge Justice Blanch to be the resident Judge to run the criminal list at Newcastle and East Maitland District Courts". Judge Maiden sat at Newcastle from soon after his appointment until May 2014. It appears that he undertook some civil work as well as criminal work while at Newcastle.
- 28 An annexure attached to Chief Judge Price's second witness statement shows that on 5 May 2014 Judge Maiden commenced to sit in civil work in Sydney but that there were occasions in May and June when he returned to Newcastle to deal with part-heard matters. In the period 21 July to 5 September 2014, he sat in crime in Sydney or at Parramatta, or, for one day,

in Newcastle. He sat in civil, either in Sydney or at Parramatta, for the remainder of 2014. Justice Price was appointed Chief Judge of the District Court in August 2014.

- 29 In 2015 Judge Maiden was rostered to sit in the civil jurisdiction of the District Court in Sydney, and was allocated to criminal cases when he was available. In 2015 he had 29 days annual leave and was allocated five days out of court to write judgments, in addition to having the benefit of the usual court closure over Christmas and New Year.
- 30 In 2016 he was also rostered to sit in the civil jurisdiction in Sydney. In that year, he had 20 days annual leave and nine days out of court to write judgments, in addition to having the benefit of the usual court closure over Christmas and New Year.
- 31 In 2017 he was rostered to sit in the civil jurisdiction in Sydney until the allocation to him of a criminal trial in May 2017. From then, he sat in criminal cases, as well as on some part-heard civil cases. In that year he had 20 days annual leave and 19 days out of court to write judgments, in addition to having the benefit of court closing times.
- 32 In the first term of 2018 he was rostered to sit in the criminal jurisdiction of the court which he did except when it was necessary for him to deal with part-heard civil cases. In the second term he was rostered to sit in crime in Sydney, Parramatta and Penrith. During the year, he had 24 days annual leave and was allocated 64 days out of court for judgment writing.

### **THE 2014 CONDUCT DIVISION INQUIRY AND REPORT**

- 33 The 2014 Conduct Division was initially concerned with two complaints, one relating to a barrister, Ms Moen, and the second to a solicitor, Mr Fawkner. The Conduct Division found both complaints substantiated. They concerned Judge Maiden's in-court treatment of those practitioners. Exercising its powers under s 31 of the Act, the Conduct Division treated the complaints as extending to other matters including criticism of Judge Maiden in two Court of

Criminal Appeal judgments (referred to at [194] to [195] below) and including his "failure to provide the Judicial Commission with timely responses to its advice of the complaints it had received".

- 34 The Conduct Division's reasons for not forming the opinion that the matters it examined could justify parliamentary consideration of the removal of Judge Maiden from his judicial office were summarised as follows:

"This is because the Judge has long suffered from a depressive disorder that was undertreated at the time of the events the subject of the complaints. The under treatment resulted in a relapse of his illness, which, in turn, resulted in the Judge becoming mentally unfit to exercise efficiently the functions of his judicial office. This was in part a consequence of the Judge's then restricted insight into his illness and its symptoms, which led to him being unable to appreciate either that he had suffered a relapse, or the impact which that was having on his conduct and decision making in court. In the result he did not seek timely medical treatment, or other assistance, when he needed it.

The problem has been successfully addressed by medical treatment, which is ongoing. As a result of the treatment which he has received the Judge is once again mentally fit to exercise efficiently the functions of his judicial office. On the evidence he now has much greater insight into his personality characteristics and how his illness affects them than he did at the time of the events which led to the complaints made about him. If the Judge adheres to the treatment he is receiving, the problem which led to the complaints should not recur. This he intends to do."

- 35 As to the allegation that Judge Maiden failed to provide the Commission with timely responses to its advice of the complaints, the Conduct Division said:

"There was no question that the Judge's response to the Commission's advice of the complaints it had received was inadequate, as his Honour accepted unreservedly in his oral evidence. He explained how his illness had caused him to be unable to deal with that advice, and that he proposed to avoid such a situation ever arising again, including by providing a copy of any formal complaints to the Chief Judge and consulting him about them."

- 36 At the Conduct Division's hearing, the evidence of Associate Professor Jim Greenwood, psychiatrist, included the following:

"Now, the issue I think that you're concerned about is, was [the conduct towards Ms Moen] caused by depression, and consequently if Judge Maiden were not depressed, would that not have occurred and, conversely, in the future, if Judge Maiden were not depressed in the future, would that not reoccur.

The point of difference, I think, between [Professor Philip Mitchell, psychiatrist] and myself is that I believe that personality characteristics do express themselves and although he has been treated for the symptoms of depression, he may still have vulnerability or characteristics that would be expressed in the same way, and I must say to be fair to Judge Maiden in the conversation that I had with him in the couple of instances where there had been conflict, I believe that his intention was honourable, if I can use that word, in trying to do the right thing by the plaintiff in the case or the individual in the case and to some extent he felt that the barristers had not represented their cases properly before him and that they could have been – the clients could have been represented better, and he wished to try and steer the matter to a better conclusion in their case.

My concern about that is that it expressed that obsessive controlling nature of wanting to try to steer a direction and I left it deliberately in my report, left it deliberately open to a tribunal such as this, or whoever it was that was going to be reviewing it to form an opinion as to whether that was something that was appropriate or was not appropriate for a judge in that position. Not something that I'm qualified to comment on, but I think that that nevertheless continues to be a factor."

37 Having noted Judge Maiden's undertakings referred to in [19] above, the Conduct Division made recommendations that included the following:

- "(1) That the Judge maintain ongoing regular contact with the Chief Judge in order to discuss with him his general wellbeing in connection with his medical condition.
- (2) That the Judge discuss and develop with the Chief Judge an appropriate peer arrangement among supportive staff and colleagues, with a view to enhancing the prospects of the Judge being notified of, identifying and dealing with any signs of relapse of his mental health conditions.
- (3) Noting that the Judge has already provided the Chief Judge with copies of relevant medical reports used in these proceedings, that in allocating work, he take into account matters which might aggravate or exacerbate the Judge's condition."

## **CONSIDERATION OF THE COMPLAINT**

38 Leaving aside Particular A, which concerns possible impairment of Judge Maiden's faculties, it is convenient to consider first whether the conduct alleged in the Particulars has been proved and, to the extent that it has, whether on a prima facie basis it constituted non-compliance by Judge Maiden with his judicial duties. We will then turn to consider the matters of

possible excuse or mitigation relied upon by Judge Maiden before determining on a final basis whether any breaches of judicial duty occurred.

**A. Suspected impairment affecting performance of duties**

39 Our discussion below at [120] to [208] concerning matters of possible excuse or mitigation, including medical issues, constitutes our reasoning concerning Particular A and our conclusion in relation to it is at [211] to [216] below.

**B. Delay in delivery of judgments**

40 Judge Maiden did not dispute that he delayed in delivering judgments in civil matters to the extent stated in the following list of 15 matters contained in the Particulars:

<u>Matter name</u>	<u>Date judgment reserved</u>	<u>Date judgment delivered or reasons given</u>	<u>Time taken (approx.)</u>
<i>Wayne Bradbury v North Coast Conveyancing Pty Limited (Bradbury)</i>	31 January 2014	24 February 2015	13 months
<i>Samantha Dionys v National Australia Bank (Dionys)</i>	16 June 2014	4 August 2015	13.5 months
<i>Allison Tisdell v P J Event Decorators Pty Limited (Tisdell)</i>	24 June 2014	22 July 2015	13 months
<i>Cheryl Pike v Coles Supermarkets Australia Pty Ltd (Pike)</i>	23 July 2015	29 July 2016	12 months
<i>Melissa Anne Reilly v State of New South Wales (Reilly)</i>	6 August 2015	7 June 2018 (final orders not made)	34 months
<i>Dustin Thornbury v G&amp;M Treuer &amp; JA Treuer Trading as Corindi / Red Rock Plumbing &amp; Metal Roofing (Thornbury)</i>	21 August 2015	8 June 2018 (reasons); 31 August 2018 (orders)	33 months
<i>Humud Sarhan v GIO Insurance Australia acting</i>	4 February 2016	19 December 2017	22.5 months

on behalf of the Nominal  
Defendant (**Sarhan**)

<i>Marc Lewis v The State of New South Wales</i> ( <b>Lewis</b> )	24 March 2016	18 December 2017	20.5 months
<i>Gojko Skocic v Henian Xu</i> ( <b>Skocic</b> )	3 May 2016	3 October 2017	17 months
<i>BKJH Holdings Pty Limited v Signature Stables Pty Limited</i> ( <b>BKJH</b> )	20 May 2016	7 June 2018 (no final orders yet)	24.5 months
<i>Christina Christopher v Officeworks Limited</i> ( <b>Christopher</b> )	1 July 2016	12 April 2018 (judgment); orders made on 19 October 18	21 months
<i>Nathan Coey v David Anthony Smith</i> ( <b>Coey</b> )	3 August 2016	25 September 2017	13.5 months
<i>Virginia Leyba v Honghe Zhou</i> ( <b>Leyba</b> )	5 August 2016	5 April 2018 (judgment); 12 April 2018 (orders)	20 months
<i>Michael Coshott v Charmaine Duarte</i> ( <b>Coshott</b> )	5 August 2016	17 May 2018	21 months
<i>Mohammed Ouhammi v State of New South Wales</i> ( <b>Ouhammi</b> )	17 March 2017	6 June 2018 (judgment on liability and quantum); 27 August 2018 (costs)	14.5 months

41 Judge Maiden's representatives did not suggest that there was any particular complexity in any of these matters or that there were any other exigencies that delayed delivery of judgment other than Judge Maiden's personal circumstances, with which we deal at [120] to [156] below. In *Reilly*, for example, the transcript comprised 14 and a half pages only, yet Judge Maiden took almost three years to deliver judgment, and even then he did so only orally and not in writing. In *Coshott*, which was an appeal against a costs assessment decision, Judge Maiden took nearly two years to determine the appeal by a judgment of three and a half pages. In *Skocic* the hearing was



expedited on the grounds of hardship but Judge Maiden took 17 months to deliver his decision. As well, we note that of the nine out of 15 judgments that are available to the Division, the longest is 25 pages.

- 42 In relation to this particular, Counsel Assisting referred the Division to the District Court Judges' Handbook published to judges of that Court in December 2005, which contained the following statements concerning reserved judgments:

"The Court adopts the principle that, where practicable, judgments should be delivered within 2 months of the completion of proceedings.

If a judgment remains reserved after three months, the Judge should notify the Registry's Listing Manager, who provides a list of outstanding judgments to the Chief Judge on a monthly basis, in order that the Chief Judge can assess the situation and arrange assistance for the Judge where appropriate.

A public list is maintained of judgments that have been outstanding for more than 6 months. This list is available to any interested party or member of the public, including the media, on request.

The Judicial Commission has indicated that it regards any reserving of judgments in excess of 12 months as judicial misconduct."

- 43 The November 2017 version of the Handbook contains the same statements except that the opening paragraph refers to delivery within three months of the completion of proceedings, rather than two months.
- 44 Whilst we consider that these Handbook statements constitute an important guide to the periods that are in ordinary circumstances reasonable for the delivery of judgments, we would not accept as an unqualified proposition that any reservation of judgments in excess of 12 months constitutes judicial misconduct. As in other contexts, what constitutes judicial misconduct must depend upon the particular circumstances of the case in question. Nevertheless, we take the view that unless excused or adequately explained by the matters raised by Judge Maiden to which we will return later in this Report, the time he took to deliver the subject judgments was far in excess of what was acceptable.

45 In summary, the seriousness of this prima facie departure from proper judicial conduct is indicated by:

- (1) the large number of judgments in respect of which delays occurred;
- (2) the extreme length of the periods of delay (approaching three years in respect of some of the judgments);
- (3) the absence of any particular complexity in the cases to which the judgments related;
- (4) the occurrence of the delays notwithstanding the appropriately persistent enquires and exhortations of the Chief Judge to Judge Maiden in relation to delivery of the judgments;
- (5) the occurrence of the delays notwithstanding the grant to Judge Maiden prior to March 2018 of substantial time out of court for the purpose of writing judgments.

In the period 1 April 2014 to the end of February 2018, leave taken by Judge Maiden was as follows:

- Annual leave 98 days;
- Annual leave during Court Closure Period 82 days;
- Time out of court for allocated judgment writing time 33 days;
- Sick leave 39 days; and
- Medical appointments 2 days.

Relevant to the two items for annual leave mentioned above is [24.3.3] of the District Court Judges' Handbook which states that the entitlement of judges to 10 weeks' annual leave (rather than the standard four weeks) is given to enable judges to write reserved judgments and catch up on reading. It also states that "[u]nder the

*District Court Act*, Judges are rostered to sit in court. Any time taken out of court for the writing of judgments will be debited against leave entitlements". It appears that Judge Maiden had the benefit of not having time that he was given for this purpose debited against his leave entitlements;

- (6) seven of the 15 long delayed reserved judgments in the list set out at [40] above were only delivered after the extreme step was taken by the Chief Judge in March 2018, following discussions with the Division, of giving Judge Maiden three months out of court to write them;
- (7) all of the nine judgments available to the Division (out of the 15 in the list at [40] above) appear to have been delivered orally, notwithstanding that on his own evidence Judge Maiden was aware that provision to a judge of the transcript of an oral judgment could take a "long time" and that the judge would have to take time thereafter to finalise it. This had the effect of extending already excessive periods before judgments were fully available to litigants;
- (8) the Chief Judge's repeated (but largely unaccepted) offers to Judge Maiden to give him more time out of court to write the judgments; and
- (9) repeated requests and inquiries made on behalf of litigants for and about delivery of the reserved judgments (see the chronology below at [49] to [78] above).

**C. *Failure to adhere to an undertaking to the 2014 Conduct Division to report to the Chief Judge on a regular basis as to his general wellbeing and mental health condition***

46 As the chronology at [49] to [78] below under the heading of Particular D demonstrates, in the period from 14 September 2016 to 7 February 2018 Judge Maiden failed to report to the Chief Judge on a regular basis as required by this undertaking. His only report in that period was a limited one, by a letter of 19 April 2017, followed by delivery to the Chief Judge on 8 May

2017 of two medical reports relating to Judge Maiden's eyesight (see [71] below).

**D. Failure adequately or at all to respond to communications from the Chief Judge and the Commission**

- 47 The following chronology of events is relied on in Section D of the Particulars and is established by the evidence. Where Judge Maiden did not reply to communications to him, the words "no reply" are emboldened. Communications which contained offers of assistance (usually by way of time out of court) are indicated by the emboldened words "assistance offered". Where Judge Maiden was not allocated matters for hearing to give him judgment writing time, the words "time given" are emboldened.
- 48 Before giving that chronology, we note that the events forming part of it were preceded by a number of meetings between the Chief Judge and Judge Maiden in 2015 and in 2016, prior to 28 April 2016, at which Judge Maiden's outstanding reserved judgments were discussed and reference was made to his health. At none of these meetings did Judge Maiden attribute delays in delivery of his judgments to any eyesight issues that he had.

*Chronology of communications*

- 49 At a meeting with the Chief Judge on 28 April 2016, the Chief Judge discussed Judge Maiden's outstanding judgments with him. As a result, Judge Maiden took leave from 9 to 13 May 2016 inclusive to assist him to write the judgments. According to the Chief Judge's note of the meeting, Judge Maiden informed the Chief Judge that his health issues were "resolving well".
- 50 On 24 May 2016 the Chief Judge wrote to Judge Maiden drawing attention to six outstanding reserved judgments (in the matters of *Pike*, *Reilly*, *Nicholls*, *Thornbury*, *Sarhan* and *Lewis*), four of which had been reserved for more than six months ("the 24 May 2016 List"). The Chief Judge asked Judge Maiden to inform him when he proposed to deliver each judgment and requested that

Judge Maiden make an appointment to see him if he required further assistance to deal with the outstanding judgments. **Assistance offered.**

- 51 On 7 June 2016 Judge Maiden wrote to the Chief Judge noting a difficulty he had in reading for any extended period of time and the possibility that he may undergo day eye surgery. He had the operation on 5 July 2016.
- 52 At a meeting on 30 June 2016, the Chief Judge reaffirmed his concerns about Judge Maiden's outstanding judgments. Judge Maiden informed the Chief Judge that the reserved judgment in *Nicholls* would be delivered the following day and *Pike* the following week. Those judgments were not delivered as promised. **Assistance offered.** This meeting is referred to further at [176] to [187] below.
- 53 On 15 July 2016 the Chief Judge wrote to Judge Maiden stating he was "deeply concerned" about his outstanding judgments and enquired when three outstanding judgments contained on the 24 May 2016 List would be handed down (*Pike, Reilly* and *Thornbury*). The Chief Judge stressed that it was "imperative that these matters are finalised". Whilst Judge Maiden did not respond to the Chief Judge, Judge Maiden's lack of response is not particularised and is therefore not taken into account in determining whether the complaint against him has been substantiated. **Assistance offered.**
- 54 At a meeting on 16 August 2016, Judge Maiden informed the Chief Judge that most of his health issues had resolved and that he was seeing a psychiatrist every three months. Judge Maiden stated that he would possibly complete *Reilly* the next weekend and *Thornbury* the week after. This meeting is referred to further at [176] to [187] below.
- 55 On 8 September 2016 the Chief Judge wrote to Judge Maiden emphasising the necessity for judgments in *Reilly* and *Thornbury*, reserved since August 2015, to be delivered immediately. The Chief Judge drew attention to 10 outstanding reserved judgments as at 11 August 2016 according to the Court's civil registry, of which three matters had been listed for judgment with

the listings being subsequently vacated. The Chief Judge warned Judge Maiden that undue delay may amount to judicial misconduct. The Chief Judge requested a written response by 15 September 2016. **Assistance offered.**

- 56 On 14 September 2016 Judge Maiden wrote to the Chief Judge indicating that he hoped to deliver judgment in *Reilly* "this Friday" and in *Thornbury* the "following week". Judge Maiden advised that he hoped to have all outstanding matters up to date as quickly as possible.
- 57 On 20 September 2016 the Chief Judge wrote to Judge Maiden asking for advice in writing as to whether the matter of *Reilly* had been listed for judgment. The Chief Judge noted that *Reilly*, *Thornbury* and *Sarhan* had been reserved in excess of five months. **Assistance offered. No reply.**
- 58 On 26 September 2016 the Chief Judge wrote to Judge Maiden noting that he had not received any advice from him as to whether *Reilly* had been listed for judgment and requesting a written response that day. **No reply.**
- 59 On 27 September 2016 Judge Maiden failed to attend a meeting with the Chief Judge scheduled for 4:15pm.
- 60 On 4 October 2016 the Chief Judge wrote to Judge Maiden advising that it was "absolutely essential" that he deliver the judgments in *Reilly* and *Thornbury* without further delay. The Chief Judge emphasised again Judge Maiden's obligation to deliver judgments in a timely fashion. The Chief Judge indicated that Judge Maiden had not been allocated any matters the previous Friday or on 4 October 2016 to assist with judgment writing time. **Time given. No reply.**
- 61 On 10 October 2016 the Chief Judge had a chance meeting with Judge Maiden at which the Chief Judge referred to the time he had rostered Judge Maiden out of court to enable him to write his reserved judgments and said

that he could not help him unless he came to see him. **Time implicitly offered.**

- 62 On 12 October 2016 the Chief Judge wrote to Judge Maiden advising that no hearings had been allocated to him from Friday 30 September 2016 to enable Judge Maiden to attend to outstanding judgments and requesting advice as to when judgments in *Reilly* and *Thornbury* would be delivered. The Chief Judge asked whether Judge Maiden required further judgment writing time. **Time given. Assistance offered. No reply.**
- 63 On 12 December 2016 the Chief Judge wrote to Judge Maiden drawing attention to the 10 outstanding reserved judgments referred to in his letter of 8 September 2016. The Chief Judge said that he was “deeply concerned” for Judge Maiden and the reputation of the District Court, and requested that Judge Maiden make an appointment to see him. **Reference to judgment writing time offer. No reply.**
- 64 On 31 January 2017 the Chief Judge wrote to Judge Maiden drawing attention to 13 outstanding reserved judgments, comprising the 10 reserved judgments referred to in the Chief Judge's letters of 8 September 2016 and 12 December 2016 and an additional three reserved judgments. The Chief Judge raised the possibility of a reference being made by him to the Judicial Commission under s 39B of the Act and sought a response with the statement of any reason why a referral should not be made. **No reply.**
- 65 On 3 April 2017 the Chief Judge forwarded to Judge Maiden a letter from the President of the Law Society dated 29 March 2017 seeking assistance in expediting delivery of the judgment in *Sarhan*, which had been reserved on 4 February 2016. The Chief Judge indicated that he was prepared to provide Judge Maiden with time out of court to enable him to finalise outstanding judgments. **Assistance offered.** Whilst Judge Maiden did not respond to the Chief Judge, Judge Maiden's lack of response is not particularised.

- 66 On 7 April 2017 the Chief Judge wrote to Judge Maiden expressing concern about four matters reserved for over a year (namely *Reilly, Thornbury, Sarhan* and *Lewis*). The Chief Judge indicated that no matters would be allocated the following week so that Judge Maiden could attend to his reserved judgments. **Time given.**
- 67 No hearings were allocated to Judge Maiden from 7 April 2017 up to and including 2 May 2017 to enable him to attend to reserved judgments.
- 68 In a letter to the Chief Judge dated 19 April 2017 Judge Maiden noted a problem he had with reading and that he would be seeing an eye surgeon on the following Monday (Judge Maiden subsequently had further eye surgery on 16 May 2017). Judge Maiden did not indicate when his reserved judgments would be delivered. In his letter, Judge Maiden requested that he be rostered to criminal work.
- 69 On 20 April 2017 the Chief Judge wrote to Judge Maiden indicating that he would not be rostered in court until completion of judgments reserved beyond 12 months. The Chief Judge requested that Judge Maiden inform him when the judgments had been delivered and provide him with advice concerning his consultation with the eye surgeon. **Time given. No reply.**
- 70 On 27 April 2017 the Chief Judge wrote to the Judge Maiden drawing attention to 13 reserved judgments that remained outstanding, 6 of which would be outstanding for over 12 months by the end of May 2017. The outstanding judgments included four on the 24 May 2016 List (*Reilly, Thornbury, Sarhan* and *Lewis*). The Chief Judge asked that Judge Maiden inform him of his progress in delivering them. The Chief Judge confirmed that Judge Maiden would not be rostered to sit in court the following week, with the exception of any part heard matters, to further assist him to attend to outstanding judgments. **Assistance offered. No reply.**



- 71 On 4 May 2017 the Chief Judge received medical reports of Dr Michael Jones, ophthalmic specialist, dated 27 September 2016 and 25 April 2017 relating to Judge Maiden's eyesight.
- 72 On 8 May 2017 the Chief Judge wrote to Judge Maiden noting that he had received no reply to his letter of 27 April 2017 and that it appeared that none of the reserved judgments had been delivered. The Chief Judge indicated that a criminal trial had been allocated to Judge Maiden. The Chief Judge informed Judge Maiden that reports of Dr Lock and Dr Jones concerning his eyesight would be forwarded to the Commission and enclosed copies of them. **No reply.**
- 73 On 8 May 2017 the Chief Executive of the Commission wrote to Judge Maiden requesting that he forward by 12 May 2017 a list of all matters in which he had reserved judgments, including a reference to the date on which each judgment was reserved. **No reply.**
- 74 On 9 May 2017 the Chief Judge wrote to Judge Maiden regarding the matter of *Skocic*. He forwarded correspondence from senior counsel advising that the delay in judgment delivery in that matter was causing the plaintiff considerable distress. The Chief Judge asked Judge Maiden to attend to finalisation of the judgment without further delay. **No reply.**
- 75 On 4 July 2017 the Chief Judge wrote to Judge Maiden advising that senior counsel in the matter of *Skocic* had telephoned the Chief Judge's chambers regarding the delay in delivery of judgment. The Chief Judge requested Judge Maiden to deliver judgment in *Skocic* without delay and repeated the offer of time out of court to enable delivery of his outstanding judgments. **Assistance offered. No reply.**
- 76 On 14 July 2017 the Chief Judge wrote to Judge Maiden advising that the Law Society of New South Wales had again contacted the Chief Judge's chambers regarding the delay in delivery of judgment in *Sarhan*. The Chief Judge requested Judge Maiden to deliver judgment without delay and

repeated the offer of time out of court to enable delivery of outstanding judgments. **Assistance offered. No reply.**

77. On 16 November 2017 the Chief Judge again wrote to Judge Maiden regarding the matter of *Sarhan*. He forwarded correspondence from the President of the Law Society seeking assistance in expediting judgment in that matter. The Chief Judge asked Judge Maiden to deliver the judgment without further delay, and repeated his offer of time out of court to enable him to deliver his outstanding judgments. **Assistance offered.** Whilst Judge Maiden did not reply to the Chief Judge, Judge Maiden's lack of response is not particularised.

78. Section D of the Particulars concludes with this letter of 16 November 2017. Our consideration of this aspect of the complaint against Judge Maiden is accordingly confined correspondingly. For completeness, and to put the prior communications into context, we add however that there were subsequent letters from the Chief Judge to Judge Maiden of 1 and 6 February 2018 concerning outstanding reserved judgments and offering him time out of court to deal with them. Judge Maiden replied to these on 7 February 2018 and accepted the offer of time out of court. Seven long overdue judgments remained outstanding when Judge Maiden was given three months out of court from March 2018 to write them.

#### *Comments on chronology of communications*

79. Subject to consideration of the matters relied upon by Judge Maiden as excuses or explanations for his conduct, considered at [120] to [156] below, the above chronology reveals extreme recalcitrance on his part, notwithstanding the Chief Judge's repeated offers to provide assistance to him by allowing him time out of court to prepare his outstanding judgments. According to the Particulars, there were some 12 written communications from the Chief Judge to which Judge Maiden did not reply at all and one from the Commission. The Chief Judge offered assistance (usually, expressly by way of giving Judge Maiden time out of court), or gave it, on 16 occasions.

- 80 Unless adequately excused or explained, this conduct constituted a serious breach by Judge Maiden of his judicial duties. In our view these duties extended to responding to communications from the head of the court of which Judge Maiden was a member on matters relating to the maintenance of its reputation and its administration. Judge Maiden accepted this to be so in his evidence before the Division.
- 81 The Chief Judge of the District Court bore, and bears, a heavy load in administering a Court which comprised about 70 judges at the relevant times, deals with a great diversity of judicial work and sits at a number of different places in New South Wales. The maintenance of its efficiency and reputation is of vital importance to the administration of justice in New South Wales and central to the Chief Judge's duties. Undue delays in the delivery of judgments harm the interests of the litigants concerned and damage the reputation of the Court. The Chief Judge's written communications to Judge Maiden were at all times courteous and appropriately firmly expressed. A judge acting in accordance with his or her judicial duties would have responded to the communications to which Judge Maiden did not reply and would have sought to facilitate the Chief Judge's performance of his duties rather than, as was the effect of Judge Maiden's conduct, to hinder their performance. There is no basis in the evidence for concluding that the Chief Judge's oral communications with Judge Maiden were any less appropriate than those in writing. We therefore proceed on the basis that they were also courteous and appropriately firmly expressed. We discuss the respective duties of the Chief Judge and Judge Maiden further at [167] to [175] below.
- 82 This prima facie departure from proper judicial conduct was exacerbated by Judge Maiden's experience with the 2014 Conduct Division Inquiry which, in part, dealt with admitted delays on his part in responding to the Judicial Commission (see [33] and [35] above). He accepted in his evidence given during that Inquiry that these delays were "a problem" for him. Yet he repeated that conduct, in a more extreme form, in 2016 and 2017.

83 Moreover the failures to respond to the Chief Judge only ceased after Judge Maiden had received in November 2017 the first version of the Particulars of Complaint for this Inquiry, which, as did the later version, identified his failure to respond adequately or at all to communications from the Chief Judge and the Commission as one of the bases of the complaint against him (see [20] above).

**E. Failure to undergo psychiatric examination required by the Commission**

84 Following the Chief Judge's reference of Judge Maiden to the Commission by letter of 8 February 2017, the Commission wrote to Judge Maiden on 14 February 2017 exercising its power under s 39D(1) to require him to submit to an examination by a psychiatrist approved by the Commission. By letter in response of 20 February 2017, Judge Maiden agreed to comply with this requirement and enclosed an authority for his treating psychiatrist, Professor Philip Mitchell, to make his examination notes available.

85 By letter of 22 March 2017 to Judge Maiden, the Commission advised of a time and place for Judge Maiden to see Dr Michael Diamond, a consultant psychiatrist. As well, the Commission requested that Judge Maiden provide a report from Professor Mitchell concerning his treatment of Judge Maiden and indicated that the cost of that report, and of his examination by Dr Diamond, would be met by the Commission. As Judge Maiden did not attend the appointment with Dr Diamond, the Commission, by letter of 4 April 2017, sought an explanation from him for his non-attendance. Judge Maiden did not reply.

86 By letter of 11 April 2017, the Commission advised Judge Maiden that, as he had not attended the appointment with Dr Diamond, it had determined to deal with the reference from the Chief Judge as if Judge Maiden were the subject of a complaint (s 39D(2) of the Act). It invited Judge Maiden to make whatever submissions he wished with respect to the matter, including as to whether the complaint should be summarily dismissed or should be referred to the Conduct Division under s 21(1) of the Act, or to the Chief Judge under s

21(2) of the Act. Again, Judge Maiden did not reply. By letter of 8 May 2017, the Commission sought from Judge Maiden information as to the reserved judgments that he had outstanding, but yet again did not receive a reply. Not having received a response to its letters, the Commission advised Judge Maiden by letter of 16 May 2017 that it had determined that the complaint against him should be referred to a Conduct Division for examination.

87 The only response to this Particular of Complaint provided by Judge Maiden to the Division in his witness statement was as follows:

“I agreed to attend a psychiatrist nominated by the Judicial Commission but failed to attend the appointment with Dr Diamond on 1 April 2017, because I thought that there was little point in seeing him until the Judicial Commission had spoken to Professor Mitchell and obtained his reports and notes.

I have subsequently apologised to Dr Diamond and to Mr Schmitt. I have ensured that I have attended every other appointment made for me by the Judicial Commission including those with Dr Diamond. In the event I am referred to a practitioner in the future I will ensure that I comply with the directions of the Commission.”

88 Judge Maiden’s failure to attend the appointment with Dr Diamond constituted a breach of a statutory obligation imposed upon him by s 39D(1) of the Act. That subsection provides that the Commission “may require” a judicial officer to undergo an examination such as that Dr Diamond was engaged to conduct. The corollary of this permission granted to the Commission is that a judicial officer is subject to a corresponding obligation to submit to the examination.

89 In any event, it was in our view incumbent upon Judge Maiden, as part of his general law judicial duties, to cooperate with the Commission, the body entrusted by Parliament with oversight of the judiciary in New South Wales, and to comply with such reasonable requests as it might make.

90 As Judge Maiden was apparently able to attend the appointment but chose not to, his conduct constituted a prima facie breach of his judicial duties. His belated explanation that he thought that “there was little point in seeing [Dr Diamond] until the Judicial Commission had spoken to Professor Mitchell and obtained his reports and notes” does not excuse his conduct, particularly as

he did not proffer that excuse in 2017, or even in 2018, and did not, prior to the appointment, request the Commission to defer it for that or any other reason. Whether any of Judge Maiden's personal circumstances excuse or mitigate that prima facie breach are considered at [120] to [156] below.

91 We should add that this prima facie breach was exacerbated by the fact that the 2014 Conduct Division Inquiry extended to consideration of Judge Maiden's "failure to provide the Judicial Commission with timely responses to its advice of the complaints it had received" (see [33] above). The Conduct Division's conclusions concerning that matter (see [35] above) would, or at least should, have driven home to Judge Maiden the importance of him properly responding to advice and requests from the Commission, if he were to comply with his judicial duties.

***F. Failure to adhere to an undertaking to the Division to deliver reserved judgments***

92 As noted above at [22] above, this particular relates to an undertaking given by Judge Maiden to the Division to deliver judgments in seven identified proceedings by 12 June 2018, and to do so in a particular order.

93 The judgments were in fact delivered by the required date, but not in the required order. Delivery of four of them near the end of the permissible period for delivery did not constitute a breach of the undertaking and is not therefore relevant to this particular. The additional delay in their delivery that occurred during the period to which the undertaking related is however relevant to Particular B concerned with unacceptable delays in the delivery of judgments.

94 In his witness statement provided to the Division, Judge Maiden sought to explain his failure to deliver the judgments in the specified order as follows:

"I did this because I thought it preferable for the litigants concerned for the judgments to be delivered sooner rather than later. I did not intend any discourtesy to the Judicial Commission or to disregard the undertaking, but the judgments were delivered as soon as they were ready."

95 If Judge Maiden thought it was in the interests of litigants to depart from the order in which he had undertaken to deliver them, he should have sought permission from the Conduct Division to do this. His failure to seek that permission and his consequent preparedness to disregard the terms of the undertaking are reasons why this breach, although not to be regarded as of a high level of seriousness, cannot be treated as insignificant.

**G. Failure to adequately take into account Ms Synge's interests**

96 As noted above in [23], this particular alleged that Judge Maiden discharged a jury in a criminal sexual assault trial without sufficient regard to the "needs" of the complainant, Ms Synge.

97 The facts forming the basis for this particular were as follows:

98 On 15 November 2017 Ms Synge gave evidence before Judge Maiden and a jury of 12 at the trial of Mr Robert Ljubicic relating to a charge of sexual intercourse with Ms Synge without her consent. Ms Synge's cross-examination was incomplete at the end of the day. At the commencement of the next day, Judge Maiden discharged the jury following the non-attendance of a juror. As the transcript reveals, in the course of discussion, the Crown Prosecutor told Judge Maiden that Ms Synge's evidence had been recorded but not filmed.

99 On Monday 20 November 2017 the trial recommenced before Judge Maiden and a different jury. Ms Synge gave oral evidence-in-chief but was yet to be cross-examined at the end of the day. On the next day Judge Maiden raised a question about the admissibility of certain evidence proposed to be tendered by the Crown Prosecutor and, after argument occurred, delivered judgment rejecting the evidence. After judgment was delivered, the Crown Prosecutor raised the possibility of an interlocutory appeal to the Court of Criminal Appeal under s 5F of the *Criminal Appeal Act 1912* (NSW) and the following discussion ensued:

"CROWN PROSECUTOR: ... If indeed the matter is taken on appeal, your Honour, I am advised that the Court of Criminal Appeal would not be able to deal with this before Christmas, your Honour, so just looking here.

HIS HONOUR: **We had one the other week that was dealt with the next day.**

CROWN PROSECUTOR: It can happen but--

HIS HONOUR: Yes, it can happen.

CROWN PROSECUTOR: That is true, your Honour, but I am just not that hopeful, that is all. Look, I will get some further advice from my office and then I will advise your Honour's Associate" (emphasis added).

100 At the commencement of the following day, Wednesday 22 November 2017, the Crown Prosecutor informed Judge Maiden as follows:

CROWN PROSECUTOR: Your Honour, perhaps if I can just update you and just put on the record that I rang your Associate yesterday some time around lunchtime, your Honour, and I think your Honour answered the phone and we had a conversation where I indicated that the matter was being considered by my office in terms of whether to appeal. I can now tell your Honour that **that appeal has been lodged. I'm also told that the matter is listed for call over tomorrow, your Honour, Thursday, in the Court of Criminal Appeal, and that my office will be endeavouring to have the matter heard tomorrow.** No guarantees that that in fact will occur of course. In the alternative I'm told that there might be some time on Friday in the Court of Criminal Appeal if we don't get it on Thursday, so once again my office will be endeavouring to have it heard--

HIS HONOUR: See how we go.

CROWN PROSECUTOR: Exactly. But what it boils down to is this, your Honour; I'd indicated to your Honour in the phone call that we'd be attempting to perhaps complete the evidence of the complainant regardless because it is a separate area from that matter which is the subject of the appeal. I have spoken with my learned friend about that and I think my friend needs to get some instructions on whether that was a course that she sought to adopt" (emphasis added).

101 After a short adjournment the Crown Prosecutor indicated that he would not be seeking to continue with Ms Synge's evidence before the appeal was concluded and Judge Maiden noted that the jury had previously been told that the trial would finish during the week then in progress. Counsel for Mr Ljubicic also said that she was concerned about the jury "having effectively been out all week" and the Crown Prosecutor said that "bearing in mind our complainant is coming to and from Queensland, we were considering the



possibility of a video link as one option". Judge Maiden then said that he would discharge the jury, saying "I don't want to have them worrying about what's going on".

102 As it transpired, the appeal to the Court of Criminal Appeal, under s 5F(3A) of the *Criminal Appeal Act 1912* (NSW), was heard and determined by that Court on the next day, 23 November 2017. Judge Maiden's evidentiary ruling was reversed.

103 Relevant to the complaint made by Ms Synge is a Memorandum from the Chief Judge to District Court Judges dated 26 May 2017 which was in the following terms:

**"1. Section 5F appeals**

May I remind Judges that trials should not be vacated because the parties have informed the Judge that an appeal is to be made against an interlocutory judgment or order to the Court of Criminal Appeal. In *RKF v R* [2016] NSWCCA 116, RA Hulme J said at [66]:

'Practitioners involved in proceedings in which one party proposes to bring s 5F proceedings in this Court should alert the trial judge to the possibility that the Court *may* be able to offer an expedited hearing and determination of the matter so as to enable the proceedings to continue with minimal disruption. The Registrar is readily available by way of telephone and/or email to respond to inquiries about whether it may be possible for the Court to accommodate an urgent or at least early hearing of such applications.'

The Chief Justice agreed (at [55]).

The policy of the Court of Criminal Appeal is as expressed by RA Hulme J.

Whilst the Court of Criminal Appeal cannot guarantee that a Court may be assembled, in any given case, the Court is prepared to do so if at all possible.

If there is any suggestion of proceedings being brought pursuant to s 5F that might impact upon a trial commencing, or continuing, one or the other of the parties should make urgent contact with the Registrar of the Court of Criminal Appeal by telephone (9230 8717) or email ([cca.registrar@justice.nsw.gov.au](mailto:cca.registrar@justice.nsw.gov.au)) to see whether an urgent hearing can be arranged.

I ask that you act with firmness to ensure that a s 5F application disrupts the progression of the trial as little as possible."

- 104 In oral evidence given to this Division, Judge Maiden said that he was not aware of the Chief Judge's Memorandum but was aware of the decision in *RKF v R* to which it referred, and was aware of the policy of the Court to seek to minimise disruption to trials in the event that a s 5F appeal was lodged.
- 105 On 28 November 2017 the trial commenced, for the third time, and the complainant gave evidence for the third time. At its conclusion, the accused was acquitted.
- 106 In his letter to the Commission dated 10 August 2018 in response to Ms Synge's complaint, Judge Maiden said that when discharging the first jury he had not known that "because the complainant had chosen to give evidence in Court and not in the witness room, her evidence was not visually recorded". The transcript referred to above at [98] however demonstrates that Judge Maiden did in fact know this.
- 107 His response to the complaint concerning his discharge of the second jury was as follows:
- "In respect of the second trial, the jury was discharged after I was told that the section 5F appeal was unlikely to be heard for possibly five or more days. I had told the jury initially that this would be a short trial (less than five days is my memory), and thus when the court officer expressed that there was concern amongst the jurors that the matter would take considerably longer than they had been told, rather than keep them waiting for the appeal result, I decided the best option was to discharge."
- 108 It is incorrect that the information that Judge Maiden had was that the appeal "was unlikely to be heard for possibly five or more days". As the transcript records, he was told before he discharged the jury that the appeal was listed for call-over the next day, 23 November 2017, and that the Crown would be endeavouring to have it heard on that day. Moreover, as noted above in [104], Judge Maiden was aware of the decision in *RKF v R* which suggested that there was a realistic chance that those endeavours would be successful. He was also aware, as the transcript of 22 November 2017 evidences, that a s 5F appeal from a decision "the other week" had been dealt with by the Court of Criminal Appeal on the day following the decision (see [99] above).

- 109 As Judge Maiden's senior counsel pointed out in his opening address to the Division, there were a number of matters to which Judge Maiden could properly have had regard in considering whether to discharge the second jury, including that the jury had been told that the trial would complete within the week, that counsel were not available to appear on Friday 24 November and that, due to their desire to attend a funeral, counsel had requested that the Court not sit on Monday 27 November. What is of concern however is that Judge Maiden appears to have had no regard to the court policy of minimising the disruption to trials by s 5F appeals and the realistic possibility that the subject s 5F appeal would be heard and determined on Thursday 23 November 2017, as it was. More particularly, in disregarding this policy in this case, Judge Maiden failed to take into account Ms Synge's interests in not having to give evidence again, which would occur if the second jury were discharged.
- 110 Judge Maiden should have had regard to this policy, of which he was undoubtedly aware and which was designed to advance the administration of justice. The unnecessary discharge of juries causes expenses to be incurred, the disposal of litigation to be delayed and, potentially, inconvenience and distress to jurors and witnesses. Whether Judge Maiden should or should not have discharged the second jury is not for us to determine. What is important is that he failed to have regard to an important consideration relevant to the administration of justice. In doing so, he failed to fulfil his judicial duties.
- 111 We should add that the complaint of Ms Synge with which we are presently dealing was not one that might have been summarily dismissed by the Commission by reason of it forming an opinion that "the complaint relates to the exercise of a judicial or other function that is or was subject to adequate appeal or review rights" (s 20(1)(f)) of the Act) as neither Ms Synge nor any other party had an effective right to appeal or obtain judicial review in respect of Judge Maiden's decision to discharge the second jury.
- 112 We should also add that we reject the, at least implicit, submission put in the opening address given on behalf of Judge Maiden that it is not part of the

judicial function to seek to minimise inconvenience and distress to witnesses. Senior Counsel for Judge Maiden submitted that:

“Witnesses, whether they be complainants or any other witness, are subject to a duty of not being treated badly. But there is no question of fairness. If a witness is required to be at a trial, the witness is required to be at a trial.”

113 It has long been accepted that in administering justice courts should do more than attempt to ensure that witnesses are not being “treated badly”. Concern for their interests is important to the maintenance of the efficiency and reputation of the judicial system. Statutory recognition of this is to be seen in the detailed provisions of Part 5 and 6 of Chapter 6 of the *Criminal Procedure Act 1986* (NSW) which require courts to adopt special, identified procedures to protect the interests of complainants in sexual offence proceedings and of vulnerable persons.

**H. Making false assertions in response to the complaint made by Ms Synge**

114 This particular alleges that Judge Maiden “made false statements in relation to the complaint by Ms Synge and did so with indifference to the truth of the assertions made in his response”.

115 The first statement complained of is the statement in Judge Maiden’s letter of 10 August 2018 to the Commission that he was not aware that Ms Synge’s evidence to the first jury was not visually recorded (see [106] above). The transcript demonstrates that to be incorrect (see [98] above).

116 The second statement is Judge Maiden’s assertion in that letter that he was “told that the s 5F appeal was unlikely to be heard for possibly five or more days”. This was also incorrect, as indicated in [108] above.

117 Thirdly, Dr Diamond recorded in his report of 26 October 2018 that Judge Maiden told him that “he realised that he had not made an allowance for the complainant because he did not know that she was travelling from Brisbane for each hearing that was delayed”. The transcript however demonstrates that Judge Maiden was told that the complainant lived in Queensland (see

[101] above). As well, the complainant had given evidence before Judge Maiden of that fact.

118 We conclude that the allegation in the particular that these statements were made with reckless indifference to their truth is established. The statements were each made on important occasions. The first two were in a letter to the Commission which was exercising its statutory obligation to investigate complaints made to it about judicial officers. It was part of Judge Maiden's judicial duties to respond to the Commission promptly and carefully. He had a duty to do likewise in supplying information to Dr Diamond who, as Judge Maiden knew, had been appointed by the Commission to advise it on whether Judge Maiden had any impairment affecting the performance of his judicial duties.

119 It is important that Judge Maiden did not have to be solely reliant on his memory to prepare his response to the complaint. On the contrary, before Judge Maiden made the subject statements to the Commission and Dr Diamond, he asked for and was provided with a copy of the transcripts of the Ljubicic trials. His letter to the Commission of 10 August 2018 quoted passages from the transcript that Judge Maiden seemingly regarded as exculpatory. His preparedness nevertheless to make the statements the subject of this particular without any apparent check of them against the transcript reflects poorly on him and supports the allegations that he made them with reckless indifference to their truth.

## **MATTERS OF POSSIBLE EXCUSE OR MITIGATION**

### ***Judge Maiden's depressive illness***

120 As noted at [34] above, the 2014 Conduct Division did not form the opinion that the matters it examined could justify parliamentary consideration of the removal of Judge Maiden from his judicial office because Judge Maiden suffered from a depressive illness that was under-treated at the time of the events the subject of the complaints. In its report, the 2014 Conduct Division recorded that his illness had been successfully addressed by medical

treatment, made certain recommendations and noted certain undertakings given by Judge Maiden (see [37] above).

- 121 To this Conduct Division, Dr Diamond gave evidence that Judge Maiden has not been clinically depressed since late 2014, when the previous Conduct Division proceedings took place. Judge Maiden did not attempt to contradict or challenge this opinion. As well, we note that Judge Maiden did not seek to attribute his conduct which is the subject of the Particulars of Complaint relevant to this Inquiry to his depressive illness. In these circumstances, we are satisfied that this conduct which is the subject of the Particulars was not caused by any depressive illness. We add the qualification that the first three delayed judgments the subject of Particular B were reserved in 2014, before the date of the 2014 Conduct Division Report. The significant delays in relation to them (including that which brought the delay in delivery of the longest reserved judgment past 12 months) were however in 2015.
- 122 Dr Diamond did identify some symptoms of depression that Judge Maiden exhibited in early 2018 and later in 2018, due to particular stresses to which he was subject at those times, but opined that those symptoms did not reach the threshold of severe disabling depression. Dr Diamond said that they were of a different and lower magnitude to the severe impairment suffered prior to 2015 when Judge Maiden's depression was untreated.

***Reading difficulties and other health issues***

- 123 There does not appear to have been any suggestion made to the 2014 Conduct Division that any issues with Judge Maiden's eyesight impeded his work as a judge. Consistently with this, Judge Maiden said in his witness statement to this Division:

"I experienced no significant difficulties in my work until the middle of 2015 when I experienced an increasing difficulty in reading due to an aggravation of my double vision and associated visual problems secondary to diabetes."

- 124 Documents in evidence before the Division indicate that, although in the period from 6 November 2014 to 3 May 2016 Judge Maiden's eyesight was

far from perfect, he did not attribute his delays in delivering reserved judgments to any eye issues. These documents comprise notes of his attendances on his general practitioner, on the Chief Judge and on Ms Lisa Lorentz, his treating psychologist, in which various reasons for his delays were referred to. If Judge Maiden's eyesight had been a significant problem for him in this period, we consider that reference would have been made to it in at least some, if not many, of those notes.

- 125 That view is supported by the fact that he undertook to the 2014 Conduct Division to report regularly to the Chief Judge about his "general wellbeing and mental health condition" (see [19] above) and did so on seven occasions prior to June 2016 without raising any eyesight issue.
- 126 For example, the Chief Judge's note of his meeting with Judge Maiden on 28 April 2016 records that Judge Maiden informed the Chief Judge that his health issues were "resolving well". In evidence before the Conduct Division, Judge Maiden implicitly denied the accuracy of that note but bearing in mind its contemporaneity, the Chief Judge's practice of making notes as described in his evidence, the lapse of almost three years before Judge Maiden recounted his recollection and Judge Maiden's absence of actual recollection of the words spoken at the meeting, the Chief Judge's note should be accepted as accurate.
- 127 By letter of 7 June 2016 Judge Maiden told the Chief Judge for the first time that he had been "having some problems with [his] sight" and "having difficulty in reading for any extended period of time". Consistently with that letter, ophthalmic surgeon Dr Michael Jones informed Dr Dennis Lowe, his referring ophthalmologist, by letter of 9 June 2016 that Judge Maiden had been having increasing problems with double vision, in particular in reading. Also, on 30 June 2016, Judge Maiden told the Chief Judge that he had had vision problems for some time and sought one day's leave to enable him to have a corrective eye operation on 5 July 2016. These documents are consistent with the following evidence contained in Judge Maiden's witness statement:

“In May 2016 in order to comply with my undertaking, I took one week’s leave to do reserved judgments. On the first day it became clear to me that I was unable to read the material in order sufficiently to do so. I found that within about an hour of reading a headache had developed which prevented me continuing to work.”

- 128 The treatment notes of Judge Maiden’s ophthalmologist, Dr Jane Lock, record that he had surgery on 5 July 2016 and, on examination two days later, had no diplopia (that is, double vision). Dr Ian Wechsler, an expert ophthalmologist engaged by the Judicial Commission, agreed in evidence that he gave before the Division that to the extent that Judge Maiden gradually developed diplopia thereafter “that related to distance which was able to be resolved by head tilt”. He said that this was clear from Dr Lock’s notes.
- 129 The Chief Judge’s note of his meeting with Judge Maiden on 16 August 2016 states that “Judge Maiden said that he was in ‘the best space’ he has been in. Most of his health issues have resolved”. We accept the accuracy for this note for similar reasons to those we gave for accepting the accuracy of his note of the 28 April 2016 meeting.
- 130 Clinicians’ notes made in October, November and December 2016 record that Judge Maiden’s vision was much improved then. Dr Lock recorded this on 21 October, Ms Lorentz on 15 November and 6 December and Professor Mitchell on 15 December 2016. Dr Wechsler said in evidence that there was a “slight discrepancy” between these records and the history that he took from Judge Maiden on 19 December 2017, that is, 12 months later, in that Judge Maiden stated to him that he had much more difficulty with his sight in this period than that which the medical records indicated. Dr Wechsler agreed however that he had no objective evidence that was inconsistent with the medical notes. In our view the evidence contained in the contemporaneous notes should be preferred to Judge Maiden’s recollection, which was recounted much later, at a time when he was attempting to excuse his delays in delivering judgments, and which may well have embodied some unconscious exaggeration of his difficulties. The same view is applicable to Judge Maiden’s assertion in his witness statement that “[d]uring the latter part of 2016 [his] eyesight had not improved”.



- 131 A record of further vision difficulties is contained in a note of Dr Lock of 29 March 2017 which records that in the period since Judge Maiden had returned to work from holidays six weeks earlier, he had experienced a marked increase in headaches and blurred vision “for near reads for 6hr/day”. In light of the date attributed to the commencement of the increased difficulties, at least it can be said that Judge Maiden’s failure to deliver any of his approximately 10 then reserved judgments in the period from early July 2016 (when he had the eye operation) to six weeks prior to 29 March 2017 cannot be attributed to them.
- 132 Consistent with Dr Lock’s note of 29 March 2017, by letter of 19 April 2017 Judge Maiden advised the Chief Judge that he had had a problem with his “reading sight for some time” and that “[d]oing reserved judgments has been difficult”.
- 133 Judge Maiden had further eye surgery on 16 May 2017. In a letter to Dr Lowe dated 27 July 2017, Dr Jones noted that after it Judge Maiden had single vision and no fatigue. That statement is consistent with the note of Ms Lorentz, his psychologist, of 12 December 2017, which records that “eyesight and reading has improved”. Other records support the conclusion that Judge Maiden’s eyesight was no longer significantly impeding his ability to write judgments in late 2017 and early 2018. Thus, Ms Lorentz’s note of 15 January 2018 implies that he attributed his delays to procrastination, loss of concentration and the absence of his assistant (who was on leave), not to any eye issues, although she does refer to the need for him “to rest his eyes”. Consistent with this, Judge Maiden’s general practitioner, Dr Bruce Greig, recorded on 16 March 2018 that Judge Maiden said that his eyes were “still somewhat problematic but reasonable”. Moreover, in his witness statement Judge Maiden acknowledged that there had been significant improvement in his sight by February 2018. Also, Dr Wechsler recorded in his expert report that Judge Maiden told him that since November 2017 “his near vision symptoms have been markedly improved and ... that he feels that his output with near vision work will be back to par”.

- 134 On 27 July 2018 Ms Lorentz recorded that Judge Maiden said to her that “his eyesight has deteriorated, [he] has double vision and ... this is hindering his ability to read and complete his work again”. Likewise, on 12 October 2018 Dr Greig recorded Judge Maiden as having said that “work [was] difficult with eyesight and gut”. We treat these claims, which were made when he no doubt had this Division’s Inquiry at the forefront of his mind, as involving an element of exaggeration as Judge Maiden’s ophthalmic specialist, Dr Jones, reported on 31 July 2018 that Judge Maiden was “asymptomatic of his double vision” and on 10 August 2018, was “feeling symptomatically very comfortable in his latest glasses with prismatic correction and although there was a very small shift in his refraction, he is coping well visually without the need for change in his glasses”.
- 135 This chronology of events indicates that the evidence that Judge Maiden gave to the Division that the “delay [in delivery of the judgments the subject of Particular B] was entirely the product of my visual impairment and poor health” cannot be accepted, at least so far as visual impairment is concerned. We deal with other aspects of his health elsewhere in this report. Certainly, the Conduct Division accepts that Judge Maiden’s vision difficulties were a significant contributing factor to his delays for a number of months leading up to July 2016 and between February and July 2017 but, on the evidence, they did not contribute in that way during the remainder of the three and a half years from late 2014 to mid-2018. Reference to the list in [40] above of the judgments Judge Maiden delayed in delivering for periods in excess of 12 months demonstrates that much of the delay occurred in that period. The chronology does not support the view that he performed acceptably when his eyesight was satisfactory or that he is likely to perform acceptably in the future if his eyesight is satisfactory. The delays in the past continued regardless.
- 136 The following points however need to be made. First, whilst the evidence does not warrant a conclusion that eye sight issues contributed significantly to Judge Maiden’s delays in delivering judgments in the remainder of the three and a half year period from the end of 2014 to mid-2018, that is not to say that Judge Maiden did not have vision difficulties in that remaining period, but

simply that they were not of such severity that they can be regarded, or indeed were regarded by him, as factors significantly contributing to his delays in delivering reserved judgments.

- 137 Secondly, any reading difficulties experienced by Judge Maiden in that three and a half year period should not be regarded as an excuse for his delays in delivering judgments except to the extent that he advised the Chief Judge of them and sought leave of absence for the period of his incapacity. As is apparent from [127] above, the first time that Judge Maiden told the Chief Judge that he was experiencing difficulties with his eyesight was on 7 June 2016. The second time was on 30 June 2016 when he sought and was granted leave of absence to enable him to have an eye operation on 5 July 2016. Subsequent to the operation, on 16 August 2016, Judge Maiden gave the Chief Judge a positive assessment of his health, without referring to any eyesight difficulties. Judge Maiden next told the Chief Judge of eyesight difficulties he was experiencing on 19 April 2017 but did not advise that he had any such difficulties after his operation of 16 May 2017.
- 138 With these limited qualifications, Judge Maiden did not inform the Chief Judge of any eyesight difficulties he was experiencing and did not seek leave of absence by reason of them.
- 139 Thirdly, Judge Maiden's eyesight problems do not constitute any excuse or even explanation for the misconduct proved in respect of items C, D, E, F, G and H of the Particulars. Most notably, they do not excuse his failure to adhere to his undertaking to the 2014 Conduct Division to report to the Chief Judge on a "regular basis as to his general wellbeing and mental health condition" (Particular C), and his failure to respond to communications from the Chief Judge (Particular D).
- 140 Fourthly, a question remains as to the extent to which Judge Maiden has continuing eyesight difficulties and whether they are of a severity that will, or at least may, affect his ability to perform judicial duties in the future. We now turn to that issue.

*Judge Maiden's present reading capacity*

- 141 As noted earlier in [13], past incapacity is only relevant insofar as it sheds light on present and future incapacity. Consideration of a judicial officer's capacity to perform his or her role requires an assessment of the judicial officer's likely capacity or incapacity in the future, at least for a period extending forward for a number of years. The evidence concerning Judge Maiden's present reading ability and his prognosis for the future is as follows.
- 142 In his report, the ophthalmic expert engaged by the Commission, Dr Wechsler, opined:
- (1) that Judge Maiden's "symptoms and signs suggest a continual near vision impairment which is likely to have a significant impact on Judge Maiden's ability to deliver timely judgments" and that they are likely to significantly impact prolonged close and critical reading;
  - (2) his visual efficiency in general close work is "grossly limited despite successful surgery"; and
  - (3) his vertical muscle disparity with close work is "a significant ophthalmic impairment" which is "likely to significantly impact his close and critical reading required for reading and writing of further judgments".
- 143 These views need to be read subject to Dr Wechsler's explanations and elaborations in his oral evidence. In that evidence, Dr Wechsler agreed that Judge Maiden will always have discomfort from reading and that this will be made worse by the prolonged reading that he is required to undertake in performing his duties as a judge. He said that Judge Maiden "has the capacity [to undertake prolonged reading] but it is difficult for him". Dr Wechsler said that Judge Maiden "still has a capacity to [undertake prolonged reading] as long as he can really put up with symptoms of the double vision and headaches with prolonged close work". Dr Wechsler emphasised that he was "not saying that [Judge Maiden] was not fit for work".

144 Judge Maiden's evidence as to his present reading capacity also suggests that he has a limited capacity to read legal material with full concentration. He gave evidence that at the present time he is able to read for work purposes for "[u]p to an hour probably", followed by a break. After a period of time reading he said that he either has a break or takes his glasses off, or closes his right eye and uses only his left eye to read for a period. He sometimes reads in the supine position with one eye. Reading transcript after 4.00pm is, he said, "where it gets difficult". Nevertheless, he said that he considers himself fit to discharge his judicial functions.

*The reading required in civil and criminal judicial work*

- 145 Judge Maiden accepted that reading is required in criminal cases, including of case law and written submissions. However he said "the law doesn't change much in crime unlike civil where ... counsel give you a pile of cases that you've never heard of and you have to read them". We do not accept that proposition. The New South Wales Court of Criminal Appeal and, less frequently but even more importantly, the High Court are constantly publishing judgments to which trial and sentencing judges in the criminal jurisdiction are required to give close attention to enable them to perform their judicial duties properly.
- 146 Underlying much of Judge Maiden's evidence and his repeatedly expressed desire to sit in crime rather than civil was the proposition that the former requires less reading by the judge than the latter. In opening, his senior counsel said that there was a range of criminal matters that do not require a "significant amount of reading" and he instanced sentence appeals from the Local Court. He also suggested that a summing-up in a jury trial was a mere "set piece".
- 147 Those statements do not accord with the knowledge and experience of the judicial members of this Division. Whilst considerable assistance in formulating summings-up is to be derived from the Criminal Trials Bench Book, careful adaptation to the case in hand is required and formulating the

facts for inclusion in it would ordinarily require the reading of transcript, which may be extensive. Some criminal trials also involve the tender of voluminous documents, although many do not. Sentencing frequently requires the judge to read written submissions, pre-sentence reports and other documents. Rulings on evidence often need to be made in the course of trials, frequently requiring the judge to read precedent cases. Likewise, in the District Court's jurisdiction to hear appeals in criminal matters from the Local Court, considerable reading is often required because such appeals proceed upon the basis of the transcript and documents from the court below, subject to the power of the District Court to allow additional evidence to be led.

- 148 On the other hand, civil work varies considerably in its need for extensive judicial reading. In some commercial cases voluminous documents are of course tendered but there are other civil cases in which there may be only limited documentation for the judge to read. This is so with many personal injury damages cases, such as those arising out of motor vehicle accidents or concerning occupiers' liability.
- 149 The Chief Judge gave evidence along similar lines to these observations and rejected the proposition that, as a general rule, there is less reading for a judge to do when dealing with criminal rather than civil work. He also disagreed with the proposition put to him in examination that "the obligations for a Judge in crime are easier than in civil proceedings when cases are running". He referred in this regard to the occasional need for trial judges in crime to give written reasons on complex matters of evidence and to work continuously during a trial on a draft summing-up, so that the judge is in a position to deliver it as soon as addresses are complete. He also made the point that a judge's engagement in criminal rather than civil work gives him or her less time to prepare reserved judgments as judgment writing time often becomes available in the civil jurisdiction when cases settle.
- 150 In these circumstances we do not consider that if a judge does not have the capacity to undertake civil work, he or she may nevertheless have the capacity to do criminal work. Both jurisdictions potentially require

considerable reading by the judge. No general assumption can be made that the judge will be required to read significantly less if dealing with criminal rather than civil work. Instead, the position varies greatly depending upon the particular cases that happen to come before the judge. Some acknowledgement of this is perhaps implicit in Judge Maiden's response when asked in evidence what assistance the Chief Judge should have given to him. He replied "[p]ut me straight into crime, into short matters". The qualification of "short matters" that he added is significant. Based on his senior counsel's opening statement (see [146] above) that seems to have been a reference particularly to appeals from Local Court but as we have said they often require significant reading (see [147] above).

- 151 In any event, the judge of a court such as the District Court is not entitled to dictate to his or her head of jurisdiction the type of work with which the judge will deal. Certainly, it is appropriate for the judge to express preferences and for the head of jurisdiction to take those preferences into account in rostering judges. In our view, at least in relation to a court such as the District Court which is not formally separated into Divisions, a person cannot be regarded as having the capacity to be a judge of the court unless he or she is able to work in any of the substantial jurisdictions of the court to which the head of jurisdiction may assign the judge. In his oral evidence, Judge Maiden accepted that it is the obligation of judges of the District Court to endeavour to perform their obligations as best they can in whatever jurisdiction the Chief Judge chooses to sit them.

*Conclusion on Judge Maiden's reading difficulties*

- 152 We conclude on the topic of Judge Maiden's eyesight that his present limitations, as described by Dr Wechsler, do not render him presently or prospectively unfit to perform his judicial duties. As Judge Maiden indicated in evidence, it is possible for a judge, as it is for a barrister, to struggle on to get work done, even if the individual's limitations slow or otherwise restrict his or her work. Judge Maiden himself had a successful practice as a barrister,

despite having horizontal and vertical double vision for at least its last five years.

- 153 Nevertheless we take the limitations into account in forming our ultimate opinion as they clearly render, and will render, Judge Maiden's work more difficult than if he did not have them.
- 154 We should note before leaving this topic that, as counselled by *Container Terminals Australia Ltd v Huseyin* [2008] NSWCA 320 at [8] and *Mason v Demasi* [2009] NSWCA 227 at [2], we have in this Report approached the use of notes taken by the various health professionals with caution. We have however concluded that it is appropriate to have regard to them to the extent to which we have referred to them, largely on the basis that the circumstances of the consultations are known or can be inferred, and the comments of present relevance that are recorded are by no means incidental to those consultations but relate directly to the functions being performed by the health professionals. As well, there is a consistency between them, and over time, that engenders confidence in their accuracy.
- 155 We reject the submissions made on behalf of Judge Maiden that the notes should not be used because the practitioners were not called to give evidence and did not provide reports. Whilst that is a consideration relevant to the weight to be attached to the notes, it should not in our view be regarded as decisive as the notes provide contemporaneous evidence of detailed matters which are unlikely now to be within the actual recollection of the practitioners.

#### *Judge Maiden's other health problems*

- 156 For a long time Judge Maiden has regrettably had a number of health issues in addition to his depressive illness and vision difficulties. These have included diabetes and gastric problems. Where appropriate he has taken sick leave. The evidence does not establish that they have hindered him in the performance of his judicial duties to any significant extent, or are likely to do so in the future.



*Mr Woods QC's statement*

157 We should also refer to the written submission made on behalf of Judge Maiden that an evidentiary statement of Mr Greg Woods QC, a former District Court judge, "is incredibly important" to the matters under investigation. Judge Maiden's submission states that Mr Woods was Acting Chief Judge "from time to time" but neither it nor Mr Woods' statement identifies what those times were. Presumably, they occurred during periods that Justice Price, and perhaps his predecessor Chief Judge Blanch, were on leave.

158 In his statement, Mr Woods concludes that in the period between 2014 and Mr Woods' retirement on 12 February 2017 he had the impression that "if the health problems could be overcome, Judge Maiden could have performed his judicial duties satisfactorily". With respect to Mr Woods, his statement is of no significant assistance to us at least for the reason that it is not apparent that he was aware of the nature and detail of the conduct the subject of the present Inquiry, nor of the medical evidence before the Division.

***Judge Maiden's personality***

159 As noted in [121] above, Judge Maiden has not been clinically depressed since he received increased treatment for his underlying depressive disorder in late 2014. Nor does he have any other type of psychiatric illness or disorder. In particular, Dr Diamond's unchallenged opinion was that Judge Maiden does not have any personality disorder, although he has personality characteristics that can be "dysfunctional to a significant degree".

160 In these circumstances, breaches by Judge Maiden of his judicial duties cannot be regarded as excused by his mental condition. It is relevant however to identify, so far as is possible, personality characteristics of Judge Maiden that led him to commit those breaches. The principal reason to do this is to enable an assessment to be made of the likelihood, or otherwise, of Judge Maiden committing similar breaches in the future. It also assists in assessing the seriousness of Judge Maiden's breaches and assessing

therefore the extent to which the reputation of the District Court would or may be harmed by him continuing as a judge of the Court.

- 161 A notable manifestation of his personality characteristics has been in his attitude to the Chief Judge, a topic to which we now turn.

*Judge Maiden's attitude towards the Chief Judge*

- 162 As is apparent from the description at [25] to [32] above of Judge Maiden's background, his work as a barrister included both criminal and civil work. He said that he was "approached by former Chief Judge Justice Blanch to be the resident Judge to run the criminal list at Newcastle and East Maitland District Courts" but, accepting that that was so, Justice Blanch's communication could not conceivably be regarded as a commitment, much less a binding one, that Judge Maiden would only have to do criminal work during his time as a judge of the District Court. Judge Maiden seemed to suggest otherwise in his witness statement provided to the Conduct Division in which he said that the Chief Judge's refusal in mid-2016 of Judge Maiden's requests to be rostered to sit in crime left him with no choices other than to resign or accept a referral of him to the Judicial Commission. There was no reasonable basis for that view as it was open to him to accept, as he should have accepted, the Chief Judge's assignment of him to civil work.
- 163 A judge of a court such as the District Court must be fit to, and prepared to, sit in any of the significant jurisdictions of the Court. A judge is entitled to express his or her preference and the head of jurisdiction should take that preference into account but ultimately it is a matter for the head of jurisdiction to roster judges taking into account that preference and the many other exigencies of the administration of the Court. We add that it was not suggested by Judge Maiden's senior counsel in his examination of the Chief Judge that the Chief Judge did not take Judge Maiden's preference or medical condition into account, nor is there any other reason for thinking that he did not.

- 164 Any suggestion that Judge Maiden was appointed to sit only in criminal work is contradicted by the fact that he did substantial civil work in 2014, including in May and June 2014 when Justice Blanch remained Chief Judge. When Justice Price was appointed Chief Judge in August 2014, Judge Maiden had therefore recently been sitting in the civil jurisdiction for substantial periods. Justice Price was aware of this and decided not change the existing arrangements. In these circumstances, Chief Judge Price had no reason to treat Judge Maiden as a judge dedicated to criminal work only.
- 165 Evidence of Judge Maiden's civil work in 2014 and following years can be found in the list (at [40] above) of some of the civil judgments he reserved in these years. After Justice Price became Chief Judge, he rostered Judge Maiden to sit mainly in civil work until May 2017. Certainly, Judge Maiden expressed to the Chief Judge his preference to sit in crime on a number of occasions, for example on 23 April 2015, but he does not appear to have asserted any entitlement to do so.
- 166 Commencing in 2015 (see [48] above), the Chief Judge persistently, both orally and in writing, expressed concern to Judge Maiden about his delays in delivering reserved judgments. As we have said, the Chief Judge's written communications in 2016 and 2017 were expressed in polite but appropriately firm terms. No possible objection could have been taken to them. It was not suggested to the Division on behalf of Judge Maiden that the Chief Judge's written communications, or indeed any of his oral communications, were of any other character.
- 167 It was both appropriate for, and the duty of, the Chief Judge to press Judge Maiden about his delays in delivering reserved judgments.
- 168 In *Canada (Minister of Citizenship and Immigration) v Tobias* (1997) 142 DLR (4th) 270, Pratte JA of the Canadian Federal Court of Appeal said in this regard:

"The pace of the proceedings before the Associate Chief Justice had been so slow as to certainly give rise to a suspicion that justice was not rendered with

reasonable diligence. In nearly a year, the references had made no real progress ... Once the Chief Justice had learned of that situation, irrespective of the circumstances in which the information had been conveyed to him, he was duty bound to intervene even though his intervention might frustrate the respondents' attempts to put off the hearing of the references for as long as they could. The respondents' interest in delaying the proceedings was not a legitimate interest worthy of protection. All parties were entitled to insist that justice be administered with diligence; none could claim a right to delayed justice."

169 On appeal, the Supreme Court of Canada said that it agreed with Pratte JA "that a chief justice is responsible for the expeditious progress of cases through his or her court and may under certain circumstances be obligated to take steps to correct tardiness" ([1997] 3 SCR 391 at [75]).

170 In *Bruce v Cole* at 195-6, Spigelman CJ (with the concurrence of Mason P and Sheller and Powell JJA) referred to an arrangement between Gleeson CJ, then Chief Justice of New South Wales, and Justice Bruce for the latter's delivery of judgments in accordance with a schedule. Spigelman CJ said that the arrangement was made by the Chief Justice "on the basis of his authority, indeed his responsibility, to ensure the effective operation of the Court". His Honour approved the description of that role in *Canada v Tobiass*, adopting therefore not only what Pratte JA said but also the following observations of Marceau JA in that case at 282-3:

"In my judgment, a chief justice cannot entirely disinterest himself or herself from the pace of progress and the timeliness of disposition of the cases the Court has to deal with. He or she has a responsibility to ensure that the Court provides 'timely justice'. Indeed, it is his or her duty to take an active and supervisory role in this respect. Obviously, given the profound effect that decisions relative of the timely management of a proceeding can possibly have on its ultimate outcome, this role will normally be exercised at a general over-seeing level and only quite rarely will it need to be exercised with respect to specific cases. But, if a matter appears to a Chief Justice to be moving abnormally slowly, a perception that is dependent on the subject matter of the proceedings, and if he or she has grounds to suspect that the duties of the court are not being carried with due dispatch, then his or her mandate not only authorizes but, I believe imposes a positive duty to investigate. Of course, if the chief justice's inquiries reveal that the delay has even a remotely adjudicative cause, then he or she must immediately desist. But the simple act of posing a question can certainly not be considered, *in itself*, an interference with the judicial independence of the presiding judge."

- 171 In the course of his address, Judge Maiden's senior counsel made the inevitable concession that, in pressing Judge Maiden about his reserved judgments, the Chief Judge acted properly and not outside the proper scope of his role. In these circumstances, it is surprising that neither before nor during the hearing before the Division did Judge Maiden offer any apology, or otherwise show any contrition, concerning his conduct in relation to the Chief Judge. The furthest he went was to concede, when pressed by Counsel Assisting in the course of his oral examination, that it was "inexcusable" for him not to have responded to the Chief Judge's communications. We infer that Judge Maiden does not, even now, recognise that by not responding to many letters and emails sent to him by the Chief Judge, Judge Maiden repeatedly failed to act in accordance with his judicial duties.
- 172 If, as was the case, the Chief Judge had a duty to urge Judge Maiden to deliver his reserved judgments in a timely fashion, it follows that Judge Maiden had a reciprocal duty to cooperate with the Chief Judge and to facilitate the Chief Judge's performance of his duty. Far from doing this, Judge Maiden's conduct had the clearly foreseeable effect of hindering the Chief Judge. By repeated failures to respond to the Chief Judge, Judge Maiden exhibited defiance and recalcitrance of a high order, not once but many times over an extended period of well in excess of a year, from 20 September 2016 to the end of 2017, by which stage this Inquiry was well underway. Particulars of Complaint, which were subsequently amended, were served on Judge Maiden's representatives on 27 November 2017. They included an allegation that Judge Maiden failed adequately, or at all, to respond to communications from the Chief Judge and the Commission.
- 173 Judge Maiden did not suggest in his evidence that he did not receive the Chief Judge's letters or emails, or that he failed to respond to them through inadvertence. Notes made by his treating clinical psychologist, Ms Lisa Lorentz, of her consultations with Judge Maiden confirm that his lack of response was intentional. For example, her note of 6 December 2016 refers to Judge Maiden having said that he was "not replying to boss's emails/letters

... giving him the 2 fingers". Judge Maiden in fact admitted in his evidence before this Division that he made a deliberate decision not to respond.

174. The same defiance of proper authority was reflected in Judge Maiden's failure on 1 April 2017 to undergo the psychiatric examination arranged by the Judicial Commission (see Particular E). Judge Maiden chose not to attend the appointment with Dr Diamond, and not to give notice of his intent not to attend. Nor did he provide any explanation for his non-attendance until his witness statement was provided to the Division in early 2019.
175. The seriousness of Judge Maiden's defiance was heightened by the fact that the 2014 Conduct Division found that Judge Maiden failed to respond adequately to communications from the Judicial Commission. He thus knew, or should have known, that it was part of his judicial duties to respond properly to persons or bodies having oversight of his judicial activities or conduct.

*The 30 June and 16 August 2016 meetings with the Chief Judge*

176. As September 2016 marked the commencement of a long period, referred to at [172] above, in which Judge Maiden failed to respond to written communications from the Chief Judge, it is necessary to examine the meetings that occurred between the Chief Judge and Judge Maiden on 30 June and 16 August 2016 in more detail.
177. As noted above, Judge Maiden told the Chief Judge by letter of 7 June 2016 of a difficulty that he was having in reading for "any extended period of time" and foreshadowed the need for day surgery.
178. According to the Chief Judge's contemporaneous note, Judge Maiden told the Chief Judge at their meeting on 30 June 2016 that he was scheduled to have an eye operation on 5 July 2016 and that his health had "otherwise improved". The Chief Judge said that he was "deeply concerned" about Judge Maiden's outstanding reserved judgments and that "if he required time out of court to complete them, to speak to [him] about it". Judge Maiden refers to the

discussion on this date in his witness statement but does not there suggest that the Chief Judge's note is inaccurate.

- 179 In his witness statement, Judge Maiden says that after the eye operation his reading sight had not improved and he was only able to read "when supine". This evidence is not consistent with the evidence of his ophthalmologist, Dr Lock, and the expert evidence of Dr Wechsler (see [133] above). As well, the clinician's notes made in October, November and December 2016 record a significant improvement in Judge Maiden's vision (see [130] above). Likewise it cannot be reconciled with the Chief Judge's record of the meeting he had with Judge Maiden on 16 August 2016 at which, according to the Chief Judge's contemporaneous note, Judge Maiden said that he was in "the best space" he had been in and that "[m]ost of his health issues have resolved". He did not refer to any continuing vision difficulties. The absence of such difficulties at that time is supported by the assertion in his witness statement that he was at that date "waiting to see if there was any improvement" in respect of his vision but not by the immediately following statement that "[m]y diplopia had not resolved".
- 180 In his witness statement, Judge Maiden also refers to gastric problems and a referral on 12 September 2016 to a gastroenterologist but does not suggest that he told the Chief Judge of any such problems on 16 August 2016 (or otherwise).
- 181 The Chief Judge's note of the meeting of 16 August 2016 records his expression of concern to Judge Maiden about his delay in delivery of reserved judgments, to which Judge Maiden responded that "he had become a Judge to sit in crime" and the Chief Judge replied that "he was required to preside in Civil, that if he didn't like it, he could resign and return to the Bar". He added that "[he] would not consider [Judge Maiden] sitting in crime until he had completed [the] outstanding judgments, that in any event the CCA decision earlier this year did not stand him in good stead".

- 182 In his witness statement, Judge Maiden says that he advised the Chief Judge at that meeting that he “was able to sit in crime but had difficulties in civil matters because of the extensive reading involved. This was a matter likely to aggravate or exacerbate my condition”. He said that the Chief Judge’s response was “that I was to sit in civil and my alternative was to resign and return to the Bar”.
- 183 For reasons already given, we cannot accept that Judge Maiden referred on this date to vision difficulties as hindering his ability to sit in civil. Instead, we accept that he said something to the effect, as recorded by the Chief Judge, that he “had become a Judge to sit in crime”. As indicated by what we have said at [162] to [164] above, this statement did not have a reasonable basis if it was intended to suggest that Judge Maiden had an entitlement to sit in crime.
- 184 In his witness statement, Judge Maiden said that from this time he took the view that the Chief Judge “was not going to provide me any support” and that it was clear to him that the Chief Judge “was not prepared to list me in crime”. He referred then to a letter to him from the Chief Judge of 8 September 2016 repeating his concern about the delays in delivery of reserved judgments. Judge Maiden said that in that letter the Chief Judge offered him “time out of court” to prepare the judgments “but offered no other assistance”. Judge Maiden responded to the Chief Judge by letter of 14 September 2016, stating an intention to have “all outstanding matters up-to-date as quickly as possible” and stating “regret [for] the delay due to me having been unwell”. That letter was however the last response Judge Maiden made to communications from the Chief Judge until 7 February 2018 (see [78] above). The Chief Judge sent some 12 letters or emails in that period.
- 185 By saying that in his letter of 8 September 2016 the Chief Judge offered no assistance other than “time out of court”, Judge Maiden implied that the assistance to which he was entitled included being rostered in crime, or, as he said in oral evidence, “crime ... short matters”. That was not so and the Chief Judge persistently offered him entirely appropriate and adequate assistance,



that is, time out of court to write his outstanding judgments. The offers were explicitly made in the Chief Judge's letters to Judge Maiden of 8 and 20 September and 12 October 2016, at the meeting on 30 June 2016, and at many other times. Judge Maiden did not accept any of those offers until 7 February 2018 (see [78] above), well after the Particulars of Complaint in this Inquiry had been served, at a time when it can be inferred that he at last realised that he had to start mending his ways.

- 186 The Chief Judge's letter of 20 September 2016 said that from his discussions with Judge Maiden at their meetings of 28 April, 30 June and 16 August 2016 he "understood that apart from the eye operation, which required day surgery on 5 July 2016, [his] health had otherwise improved". The Chief Judge fixed a further meeting to occur on 27 September 2016. In his oral evidence Judge Maiden sought to explain his non-attendance at that meeting on the basis that "it was pointless to discuss with [the Chief Judge] my health issues" when what the Chief Judge said in his letter of 20 September 2016 about that matter did not accord with Judge Maiden's recollection of the meeting of 16 August 2016. As we have said, we do not accept that the Chief Judge's note of that meeting was inaccurate but, even if it was, the proper course for Judge Maiden to have taken was to respond to the letter by pointing out its inaccuracy, not simply thereafter to refuse to communicate with the Chief Judge. Judge Maiden's adoption of this course was a breach of his judicial duties and of his undertaking to the 2014 Conduct Division to "report to the Chief Judge on a regular basis as to his general wellbeing and mental health condition" (see [19] above).
- 187 Following the Chief Judge's letter of 20 September 2016, Judge Maiden adopted a position of defiance, believing he had been wronged. He had however not been wronged and he should not in any event have taken the stance he did.

*The Chief Judge's rostering decisions*

- 188 The Chief Judge's statement at the 16 August 2016 meeting (and repeated to Judge Maiden at other times), that he would not consider sitting Judge Maiden in crime until he had completed his outstanding civil judgments, was an entirely proper approach bearing in mind particularly the Chief Judge's view that opportunities to write reserved judgments were more likely to arise if Judge Maiden was sitting in civil rather than criminal work (see [149] above). Again, the contrary was not suggested in the questioning of the Chief Judge.
- 189 It was proper for the Chief Judge to have regard in his rostering decisions to the Court of Criminal Appeal decision of 1 April 2016 in *R v Mulligan* [2016] NSWCCA 47 which the Chief Judge said in evidence was the decision to which his note of the 16 August 2016 meeting referred at the point where it recorded that a Court of Criminal Appeal decision "did not stand [Judge Maiden] in good stead". Judge Maiden's witness statement proceeded upon the basis that the decision that the Chief Judge had in mind was *R v CLD* [2015] NSWCCA 114, which was also critical of Judge Maiden, but the Chief Judge said in his evidence that he had not read that decision until he came to make his statement.
- 190 In *R v Mulligan*, the Court of Criminal Appeal concluded at [21] that in that case Judge Maiden had acted unfairly to the Crown. In his witness statement to the Division, the Chief Judge said that he was concerned that Judge Maiden's conduct in *R v Mulligan* "could have been due to a relapse of his depressive condition" which had been present when Judge Maiden engaged in the conduct towards the two practitioners that was the subject of the 2014 Conduct Division Report".
- 191 In his witness statement, the Chief Judge referred at some length to various factors that he had taken into account in making rostering decisions concerning Judge Maiden in 2015 to 2017. These included a number of matters related to or arising out of the 2014 Conduct Division Report and other matters such as the Court of Criminal Appeal's criticism of Judge

Maiden in *R v Mulligan* (as to which see [190] above) and in *Moss v R* [2016] NSWCCA 242 at [4] (as to which see [192] below). Judge Maiden's senior counsel did not advance any criticism of the Chief Judge's rostering decisions or reasoning in his examination of the Chief Judge.

- 192 The Chief Judge said in his oral evidence that he had not formed the "conclusive opinion" that Judge Maiden was not competent to sit as a judge but he had concerns about his competence, which the Chief Judge expressed as follows:

"My concerns were stemming back from the Conduct Division's [2014] report in the first instance, in particular the matters of *Milson* [*Milsom v R* [2014] NSWCCA 142] and I've forgotten the other acronym [*R v RMC* [2013] NSWCCA 285]. In addition to that the Judge's failure to attend in a timely fashion to his judgments, what concerned me there was having read the psychiatrists' reports it concerned me that he had a lack of insight and there was procrastination which were referred to in some of the psychiatrists' reports [tendered in the 2014 Inquiry]. There was the delay in attending to the [Fawkner matter], the Judicial Commission's requirement to write to [Mr Fawkner], that's the Conduct Division's requirement to write to [Mr Fawkner], and also there was the matter which was brought to my attention by the Court of Appeal in the matter of *Bradbury* [*North Coast Conveyancing Pty Ltd v Bradbury* [2015] NSWCA 361] and in particular at paragraph 11 of that judgment, paragraphs 10 and 11. There was also - a matter of concern was the matter of *Mulligan* [*R v Mulligan* [2016] NSWCCA 47] which was the subject of a fair degree of reporting in the media and the Judge's approach in that case again concerned me about his mental state. Also I sat in the Court of Criminal Appeal in *Moss* [*Moss v R* [2016] NSWCCA 242] and the concern of the Court in *Moss* was that the Judge's remarks on sentence were so unclear we could not work out what his sentence was. So all these matters continued to concern me about his mental health."

- 193 The Chief Judge was entitled to take these concerns into account in deciding whether Judge Maiden should be rostered to sit in the criminal jurisdiction as that jurisdiction "involves the liberty and rights of the individual" (a phrase used by the Chief Judge in his letter to Judge Maiden of 3 December 2018 with particular reference to appeals from the Local Court and criminal matters).
- 194 In *Milsom*, the Court of Criminal Appeal was highly critical of Judge Maiden in a sentencing matter, criticising him for "trespassing upon the role of the advocates" in requiring the production of a particular piece of evidence; pre-

judging the proceedings and not giving counsel an opportunity to make submissions; failing to read written submissions placed before him; failing to give reasons why he refused to disqualify himself; instigating and holding an out of court meeting with the legal representatives; putting pressure on the Crown to agree that no appeal would be brought if a non-custodial sentence was imposed; imposing without warning a longer sentence than had been identified clearly by Judge Maiden in the course of submissions; and engaging in extensive examination and thereby trespassing on the function of the advocates ([96]-[105] and [121]-[126]).

- 195 In *R v RMC*, the Court of Criminal Appeal criticised in strong terms Judge Maiden's decision to direct an acquittal during the presentation of the Crown case. The Court said that Judge Maiden misunderstood the Crown case, did not apply "well known and long-established principles" concerning directed verdicts, "continually failed to come to grips with what the [Crown] case was" and made unwarranted and unfair criticism of the police officer in charge of the case (at [26], [32], [42], [45] and [58]).
- 196 In *Bradbury*, the Court of Appeal was highly critical of the form of Judge Maiden's judgment, observing that it had rendered the task of the Court of Appeal considerably more difficult than it should have been (at [11]). *Mulligan* and *Moss* are referred elsewhere in this Report at [190] and [192].
- 197 Earlier in his evidence, when asked whether there had been any complaint concerning Judge Maiden beyond those relating to Ms Syngé (see Particulars of Complaint G and H), the Chief Judge referred to "a letter from the Director of Public Prosecutions concerning a number of matters of Judge Maiden's, in particular the number of s 5F appeals and the Director brought my attention to a number of Court of Criminal Appeal decisions in relation to those matters".
- 198 Although these matters are not the subject of the present complaint, they are relevant as explaining the Chief Judge's reluctance for some years to roster Judge Maiden in civil work.

*Dr Diamond's evidence concerning Judge Maiden's personality*

199 In his report of 20 January 2018, Dr Diamond made the following observations concerning Judge Maiden's personality traits:

"Judge Maiden has certain aspects to his personality that are part of his day to day functioning, regardless of whether he is depressed or not, at any given time. He is a man who is controlling and concerned about matters of control as part of his day to day functioning. He is obsessional in his makeup. He is reliant on order, perfectionism and more rigid structures in order to maintain a sense of emotional wellbeing in his day to day to life. When he cannot assert these aspects of his personality needs, he is prone to levels of distress and dysfunction in the course of his day to day life experiences."

200 Dr Diamond gave the following oral evidence concerning procrastination on the part of Judge Maiden:

Q. And Ms Lorentz on a number of occasions referred to procrastination, do you disagree with her view that there was procrastination on the part of Judge Maiden during the period of his delayed judgments?

A. Procrastination is a loaded word in psychological/psychiatric discussion because it's almost always associated with obsessionalism so it's a shorthand form of saying that this person gets stuck, they get caught up in being unable to actually address the task efficiently and to do it in the most efficient way. So I saw that to be a descriptive of the features one associates with obsessionalism and perfectionism and often the response by people who have those traits is to balk at tackling a difficult task and to put it off for another day.

Q. So you've explained the difference in language between obsessionalism and procrastination--

A. Well it's an association, very often people with obsessional traits in their personality tend to procrastinate.

Q. And again if I could just go back to my question, do you disagree with Ms Lorentz's description of procrastination?

A. No I think it encapsulates what she was [? treating] in the treatment sessions and would be consistent with what I observed to be part of the personality makeup."

201 The clinical notes of Ms Lorentz and Professor Mitchell contain many references to recognition by Judge Maiden of procrastination being a reason for delay in the delivery of his judgments, without reference to eyesight difficulties being a factor. In his oral evidence, Judge Maiden also recognised that procrastination is "always a problem" for him and that procrastination is a dysfunctional personality characteristic of his.

202 Dr Diamond also referred in his report to Judge Maiden's description of his "conflicted and difficult relationship with his father over many years" which Dr Diamond suggested to Judge Maiden could be reflected in the manner in which he related to the Chief Judge. Dr Diamond considered that Judge Maiden could benefit considerably from additional psychological therapy that might "assist him to better understand the basis of his personality vulnerabilities", but in his oral evidence Dr Diamond acknowledged what is common knowledge, that "personality is by definition an enduring quality". He added nevertheless that "[i]t can be attenuated. People can learn to work more productively without causing as much offence, that's all possible".

203 In his report Dr Diamond continued:

"The contribution to the delay in writing judgments that arises from his psychological vulnerability and a dysfunctional personality style, is significant. It is clearly demonstrated in the Particulars of Complaint. The extent of delay does relate to the way Judge Maiden has conducted himself by way of his conflicted relationship with the relevant figure of authority (The Chief Judge). This must be considered as contributing to his oppositional conduct in relation to the Chief Judge and in relation to non-compliance with requests made of him."

204 In his report of 15-26 October 2018, Dr Diamond said:

"The opinion of the treating psychologist mentions improved insight into problematic conduct and attitudes in the court setting and also in understanding underlying conflicts in developmental relationships in his early life that shape his dysfunctional attitude to authority figures. This improved insight was evident when I examined Judge Maiden on this occasion. It includes better appreciation of the effects upon litigants of his delayed judgments.

The effects of Judge Maiden's dysfunctional personality features continue to be expressed in the manner apparent in the communications and associated conduct towards authority figures and in particular, the Chief Judge."

205 Later in the report Dr Diamond opined that Judge Maiden had shown "considerable improvement in managing his dysfunctional personality traits" but remained "troubled by his dysfunctional response to dealing with authority, and in particular the Chief Judge". The first part of those observations would seem to relate to the apparent absence of repetition of the conduct towards practitioners which was a subject of the 2014 Conduct Division Inquiry and to

the then absence of outstanding reserved judgments. Elsewhere in his report, Dr Diamond said:

“There are clear descriptions of Judge [M]aiden’s attitudes and conduct that are indicative of his personality vulnerabilities of perfectionism, conflict with authority figures and rigidity of opinion with the propensity to catastrophise, especially when his mood was low. These are noted but are not markedly different from previous clinical features at assessment.”

206 Dr Diamond concluded that “[r]eview of Judge Maiden’s personality traits and associated impaired functioning, confirms that these features of his personality persist”.

207 In Dr Diamond’s oral evidence, the following exchange occurred:

“Q. Does that really boil down to that he would function better if he is allowed to work in an environment of his choice, rather than one that’s imposed on him by others?

A. No, I don’t think it boils down to that at all. I think the key issue there is that he perceives that he’s been treated unfairly. Whether that’s a fact, that’s not mine to determine. But with that perception in place, if he then makes requests to be allocated to sit at certain places or to have his associate with him, he then perceives that to be problematic, and that causes him to show higher levels of dysfunction than he otherwise might.

Q. So it’s his (not transcribable) [?dysfunctional personality problems] that causes the ongoing problem?

A. Well, it’s his interpretation of what is occurring between himself and the Chief Judge.

208 Particularly because Judge Maiden does not have any mental illness or disorder, the question of how his past behaviour should be viewed and what his behaviour is likely to be in the future, is ultimately one for us. Nevertheless, Dr Diamond’s observations are of assistance on these questions. Dr Diamond’s opinions and conclusions do not suggest that there has been, or is likely to be in the future, any dramatic change in the personality traits that led Judge Maiden to breach his judicial duties in the way that we have found. In particular, first, there is no evidence of an improvement in his ability to deliver reserved judgments in a timely fashion as he has been sitting mainly in crime since May 2017 and apparently has not had the need to reserve judgments. Secondly, Dr Diamond’s observations

suggest the continuation of Judge Maiden's attitude that led him to defy the legitimate authority of the Chief Judge over a substantial period.

## **SUMMARY OF CONCLUSIONS CONCERNING COMPLAINT**

209 As we have recorded at [1] above, in February 2017 the Chief Judge of the District Court requested that the Judicial Commission investigate whether Judge Maiden may have an impairment that affects the performance of his judicial duties. The Commission resolved to treat that reference as a complaint and referred it for examination to the presently constituted Conduct Division. As it was authorised by the *Judicial Officers Act* to do, the Division also examined other matters arising in the course of its investigations. These matters were subsequently described in Particulars of Complaint supplied to Judge Maiden's representatives by Counsel Assisting the Conduct Division.

210 The Division has found the complaint wholly substantiated as indicated by its conclusions below concerning the Particulars of Complaint. The Division's detailed reasoning in support of these conclusions appears at [38] to [208] above.

### ***A. Suspected impairment that affects Judge Maiden's performance of his judicial duties***

211 The Particulars assert that it is suspected that Judge Maiden "is suffering from a psychiatric or medical impairment that affects his performance of judicial or official duties". As noted in [16] above, the Inquiry was extended to consideration of whether Judge Maiden has a psychological impairment arising out of his personality characteristics.

212 Judge Maiden has a depressive illness but it has been adequately treated since 2014 and he has not been clinically depressed since that year. There is no reason to conclude that his depressive illness will impair the performance of his judicial duties in the future.



- 213 Judge Maiden has had difficulties with his eyesight for many years. Since 2014, they have significantly affected the performance of his judicial duties for two periods of some months each. Deficiencies in the performance of his judicial duties in these two periods were however in large measure not excused by the eyesight difficulties as Judge Maiden did not, as he had undertaken to the 2014 Conduct Division Inquiry to do, keep the Chief Judge informed as to his health position (see at [19] below), and did not seek leave of absence for the whole of the periods of impairment.
- 214 Judge Maiden has continuing, but lower level, vision difficulties that do not incapacitate him from performing his judicial duties but make it more difficult for him to perform them than if he had normal vision. This position is likely to continue into the future.
- 215 Judge Maiden has had other health issues in the period since 2014 but none significantly impaired, or presently impair, the performance of his judicial duties.
- 216 In these circumstances the Division does not conclude that Judge Maiden has a psychiatric or medical impairment that significantly affected or affects the performance of his judicial duties. Instead, the unsatisfactory performance of his judicial duties as described in this Report, including his failure to deliver reserved judgments in a timely fashion, was the result of his personality characteristics. These characteristics endure and are likely to continue to impair the performance of his judicial duties. This aspect of the complaint was therefore substantiated.

#### ***B. Unacceptable delay in delivery of judgments***

- 217 We find that Judge Maiden was guilty of unacceptable delay in the delivery of the 15 judgments identified in [40] of this Report. These judgments were each reserved for a period in excess of 12 months, with delays of almost three years in respect of two judgments and delays in the vicinity of two years in respect of six others. The final seven judgments were only delivered after the

Chief Judge took the extraordinary but necessary step of granting Judge Maiden a period of three months out of court to write them.

- 218 There were no features of the proceedings or judgments, or of Judge Maiden's personal circumstances, that excused the delays. As a result, this aspect of the complaint was substantiated.

***C. Failure to adhere to an undertaking to the Conduct Division to report to the Chief Judge on a regular basis as to his general wellbeing and mental health condition***

- 219 In 2014 Judge Maiden gave an undertaking to the Conduct Division, as then constituted, to report to the Chief Judge on a regular basis as to his general wellbeing and mental health condition. He failed to report at all in the period from 30 June 2016 to 7 February 2018, other than as referred to at [68] above. As a result, this aspect of the complaint was also substantiated.

***D. Failure adequately or at all to respond to communications from the Chief Judge and the Commission***

- 220 In the period from 20 September 2016 until at least July 2017 Judge Maiden failed to respond to some 12 written communications from the Chief Judge to him concerned with Judge Maiden's outstanding judgments. He also failed to respond to a letter from the Commission on this topic. Judge Maiden's conduct constituted deliberate defiance of the proper authority of the Chief Judge whose communications were sent in pursuance of his obligation to ensure the effective operation of the Court. Judge Maiden only recommenced communicating with the Chief Judge after Judge Maiden received this Inquiry's Particulars of Complaint which complained of his failure to communicate with the Chief Judge.

- 221 As a result, this aspect of the complaint was also substantiated.

***E. Failure to undergo psychiatric examination required by the Commission***

- 222 Section 39D(1) of the *Judicial Officers Act* entitled the Commission to require Judge Maiden to submit to an examination by a psychiatrist approved by the

Commission. Despite initially agreeing to comply with a requirement to this effect, Judge Maiden failed to attend an appointment arranged by the Commission with a psychiatrist, Dr Michael Diamond and failed to provide any explanation for not attending despite the Commission's request that he did so (see [85] above). Judge Maiden did not assert that he was unaware of the appointment or was unable to attend.

223 This aspect of the complaint was therefore also substantiated.

***F. Failure to adhere to an undertaking to deliver reserved judgments***

224 Judge Maiden undertook to the Division to deliver judgment in seven identified proceedings by 12 June 2018, and to do so in a particular order. He delivered the judgments by that date, but not in the required order. As he gave no adequate explanation for this failure and did not seek any variation of the undertaking, this aspect of the complaint was also substantiated.

***G. Failure to adequately take into account Ms Synge's interests***

225 In considering whether to discharge a jury in a criminal trial, Judge Maiden wrongly failed to take into account the interests of the prosecution's principal witness in not being required to give her evidence again at a retrial.

226 This aspect of the complaint was therefore also substantiated.

***H. Making false assertions in response to the complaint made by Ms Synge***

227 Judge Maiden made two false statements to the Commission and one to the Commission-appointed psychiatrist, Dr Diamond, in connection with the Commission's consideration of a complaint made by Ms Synge concerning the same criminal proceedings. As he did so with indifference to their truth, this aspect of the complaint was also substantiated.

## PARLIAMENTARY CONSIDERATION OF THE REMOVAL OF JUDGE MAIDEN

- 228 Judge Maiden's delays in the delivery of reserved judgments, approaching three years in two matters, were unacceptable. The delays continued even after he was assigned to criminal work in May 2017 when "[a]s a consequence of the court's heavy caseload and lack of available judicial resources [the Chief Judge] was unable to continue to roster [Judge Maiden] out of court".. Although two long-outstanding judgments were delivered in the second half of 2017, a further seven remained reserved. The seven outstanding reserved judgments were only delivered when the Chief Judge had no choice but to roster Judge Maiden out of court for three months from 12 March to 7 June 2018 to enable him to complete the judgments. As Judge Maiden has, at his request, sat in crime since May 2017 and there has apparently not yet been any need for him to reserve any judgments, there has been no opportunity for him to establish that there has been a change to his previously demonstrated inability to deliver timely reserved judgments. In these circumstances, the Division has no confidence that Judge Maiden would in the future be able to deliver reserved judgments, whether in civil or, if it became necessary, in crime, in a timely fashion. Yet this is a fundamental aspect of the duties of a judge.
- 229 Moreover, we do not have any confidence that Judge Maiden will in the future focus on the performance of his judicial duties rather than take an unreasonable approach in defiance of legitimate authority, as he did in his dealings with the Chief Judge. His refusal to respond to written communications from the Chief Judge for a long period, apparently due to an unjustified belief that he was being treated unfairly in not being rostered to sit in crime, contributed to his long delays in judgment delivery because Judge Maiden failed until February 2018 to respond to the many offers made to him by the Chief Judge in this period to give him further time out of court to write his reserved judgments.
- 230 As well, we find it of particular concern that neither Judge Maiden's witness statement nor his oral evidence-in-chief given before the Division contained

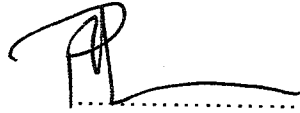
any significant recognition that he seriously breached his judicial duties on many occasions. It was only when pressed strongly in examination by Counsel Assisting that he made a limited concession of inappropriateness of his conduct. Instead, Judge Maiden sought to justify his behaviour and to do so on insubstantial bases. As was observed in the *Betts' Report* at [163] “[a]n essential quality of a judicial officer is an appreciation of what constitutes proper judicial conduct, and what does not. The absence of that quality is apt to signify incapacity to discharge the judicial functions”. The evidence has demonstrated that Judge Maiden lacks that quality.

231 Our conclusion based upon the matters we have found substantiated is that Judge Maiden does not have the personal characteristics that would enable him to perform satisfactorily in the future the duties of a District Court judge. We find that on that basis, and not on the basis of any mental health or other medical issues, that his incapacity for that role has been proven.

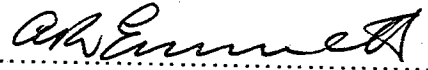
232 We also find that Judge Maiden’s misbehaviour that we have found proven could reasonably be considered to be such as to adversely impact on the future reputation and standing of the District Court, and therefore of the New South Wales justice system, if he were to continue as a judge of the Court.

233 For these reasons, the Conduct Division has formed the opinion that the matter the subject of the complaint referred to it and the various other matters which arose in the course of the complaint being dealt with by the Conduct Division could justify parliamentary consideration of the removal of Judge Maiden from his office of a judge of the District Court of New South Wales on the grounds of proved misbehaviour or of proved incapacity.

DATED: 26 March 2019



The Honourable Justice Robert Macfarlan



The Honourable Acting Justice Arthur Emmett AO



Mr Ken Moroney AO APM