

IN THE MATTER OF
AN INVESTIGATION PANEL
ESTABLISHED UNDER THE *JUDICIAL COMMISSION ACT 2020* (NT)

REPORT AND REASONS FOR DECISION OF THE PANEL

Introduction and Summary

- 1 By letter dated 22 August 2023,¹ the Judicial Commission of the Northern Territory (**Commission**) informed The Hon. Justice Southwood (the **Judge**) that it had resolved to establish an Investigation Panel (**Panel**) to examine and investigate a matter that was common to three separate complaints made about the Judge, being the complaints made by Mr Alistair Wyvill SC on 21 November 2021,² Mr Anthony Young on 22 November 2021³ and Ms Delia Lawrie on 14 December 2021.⁴ We will refer to Mr Wyvill, Mr Young and Ms Lawrie collectively as “the **Complainants**”. Subsequently, we were appointed to constitute the Panel.
- 2 The complaints the subject of the Panel’s investigation arose out of a judgment published by the Judge on 1 April 2015 in *Lawrie v Lawler* [2015] NTSC 19 (**Judgment**).⁵
- 3 The Judgment was delivered in Supreme Court of Northern Territory proceeding numbered 68/2014 (**Proceeding**). The Proceeding was an application for judicial review brought by Ms Lawrie concerning a report published by Mr John Lawler as part of an inquiry commissioned by the

¹ Exhibit JCP-1, Tender Book (TB), E10.

² TB, E3.

³ TB, E4.

⁴ TB, E5.

⁵ TB, B107, pp 1079 to 1200.

Legislative Assembly of the Northern Territory into a purported decision to grant a lease over a site known as “Stella Maris” (**Inquiry**).

- 4 The effect of the Judgment was that the Judge dismissed Ms Lawrie’s judicial review application on the principal ground that she failed to establish any denial of procedural fairness during the Inquiry. The Judge dismissed Ms Lawrie’s application on an alternative ground, namely that she had waived her entitlements to procedural fairness. In addressing that ground, the Judge made serious adverse findings against Ms Lawrie and her legal representatives, Mr Wyvill and Ms Cathy Spurr. It is these serious adverse findings which are at the heart of the complaints that are the subject of the Panel’s investigation.
- 5 For the reasons explained in the following section, the common matter that was referred to the Panel for examination and investigation under ss 48(1)(c) and 50 of the *Judicial Commission Act 2020* (NT) (**Act**) was whether the conduct of the Judge in making certain findings in the Judgment⁶ and referring Mr Wyvill and Ms Spurr to the Law Society of the Northern Territory (**Law Society**) for investigation was a result of, or indicative of, “malice” towards Mr Wyvill, Ms Lawrie and Ms Spurr. We refer to this matter as the **Malice Allegation**.
- 6 By way of summary of our conclusions, the evidence as a whole falls well short of satisfying us that in making the serious adverse findings against Ms Lawrie and her legal representatives, Mr Wyvill and Ms Spurr, or in any step he took after delivery of the Judgment, the Judge acted with malice. To us, having regard to the whole of the available material and to our findings of fact, there is a markedly more probable inference: that the Judge made the adverse findings in the genuine belief that the findings were necessary and appropriate

⁶ TB, B107.

to make, having regard to the pleaded issues and to the submissions and evidence before him.

- 7 Consequently, the Malice Allegation is not substantiated and the complaints must be dismissed accordingly.
- 8 We now provide our report under s 53(2) of the Act, setting out our findings of fact, our conclusions as to whether the Malice Allegation is substantiated and our reasons for so concluding.

The scope of the matter referred to the Panel, and the Particulars of Complaint

- 9 Mr Wyvill’s complaint to the Commission on 21 November 2021⁷ set out four grounds of complaint against the Judge. The first ground concerned the Proceedings and extended beyond the Malice Allegation to encompass other serious allegations including as to the Judge’s motivations. The second to fourth grounds concerned allegations of judicial bullying, “breaches of the basic rules of judicial conduct” and failure to deliver judgments in a timely manner.
- 10 The complaints made by Mr Young and Ms Lawrie respectively on 22 November 2021⁸ and 14 December 2021⁹ raised similar allegations to those contained in Mr Wyvill’s first ground of complaint.
- 11 On 28 June 2022, the Commission notified the Judge that it had undertaken a preliminary assessment of the complaints and, consistently with s. 46(3) of the

⁷ TB, E3.

⁸ TB, E4.

⁹ TB, E5.

Act, provided the Judge with an opportunity to respond.¹⁰ The Commission received the Judge’s response on 27 September 2022.¹¹

- 12 On 22 August 2023, the Commission notified the Judge of its decision in relation to the complaints.¹² The effect of that decision was to establish this Panel to examine and investigate the Malice Allegation, with the remaining allegations being dismissed other than the second and fourth grounds of Mr Wyvill’s complaint which were found to have been partially made out and referred to the head of jurisdiction. The Complainants were notified of the Commission’s decision shortly thereafter.¹³
- 13 On 5 August 2024, Counsel Assisting the Panel (**Counsel Assisting**) made submissions about the scope of the examination and investigation being conducted by the Panel. The Judge and the Complainants were afforded the opportunity to consider and respond to those submissions.
- 14 On 23 August 2024, Mr Young made submissions in which he generally agreed with Counsel Assisting’s approach as to the scope of the investigation but raised a number of qualifications, including that the Panel’s investigation “should not be limited in the way counsel assisting proposes: only to the question of malicious motivation” (at [5]) and that the Panel should investigate the “judge’s capacity”.
- 15 On 28 August 2024, Mr Wyvill provided submissions in which he submitted that the Panel was not permitted to confine its investigation to the Malice Allegation and was instead bound to investigate all allegations raised in his

¹⁰ TB, E6.

¹¹ TB, E7.

¹² TB, E10.

¹³ TB, E11.

complaint, including allegations that had been addressed by the Commission and the Independent Commissioner Against Corruption.

- 16 The Panel received further written submissions concerning the scope of the Panel's investigation from the Judge (namely, submissions dated 3 September 2024, submissions dated 13 September 2024 and submissions dated 30 October 2024), the Complainants (namely, submissions from Mr Young dated 4 September 2024, submissions from Mr Wyvill dated 9 September 2024, correspondence from Ms Lawrie dated 10 September 2024, submissions from Mr Wyvill dated 16 September 2024, submissions from Mr Wyvill dated 29 September 2024 and submissions from Mr Wyvill dated 30 October 2024) and Counsel Assisting (namely, submissions dated 17 September 2024 and submissions dated 10 October 2024). In the submissions to which we have referred, Mr Wyvill and Mr Young submitted that insofar as the Commission had constituted the Panel to investigate only part of their complaints, the Panel was not validly established.
- 17 On 27 November 2024, the Panel advised the Judge and the Complainants that it considered the Commission's decision had been validly made, that it (the Panel) had been validly established by the Commission and that it (the Panel) would proceed with its investigation. It delivered reasons for that decision to them. The Panel's decision has not been the subject of any application for judicial review.
- 18 At the same time, the solicitors assisting the Panel notified the Judge and the Complainants that in the Panel's view, the scope of its jurisdiction is correctly identified in [14], [18] to [26] and the first two sentences of [28] of Counsel Assisting's submissions dated 5 August 2024. By way of summary, Counsel Assisting submitted in those passages that the scope of the Panel's investigation is confined to the Malice Allegation and that is to be understood

in the context of the Commission’s decision of 22 August 2023. Put another way, the Malice Allegation is to be investigated in the light of the Commission’s dismissal of the allegations said to bear upon the Judge’s motivations. As such, in assessing whether the Judge acted maliciously in making certain findings in the Judgment and in referring Mr Wyvill and Ms Spurr to the Law Society it forms no part of the Panel’s function to examine, investigate or in any way revisit any of the matters of complaint dismissed by the Commission.

- 19 From November 2024 to March 2025 the solicitors assisting the Panel conducted investigations as instructed by the Panel.
- 20 On 3 March 2025, the solicitors assisting the Panel informed the Judge’s lawyers that the Panel’s investigations were nearing completion and foreshadowed the Panel’s intention to conduct a hearing at which evidence would be received by the Panel and submissions advanced.
- 21 On 28 March 2025, the solicitors assisting the Panel provided the Judge’s lawyers with a proposed Tender Book containing the materials to which the Panel might have regard in performing its statutory task, together with a document headed “Particulars of Complaints” (**Particulars of Complaints**). The Particulars of Complaints identified: (1) the conduct that is alleged to have been engaged in as a result of “malice” towards Mr Wyvill, Ms Lawrie and/or Ms Spurr and (2) the matters that, if established, could support an inference that the Judge engaged in that conduct maliciously. The purpose of the Particulars of Complaints was to provide the Judge with procedural fairness as to the conduct the subject of the Panel’s examination and investigation and the matters potentially capable of supporting an inference of malice.
- 22 On 5 April 2025, Mr Wyvill wrote to the solicitors assisting the Panel to request it exercise its power under s 43(1) of the Act to consider additional

matters, namely matters arising out of a decision made by the Judge on an application brought by former Commander Peter Bravos. The Panel notified Mr Wyvill on 22 April 2025 that it declined to expand the scope of its investigation to encompass those further matters.

23 In his correspondence to the solicitors assisting the Panel of 5 April 2025, Mr Wyvill raised a series of alleged deficiencies with the Particulars of Complaints. Following the Panel's consideration of those matters, some relatively minor amendments were made to the Particulars of Complaints. The Amended Particulars of Complaints were circulated to the Judge on 19 May 2025.

24 The Amended Particulars reflect the matters which, on all the material available to the Panel and to Counsel Assisting, were considered to be capable of supporting the Malice Allegation. Insofar as the Panel determined not to amend the Particulars along the lines suggested by Mr Wyvill, that determination reflected the Panel's assessment that such matters were not so capable.

25 The meaning of "malice" is identified in [5] of the Amended Particulars of Complaints:

In this context, "*malice*" is to be understood as raising the question whether the Judicial Officer acted with ill-will or spite towards Mr Wyvill, Ms Lawrie and / or Ms Spurr when he engaged in the conduct. Put another way, as Mr Wyvill expressed his complaint, the allegation of malice is that the Judicial Officer "*used his powers as a judge not to decide the case before him according to law but for the purpose of inflicting harm [on those persons].*"

That meaning reflects the decision of the Panel of 27 November 2024.

26 Section B of the Amended Particulars of Complaints specified the conduct alleged to have been engaged in by the Judge as a result of malice. Such conduct primarily comprised certain findings made by the Judge in the

Judgment. As relates to Mr Wyvill, those findings were set out in paragraph 7 of the Amended Particulars of Complaints:

The Judicial Officer made findings in the Judgment that:

- 7.1 Mr Wyvill had, as counsel for Ms Lawrie in the inquiry undertaken by John Lawler concerning the Stella Maris site (**Inquiry**), devised, developed and implemented a deceptive strategy to ignore, disengage and discredit the Inquiry (**Strategy**);
- 7.2 in implementing the Strategy, Mr Wyvill counselled:
 - 7.2.1 the making of knowingly false, disingenuous and misleading statements in a letter from Ms Spurr to Mr Lawler on 14 April 2014;
 - 7.2.2 the making of a “clearly untrue” statement in a proposed media statement;
 - 7.2.3 the making of a “completely baseless allegation” that the “Country Liberal Party Government picked Mr Lawler on the basis that he would find what they wanted him to find”;
 - 7.2.4 the use of a “fictitious device” in a document titled “Stella Maris Inquiry – Key Points” (otherwise described by the Judicial Officer as “Mr Wyvill’s one page statement”); and
 - 7.2.5 Ms Lawrie to make a false statement in an attempt to bolster her assertion that she had been denied procedural fairness during the Inquiry;
- 7.3 the allegations in the Plaintiff’s Statement of Facts, Issues and Contentions (**Plaintiff’s SOFIC**) were, save for a partial admission, untrue and the filing of that document in the Proceedings appears to have been the culmination of Mr Wyvill’s Strategy;

7.4 while an affidavit of Mr Wyvill was filed in support of allegations in paragraphs 6 to 12 of the Plaintiff's SOFIC, that affidavit was not read in circumstances where those allegations were untrue and were properly abandoned by Ms Lawrie; and

7.5 the Strategy was consciously and deliberately adopted to enable Ms Lawrie wrongly to maintain in the Proceedings that she had been denied procedural fairness.

Particulars

7.6 [144], [151], [152], [161], [163], [164], [171], [181], [182], [192], [195], [203], [204], [206], [210] to [211], [215], [221], [223] to [225] of the Judgment.

27 At [8] and [9] of the Amended Particulars of Complaints, there were corresponding allegations with respect to adverse findings made against Ms Spurr and Ms Lawrie. There was an additional adverse finding made against Ms Lawrie set out in [9.1] of the Amended Particulars of Complaints, namely that "Ms Lawrie's evidence during the Inquiry was 'dissembling', and she was 'not conscientiously endeavouring to assist the Inquiry'" (see [151] of the Judgment).

28 The other alleged conduct that was said to have been engaged in by the Judge maliciously was set out at [10] of the Amended Particulars of Complaints:

On 2 April 2015, the Judicial Officer decided to refer Mr Wyvill and Ms Spurr's conduct during the Inquiry and their representation of Ms Lawrie in the Proceedings to the Law Society of the Northern Territory (**Law Society**) for investigation.

29 Section C of the Amended Particulars of Complaints outlined the matters potentially capable of supporting an inference that the Judge engaged in the Section B conduct with malice. As to Mr Wyvill, those matters were set out in [11] of the Amended Particulars in the following terms:

The following matters, if established, could be capable, individually or collectively, of supporting an inference that the Judicial Officer's conduct particularised in paragraphs 7 and 10 above was engaged in because of malice towards Mr Wyvill:

11.1 The findings particularised in paragraph 7 were, objectively, not required to be made by the Judicial Officer in deciding whether Ms Lawrie had waived her entitlement to procedural fairness (**Waiver Defence**): *Lawrie v Lawler* [2016] NTCA 3 at [247] to [250] per Doyle and Duggan AJJ and [437] per Heenan AJ. Counsel for Ms Lawrie so submitted to the Judicial Officer during the hearing on 30 January 2015.

11.2 The findings particularised in paragraph 7 were serious adverse findings capable of causing irreparable damage to Mr Wyvill's professional standing and reputation, and would otherwise warrant him being struck off as a legal practitioner for engaging in professional misconduct, and the Judicial Officer knew that at the time the findings were made.

Particulars

11.2.1 The Judicial Officer's knowledge can be inferred from:

11.2.1.1 the Judicial Officer's decision to refer Mr Wyvill's conduct to the Law Society, as identified in paragraph 10;

11.2.1.2 the Judicial Officer's decision to report the conduct of Mr Wyvill, Ms Spurr and Ms Lawrie to the Northern Territory Police (**NT Police**), as identified in paragraph 11.9; and/or

11.2.1.3 the exchange that he had with counsel for Ms Lawrie on 27 January 2015 during the trial in the Proceedings at T5;

11.2.1.4 Further or alternatively, the fact that any person in the position of judge would know that the findings

particularised in paragraph 7 were of the nature pleaded in paragraph 11.2.

- 11.3 The findings particularised in paragraph 7 were expressed in absolute terms without any qualification in the Judgment, including a qualification that the Judicial Officer had not heard from Mr Wyvill.
- 11.4 The findings particularised in paragraph 7 were made in circumstances where Mr Wyvill was not a party to the proceedings and was not given an opportunity by the Judicial Officer to be heard about the findings before they were made. Further, neither Mr Wyvill, nor any other person, gave oral evidence before the Judicial Officer.
- 11.5 The findings particularised in paragraph 7 were made in circumstances where the fact that Gerry McCarthy was not a party to the Proceedings and had not been given the opportunity to be heard was relied upon by the Judicial Officer as a basis for not making adverse findings against Mr McCarthy.

Particulars

- 11.5.1 [185] of the Judgment.
- 11.6 By reason of the matters identified in paragraphs 11.3, 11.4 and 11.5, the Judicial Officer treated Mr Wyvill differently from Mr McCarthy in the Judgment, and did so without providing any explanation for doing so.
- 11.7 In addition to notifying Mr Wyvill that he had determined to refer his conduct to the Law Society for consideration as to whether disciplinary action should be taken against him, the Judicial Officer informed Mr Wyvill that he intended to invite the Law Society to consider whether there were “any matters which should be referred to the Director of Public Prosecutions” arising out of Mr Wyvill’s conduct.

Particulars

- 11.7.1 Letter from the Judicial Officer to Mr Wyvill dated 2 April 2015.
- 11.8 On 2 April 2015, the Judicial Officer offered Mr Wyvill an opportunity to be heard before making the referral to the Law Society in circumstances where the Judicial Officer, before hearing from Mr Wyvill, corresponded with representatives of the Law Society and the Honourable Chief Justice Michael Grant (at a time when his Honour was the Solicitor General and Statutory Supervisor) that same day about the process involved in making the referral and advised Mr Grant that he considered it “appropriate for a referral to be made” to him in his “capacity as Statutory Supervisor”. The inference may be open that in so offering, the Judicial Officer acted disingenuously.
- 11.9 On 27 April 2015:
- 11.9.1 the Judicial Officer caused his Associate to contact James O’Brien, a then Detective Superintendent of the Special References Unit, to request a meeting to discuss a matter that the Judicial Officer wanted to report to NT Police;
- 11.9.2 the Judicial Officer caused his Associate (Lachlan Spargo-Peattie) to attend a meeting with Mr O’Brien and Assistant Commissioner Peter Bravos, at which a report was made by his Associate on his behalf to NT Police that false affidavits may have been filed in the Proceedings.
- 11.10 Following the meeting referred to in paragraph 11.9, the Judicial Officer notified the lawyers acting for Mr Wyvill and Ms Spurr that the “Northern Territory Police have contacted the Court and requested access to material held on the above file”, and made orders on 30 April 2015 granting leave to NT Police to inspect the file, including affidavits on it, but did not disclose to Mr Wyvill, Ms Lawrie or Ms Spurr, or their lawyers, in that notification or otherwise, the fact of the meeting

referred to in paragraph 11.9 or that he had, through his Associate, reported to NT Police that false affidavits may have been filed in the Proceedings.

Particulars

11.10.1 Email from the Judicial Officer's Associate to Ms Lawrie, Nola Pearce and Chris Osborne dated 30 April 2015.

11.10.2 Orders made by the Judicial Officer on 30 April 2015.

11.11 On 7 May 2015, the Judicial Officer wrote to Mr Grant in his capacity as the Statutory Supervisor and:

11.11.1 stated that Mr Wyvill and Ms Spurr's conduct may constitute an offence contrary to sections 118, 119 and/or 286 of the Criminal Code (NT);

11.11.2 directed Mr Grant's attention to the findings at [225] of the Judgment as to "matters potentially arising under the Criminal Code"; and

11.11.3 invited Mr Grant to formulate whatever complaints against Mr Wyvill he deemed appropriate.

Particulars

11.11.4 Letter from the Judicial Officer to Mr Grant dated 7 May 2015.

11.12 On 8 May 2015, the Judicial Officer caused his Associate to make a request of the solicitors for Mr Lawler, without notifying the legal representatives for Ms Lawrie, or Mr Wyvill or Ms Spurr or their representatives, for the provision of documents which had been filed in the Proceedings that day, being an affidavit of Mr Lawler's solicitor and Mr Lawler's submissions on costs, and, upon those documents being provided to his Associate, caused those documents to be sent to Mr Grant without notifying Ms Lawrie, Mr Wyvill or Ms Spurr or their representatives.

11.12.1 Email chain between the Judicial Officer's Associate and Bernadette Raumteen (a then Graduate at Paul Maher Solicitors) dated 8 May 2015.

11.12.2 Email from the Judicial Officer's Associate to Mr Grant dated 8 May 2015.

11.13 On 3 June 2015, after being informed by Mr Grant that he had lodged a complaint with the Law Society in his capacity as Statutory Supervisor, the Judicial Officer asked Mr Grant to be kept informed about the progression of the complaint.

Particulars

11.13.1 Email from the Judicial Officer's Associate to Mr Grant dated 3 June 2015.

11.14 On 5 June 2015, the Judicial Officer presided at a hearing in the Proceedings in which his Honour asked Ms Lawrie's Counsel, "what else do you think the defendant was going to do upon the discovery of those documents, which were produced because of the manner in which Mr Wyvill designed the case to run".

30 It follows from the above that the issue before the Panel is the Malice Allegation, as articulated in the Amended Particulars of Complaints and as understood in the context of the Commission's decision dismissing allegations bearing upon the Judge's motivations.

Hearing

31 On 22 April 2025, the solicitors assisting the Panel notified the Judicial Officer's lawyers and the Complainants that the Panel had resolved, pursuant to s 52 of the Act, to list the matter for a hearing in Darwin in the week commencing Monday 11 August 2025, with 5 days set aside (**Hearing**). The Panel determined that the Hearing would be conducted in private but that Mr

Wyvill, Mr Young, Ms Lawrie, as the complainants, were permitted to attend to observe the Hearing, along with the Judicial Officer and his legal representatives.

- 32 The Panel conducted a hearing on 11 August 2025 and 12 August 2025. Counsel Assisting appeared, as did Senior and junior counsel on behalf of the Judge. Mr Young and Ms Lawrie were present during the hearing.

The Panel's statutory task

- 33 Pursuant to s 51 of the Act, the Panel must conduct an examination of the complaints for which it was established and initiate the investigations into the subject matter of the complaints that it thinks appropriate. Section 52 empowers the Panel to conduct a hearing in connection with the complaints.

- 34 Pursuant to s 53(1) of the Act, the Panel must dismiss the three complaints to the extent that it is of the opinion that (1) the complaints should be dismissed on any of the grounds specified in s 44 or (2) the complaints are not substantiated.

- 35 Under s 44(1), the Panel may dismiss all or part of the complaint if satisfied on reasonable grounds of any of the following:

- (a) the complaint is frivolous or vexatious or not made in good faith;
- (b) the complaint is trivial;
- (c) the matter is one for which a complaint may not be made under section 40(2);
- (d) there is or was available another satisfactory means of dealing with the matter;
- (e) the matter is the subject of legal proceedings and should more properly be the subject of an appeal;
- (f) the matter happened so far in the past that it does not justify further consideration;

- (g) the matter arose before the person who is the subject of the complaint was appointed as a judicial officer or an ordinary member of NTCAT, unless it appears to the Judicial Commission that the matter could justify the removal from office or termination of appointment of the judicial officer or ordinary member;
- (h) the person who is the subject of the complaint is no longer a judicial officer or an ordinary member of NTCAT;
- (i) the matter relates to the private life of a judicial officer or an ordinary member of NTCAT that cannot reasonably be considered to affect, or have affected, either:
 - (i) the judicial officer's or ordinary member's suitability to hold office; or
 - (ii) the judicial officer's or ordinary member's performance of the functions or exercise of the powers of the officer's or member's office;
- (j) having regard to all the circumstances, further consideration of the complaint is unnecessary or unjustifiable.

36 If the Panel dismisses the complaints, either because it is of the opinion that they should be dismissed pursuant to s 44 or because it is of the opinion that they are not substantiated, the Panel must give a written report setting out its determinations to the Commission and the Judicial Officer: s 53(2). It must also give the Complainants written notice of the dismissal of their respective complaints and set out the reasons for their dismissal: s 53(3). The Panel may give a copy of the report that it is required to provide to the Commission and the Judicial Officer under s 53(2) to the Complainants: s 53(4).

37 If the Panel does not dismiss the complaints under s 53 of the Act, it has a duty to report under Division 4 of Part 3 of the Act: s 55. The effect of Division 4 of Part 3 is that it must do one of two things. Which of those things it does is a binary choice dictated by the Panel's evaluation of whether the complaint, if substantiated, could justify consideration of the removal of the Judicial Officer.

- 38 If it forms the opinion that the complaints *do not* justify consideration of the Judicial Officer's removal from office, the Panel must provide a report to the head of jurisdiction (in this case the Chief Justice) setting out the Panel's findings of fact and its opinions: ss 56(1) and (2). It may include recommendations as to what action should be taken in relation to the complaints. The Panel must give a copy of the report to the Complainants, the Judicial Officer and the Commission: s 56(4).
- 39 Alternatively, if it forms the opinion that the complaints *could* justify consideration of the Judicial Officer's removal from office, the Panel must provide a report to the Administrator of the Northern Territory setting out its findings of fact and its opinions: ss 57(1) and (2). The Panel must give a copy of its report to the Minister, the head of jurisdiction (the Chief Justice), the Commission and the Judicial Officer: ss 57(3) and (4). If this occurs, the Judicial Officer will have the opportunity to provide a written response to the report to the Minister: s 57(5). The Minister must table a copy of the report in the Legislative Assembly within 6 sitting days of its receipt by the Minister, and the Minister must table a copy of any response provided by the Judicial Officer in the Legislative Assembly within 6 sitting days after the Minister receives it: s 58.
- 40 Thus, in summary, putting aside the question of whether the complaints should be dismissed under s 44 of the Act, the Panel must make findings of fact about whether the Malice Allegation is substantiated, and it must then consider and form an opinion as to whether the Malice Allegation is substantiated. If the Panel is of the opinion that the Malice Allegation is not substantiated, the complaints must be dismissed. If it is of the opinion that it is substantiated, the Panel must proceed to consider whether the Malice Allegation justifies consideration of the Judicial Officer's removal from office, and report accordingly.

41 It is appropriate to turn immediately to a fundamental issue raised at the hearing by the Judge as to whether the matters complained of in the Malice Allegation are capable of being subject of complaint under the Act.

Does the conduct complained of in the Malice Allegation constitute behaviour within the meaning of the Act?

The Judge's submissions

42 In opening submissions filed before the hearing, the Judge contended that the conduct complained of in the Malice Allegation does not, on a proper construction of the Act, constitute behaviour within the meaning of the Act. In essence the Judge contends that the ambit of the word 'behaviour' does not extend to a judicial officer's formation and expression of reasons for decision.

43 At the hearing, senior counsel for the Judge accepted that the word behaviour has a broad connotation, reflecting its ordinary meaning, encompassing anything a person had done.¹⁴ If behaviour is so understood, a judicial officer's formation and expression of reasons for decision falls within the ordinary meaning of 'behaviour'. However, counsel submitted, construing the general words of s 40(1) of the Act as extending to include the formation and expression of the reasons recorded in a judicial officer's reasons for judgment would be inconsistent with three overlapping, and mutually reinforcing, fundamental principles and systemic values: the centrality of the giving of reasons to the judicial function; the principle of finality; and the independence and impartiality of the judiciary. Thus, the submission continues, having regard to the principle of legality the Act should not be so construed – the word 'behaviour' should be read down so as not to encompass the forming and expressing of reasons, to avoid such a result.

¹⁴ Panel Hearing Transcript, pp 48, 51.

44 In support of these submissions senior counsel pointed to a number of decisions of the High Court espousing the fundamental importance of these principles and values. For example, counsel referred to the following passages from the recent decision of the High Court in *Queensland v Stradford*.¹⁵

45 As to the principle of finality, the plurality (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ) observed that:¹⁶

... the finality of judicial decisions would be undermined if those disappointed with a decision could bring proceedings against a judge as a means of attacking the judge’s decision. ... Absent a successful appeal or permissible collateral challenge to a decision, those disputes are resolved to finality.

46 In *Stradford*, the plurality re-affirmed that “the independence of all courts referred to in s 71 of the Constitution is constitutionally guaranteed by the requirement that all must ‘satisfy minimum requirements of independence and impartiality’”.¹⁷

47 In the context of discussion of judicial immunity from suit by dissatisfied litigants, the Court observed that “an allegation of judicial misconduct by a dissatisfied litigant often, perhaps even typically, will be accompanied by an accusation of malice or want of good faith in the exercise of judicial authority”.¹⁸ Judicial immunity exists both to advance finality of judgments and to protect judicial independence in decision making.¹⁹ It enhances public confidence in the impartiality of judicial decision by foreclosing even the assertion that the prospect of suit may have had some effect on the decision-making process or its outcome.²⁰

¹⁵ *State of Queensland v Stradford* (2025) 421 ALR 376.

¹⁶ *Stradford*, [76].

¹⁷ *Stradford*, [106].

¹⁸ *Stradford*, [109] quoting *Fingleton v R* (2005) 227 CLR 166 at [37].

¹⁹ *Stradford*, [74] – [76].

²⁰ *Stradford*, [75].

48 The plurality quoted O'Connor J in the US Supreme Court, who observed that absent judicial immunity, "the resulting avalanche of suits... would provide powerful incentives for judges to avoid rendering decisions likely to provoke such suits."²¹

49 The Court accepted that, if judges were required to give reasons for their decisions more than once, "their impartiality would be compromised".²² In recognising that there was a need "not [to] invite any inquiry into the judicial officer's state of mind", the plurality observed that:²³

The prospect of judges giving evidence about what was said to be their actual reasons or state of mind when deciding a matter, as opposed to their published reasons, would undermine judicial independence and finality of judgments, and the public interest each serves.

50 Having regard to the principle in [46] above, Senior Counsel submitted that the Act would be constitutionally invalid if it permitted complaints about the formation and expression of the reasons in a judicial officer's reasons for judgment in that it would thereby undermine the independence and impartiality of the NT Supreme Court.

51 In written submissions, Senior Counsel submitted that acceptance of the contention in [42] above would mean the Panel has no jurisdiction. However, in oral submissions, Senior Counsel shied away from this position, submitting that their contention goes to power not jurisdiction. It is not necessary to determine that question because, as explained below, we do not accept the contention in [42] above.

²¹ *Stradford*, [74], quoting *Forrester v White* (1988) 484 US 219, 226-227.

²² *Stradford*, [110].

²³ *Stradford*, [110] and [111].

Statutory Construction: general principles

52 The principles of statutory construction are well-established, and may be summarised as follows.

53 Statutory construction involves attribution of meaning to statutory text. It requires attention to the text, context and purpose of the Act.²⁴ While the task of construction begins and ends with the statutory text, throughout the process the text is construed in its context.²⁵ As Kiefel CJ, Nettle and Gordon JJ explained in *SZTAL*:²⁶

The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

54 Construction is a “text-based activity”.²⁷ The meaning of the legislation must emerge from the statutory text, understood in its context and having regard to the statutory purpose being pursued.²⁸

²⁴ *Thiess v Collector of Customs* [2014] HCA 12; (2014) 250 CLR 664 at [22] - [23]; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27 at [4] and [47]; *Coverdale v West Coast Council* [2016] HCA 15; (2016) 259 CLR 164 at [21]; *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 91 ALJR 936 at [14] and [37].

²⁵ *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at [69]; *SZTAL* at [14] and [37]; *Probuild Construction (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4; (2018) 92 ALJR 248 at [34].

²⁶ *SZTAL* at [14].

²⁷ *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27 [4], [47].

²⁸ *Australian Unity Propoerty Ltd v City of Busselton* [2018] WASCA38 [83], [93]; *CEO, Department of Environmental Regulation v Waroona Resources* [2023] WASCA 73 [39] [40].

- 55 The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute.²⁹
- 56 The objective discernment of the statutory purpose is integral to contextual construction.³⁰ The statutory purpose may be discerned from an express statement of purpose in the statute, inference from its text and structure and, where appropriate, reference to extrinsic materials.³¹ The purpose must be discerned from what the legislation says, as distinct from any assumptions about the desired or desirable reach or operation of relevant provisions.³²
- 57 Discernment of statutory purpose is particularly significant in cases where the text read in context permits of more than one meaning, so that the constructional choice presented is from “a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural”.³³ In such a case, the choice “turns less on linguistic fit than on evaluation of the relevant coherence of the alternatives with identified statutory objects or policies”.³⁴
- 58 Statutory construction involves the attribution of meaning to the statutory text, and not the remediation of perceived legislative oversight.³⁵

²⁹ *Project Blue Sky v Australian Broadcasting Authority* at [69]; *Independent Commission Against Corruption v Cuneen* [2015] HCA 14; (2015) 256 CLR 1 at [31].

³⁰ *Thiess v Collector of Customs* at [23]; *Taylor v Owners of Strata Plan 11564* [2014] HCA 9; (2014) 253 CLR 531 [66]; *SZTAL* at [38] - [39].

³¹ *Certain Lloyd's Underwriters v Cross* [2012] HCA 56; (2012) 248 CLR 378 at [25].

³² *Certain Lloyd's Underwriters v Cross* at [26].

³³ *Taylor v Owners of Strata Plan 11564* at [66]; *SZTAL* at [38].

³⁴ *Taylor v Owners of Strata Plan 11564* at [66]; *SZTAL* at [38]; *SAS Trustee Corporation v Miles* [2018] HCA 55; (2018) 265 CLR 137 at [20].

³⁵ *Taylor v Owners of Strata Plan 11564* [65]; *H Lundbeck A/S v Sandoz Pty Ltd* [2022] HCA 4; (2022) 276 CLR 170 [63].

Disposition

- 59 For the reasons set out below, we do not accept the Judge’s contention that the Malice Allegation lies outside of behaviour within the meaning of the Act. In our view, behaviour has its ordinary and natural meaning and there is no carve-out concerning the formation and expression of reasons.
- 60 Consistently with the principles set out above, the starting point in addressing the Judge’s submission is the text of the Act.
- 61 The Act authorises an investigation panel to examine and investigate, and hold a hearing in connection with, a “complaint”: see ss 51(1) and 52(1). As explained in [34] – [39] above, the panel then deals with the complaint by either dismissing it or by preparing a report in relation to the complaint under Division 4 of Part 3 of the Act: s 55.
- 62 Section 3 of the Act provides that, in the Act, “complaint means a complaint made under section 40”. Section 40(1) of the Act provides that a person may make a complaint “about a matter relating to the behaviour or the physical or mental capacity of a judicial officer”.
- 63 Given this statutory framework, the question raised by the Judge’s contention directs attention to the meaning of ‘behaviour’ in s 40.
- 64 The words “behaviour or ... capacity” in s 40(1) of the Act must be read with the cognate expression “proved misbehaviour or incapacity” that is found both in s 61 of the Act and in s 40 of the *NT Supreme Court Act*. “[P]roved misbehaviour or incapacity” constitutes the sole grounds for removal of a judge. Any limits to be found in the ambit of ‘behaviour’ would directly limit the scope of what can constitute ‘misbehaviour’, thereby limiting the scope of conduct by a judge capable of amounting to grounds for removal. We will return to this point.

- 65 As already noted, the ordinary meaning of a person's behaviour is their conduct or acts. Behaviour encompasses a single act, a course of conduct or a series of acts. In its natural meaning therefore, a judge's 'behaviour' encompasses a judge's preparation and expression of reasons for decision.
- 66 Significantly, in our view, nothing in the concept of behaviour or in any part of the text of s 40 suggests that certain kinds of conduct falls outside the ambit of the expression behaviour. The same is true of the statutory context more broadly. More specifically, nothing in the text of s 40, or in any other provision of the Act, gives any indication at all that the formation and expression of reasons by a judicial officer falls outside the ambit of the expression behaviour.
- 67 Put another way, the construction put on behalf of the Judge has no foothold in the text of s 40 or in any aspect of the text of the Act. That counts strongly against adoption of the construction.
- 68 We turn to consider the purpose of the Act. Put most broadly, the purpose of the Act is to improve judicial accountability. It does so by providing a structured mechanism for the making of complaints, so as to uphold standards of judicial conduct and to ensure that only those with the necessary capacity exercise judicial power. These purposes can be derived from the text of the Act. They were also identified by the Attorney-General in the Second Reading Speech, who observed that by so providing, the Act would enhance public confidence in the judicial system.³⁶
- 69 Contrary to the submissions made on behalf of the Judge, nothing in the purpose of the Act nor in the Second Reading Speech suggests that the formation and expression of reasons for decision lies outside the reach of

³⁶ Second Reading Speech (Legislative Assembly of the Northern Territory, Tuesday, 23 June 2020), pp 8435 and 8436.

complaints to the Judicial Commission. The ambit of complaints is expressed by reference to behaviour and capacity. As already explained, behaviour in its ordinary meaning has a broad connotation. If anything, the exclusion of a core element of judicial work – namely forming and expressing reasons – from the ambit of complaints as framed by reference to ‘behaviour’ – a word of broad connotation – would tend to undermine the evident legislative purpose. Insofar as in the Second Reading Speech the Attorney-General referred to preserving judicial independence, as explained below, construing behaviour as encompassing formation and expression of reasons does not undermine judicial independence.

70 The broad connotation of behaviour that we favour is also supported by consideration of an aspect of the statutory context: the cognate term ‘misbehaviour’ in s 61 of the Act and in s 40 of the *Supreme Court Act 1979* (NT). Proved misbehaviour, together with incapacity, are the criteria for removal of a judge. As noted in [64] above, any limits to be found in the ambit of ‘behaviour’ would directly limit the scope of what can constitute ‘misbehaviour’, thereby limiting the scope of conduct by a judge capable of amounting to grounds for removal. That is reason for pause where, as here, the limit on the ambit of behaviour is not founded on anything expressed in any aspect of the legislative text. And that is particularly so where the phrase ‘proved misbehaviour or incapacity’ has been used in the Northern Territory and in a great many jurisdictions for many years *before* the Act was passed.

71 It is, we think, unlikely in the extreme that in passing the Act employing the language of s 40 the legislature intended to limit the grounds available to remove a judge. Before the Act was passed, was misconduct, such as malice, in the formation and expression of reasons for decision excluded from consideration as grounds to remove a judge? We see no basis to suggest it was so excluded. We are not aware of a great deal of authority on the scope of the

expression ‘misbehaviour’ in the conventional statutory statement of grounds for removal, but such guidance as there is suggests the expression has a wide ambit.

72 Like the High Court of New Zealand in *Wilson v Attorney-General*, we would adopt what was said by Commissioner Wells QC in the Murphy Inquiry to the effect that the word ‘misbehaviour’ extends to the conduct of a judge in or beyond the execution of their judicial office.³⁷ In our view, as we have said, behaviour has a cognate meaning.

73 The precepts of finality in litigation, the importance of reasons for decision, and the need to uphold judicial independence do not justify or sustain a contrary construction. Those general themes in our law, important though they undoubtedly are, do not sustain or justify attributing to the text of s 40 a meaning that the language of its text cannot bear.

74 The statements of principle in the authorities relied on by the Judge explain the rationale of the common law rules of judicial immunity (1) from civil suit by a litigant; and (2) from criminal prosecution, for conduct in the course of executing judicial³⁸ duties. They cannot be transposed into the fundamentally different context of construing legislation of the nature of the Act. Moreover, in *Stradford*, the plurality specifically recognised processes of discipline and removal from office as a potential response to a malicious act by a judge. Both the plurality and Gordon J cited Gleeson CJ’s observation in *Fingleton* that judicial immunity did not mean judges were unaccountable and the “ultimate sanction for judicial misconduct is removal from Parliament.”³⁹ The plurality also observed:

³⁷ *Wilson v Attorney-General (NZ)* [2011] 1 NZLR 399 at [59]; quoting Parliamentary Commission of Inquiry Re The Honourable Mr Justice Murphy: Ruling on Meaning of “Misbehaviour” (1986) 2 Aust Bar Rev 203.

³⁸ And, in the case of *Fingleton*, administrative duties.

³⁹ *Stradford*, [74] and [208], quoting *Fingleton*, [39].

Recourse against a wrongful act or omission by a judicial officer (including a negligent, unjust, or *even malicious act or omission by a judicial officer*) in the performance or purported performance of a judicial function is to be found within such system of appeals as might be applicable, such means of collateral challenge as might be available, *and such processes of discipline and removal from office to which the judicial officer might be amenable*. It is not to be found in a civil suit against the judicial officer. (emphasis added)

75 To read the Act as encompassing complaints about the formation and preparation of reasons does not, in our view, impinge on judicial independence. Certainly, to us, it does so impinge on judicial independence as to fail to satisfy the minimum requirements of independence and impartiality that inhere in courts referred to in s 71 of the Constitution under the principle referred to in [46] above. In this regard, it must not be overlooked that the Judicial Commission's members include the three heads of jurisdiction and that the Commission has broad powers in dealing with the complaint. The Commission's powers include the power to dismiss a complaint summarily on the grounds set out in s 44(1), the terms of which are set out at [35] above. Thus, a vexatious or otherwise baseless allegation as to a judge's conduct in forming or expressing their reasons for judgment can readily be summarily dismissed. So too, a complaint can be dismissed on the ground that the matter subject of legal proceedings can and should more properly be the subject of an appeal. A concern as to a baseless allegation would thus not constrain the fearless and independent preparation of reasons for decision. And, as both counsel for the Judge and Counsel Assisting submitted, neither the Commission nor an investigation panel can compel a judge to give evidence as to their reasons for decision.

76 For these reasons we do not accept the construction advanced on behalf of the Judge. In our view, 'behaviour' has its ordinary broad meaning of conduct, acts or act. The matters raised by the complaints in this case lie within the ambit of behaviour within the meaning of s 40 of the Act.

The Factual Background

77 We turn to deal with the merits of the Malice Allegation: is the allegation substantiated? We begin by setting out the background. The primary facts as to the background are uncontroversial. There are issues as to what occurred in the aftermath of the Judgment. We will come to those issues in a subsequent section of this report.

The Inquiry

78 On 5 December 2013, the Legislative Assembly of the Northern Territory resolved that a person be appointed to inquire into and report to the Administrator on the purported decision to grant a lease of Stella Maris to Unions NT on or about 3 August 2012.⁴⁰ As at August 2012, Gerry McCarthy was the Minister for Lands and Planning⁴¹ whilst Ms Lawrie was the Deputy Chief Minister.⁴²

79 On 18 December 2013, Mr Lawler was appointed by the Administrator to undertake the Inquiry.⁴³ Shortly after Mr Lawler's appointment, Mr Wyvill and Ms Spurr came to be the legal representatives for Ms Lawrie and Mr McCarthy during the Inquiry.⁴⁴

80 On 14 February 2014, Ms Spurr sent a letter to Mr Lawler in which she stated that "no warning has been given that you are considering making any particular finding of wrong-doing against either of our clients".⁴⁵ Mr Lawler responded by letter dated 17 February 2014, in which he stated:⁴⁶

⁴⁰ Judgment, [1].

⁴¹ Judgment, [47].

⁴² Judgment, [118].

⁴³ Judgment, [3].

⁴⁴ Judgment, [69].

⁴⁵ TB, D1, pp 2798 to 2801.

⁴⁶ TB, D2, pp 2802 to 2805.

The Inquiry is being conducted in 4 phases and we are still in phase 2 – which is the information gathering phase. Until that stage has been completed, the Inquiry is not in a position to consider or form a view on whether there is any ground for making the findings of wrongdoing against any person or organisation. ...

The preliminary evidence gathering stage will be concluded and the relevant materials examined. Then and only then will I be in a position to determine whether there may be grounds to make any adverse findings against any person or organisation. Should that eventuate, I will provide any such person or organisation with notice, all relevant materials, and opportunity to make submissions in relation to the matter.

81 As events transpired, a critical issue which emerged during the Proceeding was whether reliance was placed on this letter by Ms Lawrie, Mr Wyvill and Ms Spurr prior to the completion of the Inquiry.

82 On 10 March 2014, Ms Lawrie attended a pre-hearing interview conducted by Mr Lawler. Ms Lawrie gave evidence in hearings before Mr Lawler on 13 and 14 March 2014. Mr Wyvill attended the pre-hearing interview and those hearings with Ms Lawrie.

83 On 31 March 2014, Mr Wyvill sent an email to Ms Lawrie, Ms Spurr and Mr McCarthy in which he stated:⁴⁷

... is it also time to say to him that we have no confidence in the inquiry or him because of the unfairness of his conduct of the inquiry to date, Delia and Gerry have important public duties to perform to which this is a serious distraction and, given the fact that no lease was actually granted, we consider the inquiry to be a pointless waste of time and will not be co-operating with it any further?? And then to ignore him from now on? By staying engaged we may actually be giving him the opportunity to try to fix up the messes we say he has created and also more chance to verbal us.

⁴⁷ TB, D8, pp 2814 to 2815.

84 Ms Lawrie replied, “*I fully concur with your advice*”.⁴⁸ These communications, together with subsequent communications in the period leading up to the completion of the Inquiry, came to be examined in detail by the Judge in the context of addressing Mr Lawler’s waiver defence. Principal amongst those communications was a letter that Ms Spurr sent to Mr Lawler on 15 April 2014 which had been settled by Mr Wyvill.⁴⁹ Ms Spurr stated in that letter:

Our Clients have exhausted their ability to access pro bono legal assistance. Accordingly, we will no longer be representing Ms Lawrie and Mr McCarthy in this matter. In those circumstances, we do not propose to respond to the advice of Mr Maher or the subsequent valuation report of Mr Harris.

...

Please note that our clients remains vitally interested in the outcome of the enquiry [sic]. ...

85 The representations in this letter came to be closely assessed by the Judge against internal communications between Ms Lawrie, Mr Wyvill and Ms Spurr in the period up until Mr Lawler’s report titled “Inquiry into Stella Maris – 2014” (**Lawler Report**) was tabled in the Legislative Assembly on 19 June 2014.⁵⁰

86 The Lawler Report made a number of findings adverse to Ms Lawrie.

The Proceeding

87 On 30 July 2014, Ms Lawrie filed an Originating Motion in the Supreme Court of the Northern Territory seeking a declaration that Mr Lawler failed to

⁴⁸ TB, D8, p 2814.

⁴⁹ TB, D19, pp 2867 to 2868.

⁵⁰ TB, C1, pp 2262 to 2425.

observe the requirements of procedural fairness and sought an order quashing the Lawler Report.⁵¹

- 88 On 25 August 2014, Ms Lawrie filed a Summons on her Originating Motion.⁵² Ms Spurr swore an affidavit that same day in which she deposed, among other things, that the decision to withdraw legal representation in the Inquiry was made on the basis of her, Mr Wyvill and Ms Lawrie's conclusion that Mr Lawler was not considering making any adverse findings against Ms Lawrie.⁵³
- 89 On 11 September 2014, the first hearing in the Proceeding occurred. The hearing was before The Hon. Justice Kelly. Ms Spurr appeared for Ms Lawrie and Mr Paul Maher appeared for Mr Lawler. Her Honour Justice Kelly made orders regarding the filing and service of Statements of Facts, Issues and Contentions by the parties, as well as affidavits.⁵⁴
- 90 On 24 September 2014, Ms Lawrie filed her Statement of Facts, Issues and Contentions (**SFIC**) in which she alleged, among other things, that she and her legal representatives relied on statements in Mr Lawler's 17 February 2014 letter in determining her conduct in the Inquiry.⁵⁵ It was also alleged that Ms Lawrie did not seek to contribute further to the Inquiry from about 26 March 2014, her solicitors ceased acting on 14 April 2014, and she and her legal representatives so acted in the belief that Mr Lawler was not considering making any adverse findings against Ms Lawrie.⁵⁶

⁵¹ TB, B1.

⁵² TB, B3.

⁵³ TB, B4, pp 154 to 158, [7] to [8].

⁵⁴ TB, B5.

⁵⁵ TB, B6, [7].

⁵⁶ TB, B6, [11] to [12].

- 91 On 13 October 2014, Mr Lawler filed his SFIC.⁵⁷ It is apparent from [11] and [24] of that document that Mr Lawler was at least not admitting the allegations bearing upon the state of mind of Ms Lawrie and her legal representatives.
- 92 On 14 October 2014, there was a further hearing before Justice Kelly. Mr Wyvill appeared for Ms Lawrie, along with Ms Spurr, and Mr Michael Maurice QC appeared with Mr Maher for Mr Lawler. Her Honour made orders that Ms Lawrie make discovery in relation to the reliance plea at [7] of her SFIC and the state of mind plea at [12] of her SFIC.⁵⁸
- 93 At some point in November 2014 Mr Young replaced Mr Wyvill as Ms Lawrie's counsel. This emerges from [83] of Mr Wyvill's affidavit dated 26 May 2015.⁵⁹ Ms Spurr was Ms Lawrie's solicitor throughout the Proceeding.
- 94 On 22 October 2014, the matter was listed for trial before Justice Barr on 29 and 30 January 2015.⁶⁰ The parties were notified of this trial listing before Justice Barr on 23 October 2014.⁶¹
- 95 On 29 October 2014, Ms Spurr filed a List of Documents in response to the discovery orders made by Justice Kelly on 14 October 2014.⁶² A broad claim of legal professional privilege was made over certain communications that were not individually identified.
- 96 On 12 November 2014, Mr Wyvill made an affidavit which was filed in the Proceeding.⁶³ In that affidavit he deposed to a number of things, including that he had a belief that if Mr Lawler was contemplating making adverse findings against Ms Lawrie in his report, he (Mr Lawler) would have drawn

⁵⁷ TB, B7.

⁵⁸ TB, B9.

⁵⁹ TB, B70.

⁶⁰ TB, F16, p 4462.

⁶¹ TB, F16, p 4465.

⁶² TB, B10.

⁶³ TB, B11.

that to his (Mr Wyvill's) attention because of a statement made by Mr Lawler in his letter dated 17 February 2014 and also because he considered it to be a requirement of the rules of natural justice.

97 On 13 November 2014, Ms Spurr made an affidavit which was also filed in the Proceeding in which she said that based on Mr Lawler's letter of 17 February 2014, and a conversation she gave evidence about, she believed that if Mr Lawler was considering any adverse findings against either of her clients, he would give them notice of that fact.⁶⁴

98 On 14 November 2014, Ms Lawrie made an affidavit in which she similarly deposed that she believed Mr Lawler was not considering making any adverse findings against her, including because of the letter from Mr Lawler of 17 February 2014.⁶⁵

99 In November 2014, the Proceeding was reassigned in circumstances where Justice Barr was going on an extended period of annual leave shortly after the trial, which at that point had been scheduled for 29 and 30 January 2015, and it was considered that Justice Barr did not have sufficient time to hand down judgment before going on annual leave.⁶⁶

100 On 1 December 2014, the parties to the Proceeding were notified that the Judge "will now hear this matter".⁶⁷ At the time, the Judge was on circuit in Alice Springs.⁶⁸

101 On 15 December 2014, Ms Lawrie filed an Amended List of Documents which itemised 17 documents subject to claims of privilege.⁶⁹ On the same

⁶⁴ TB, B12.

⁶⁵ TB, B13.

⁶⁶ TB, F16, pp 4460 and 4461.

⁶⁷ TB, A1, p 12.

⁶⁸ TB, B114, [70].

⁶⁹ TB, B16.

day, Ms Spurr sent a letter to Mr Maher in which she stated if Mr Lawler wished to cross-examine either her or Mr Wyvill, that “may be embarrassing for any judge who knows us well or has a pre-existing view about our credibility”.⁷⁰ She stated that if “you propose to cross-examine either of us I believe this should be raised as an issue before the trial judge (Southwood J I understand) as soon as possible”.⁷¹

102 On 16 December 2014, Mr Maher sent an email to Ms Spurr in which he stated that “we have no present intention to call or cross-examine either you or Mr Wyvill” but the “only thing that would change our view is if any of the documents produced by you appear to clearly contradict what is in your own or Mr Wyvill’s affidavit”.⁷²

103 On 22 December 2014, Ms Lawrie produced to Mr Lawler the 17 documents which had been identified in the privileged section of Ms Lawrie’s Amended List of Documents.⁷³

104 On 23 December 2014, Mr Maher wrote to Ms Spurr setting out detailed submissions on why privilege had been waived in relation to the documents identified in the privileged section of Ms Lawrie’s Amended List of Documents. The letter concluded by observing that it appeared that the trial could not proceed on the listed dates and identifying the likely need to cross-examine Ms Spurr and Mr Wyvill.⁷⁴

⁷⁰ TB, A2, p 13.

⁷¹ TB, A2, p 13.

⁷² TB, A3, p 14.

⁷³ TB, B21, [2].

⁷⁴ TB, B22, p 326.

105 On 6 January 2015, Mr Maher sent an email to the Judge’s Associate in which he indicated that Mr Maurice was unwilling to cross-examine Mr Wyvill and Ms Spurr, and requested that the matter be called on for directions.⁷⁵

106 On 8 January 2015, Mr Maher made two affidavits in the Proceeding. In one affidavit he exhibited the 17 documents that had been produced by Ms Lawrie on 22 December 2014.⁷⁶ In the second affidavit, he deposed to the circumstances surrounding the disclosure of those documents.⁷⁷ In particular, he said that he and Mr Maurice agreed that, “although there was every likelihood that the documents would merely confirm the plaintiff’s Statement of Facts, Issues and Contentions and the matters set out in the affidavits filed on behalf of the plaintiff, we owed a duty to the defendant to at least investigate the issue” ([14]). He continued in this affidavit that upon examining the documents produced on 22 December 2014, “Mr Maurice and I realised that, against our earlier expectations, there are substantial issues of fact to be resolved” and “both Mr Wyvill and Ms Spurr will be required for cross-examination” ([15]).

107 On 9 January 2015, there was a hearing before the Judge⁷⁸ at which the Judge raised the following matter:⁷⁹

... I’ve had a brief look at the papers in this case. I’m also wondering whether we’re all potentially galloping down a diverticulum, because looking at the defendant’s statement of facts and issues in contention, the key aspect potentially is what’s pleaded about the change in the course of the inquiry and

⁷⁵ TB, A4, p 15.

⁷⁶ TB, B21, pp 234 to 297.

⁷⁷ TB, B22, [15] and [16].

⁷⁸ TB, B115, pp 1496 to 1500.

⁷⁹ TB, B115, p 1498. At [88] of *Lawrie v Lawler* [2015] NTSC 40 (TB, B114), the Judge referred to this hearing in the following terms: “I also raised with the parties whether the key issues in the trial involved what Mr Lawler had pleaded in paragraphs 8, 9 and 11 of the DEFENDANTS STATEMENT OF FACTS, ISSUES & CONTENTIONS and, if that was the case, whether any alleged reliance by Mr Wyvill and Ms Spurr on the letter of 17 February 2014 was irrelevant”.

what is then set out as to what steps were taken by the enquirer, by the defendant, to accord a fair hearing.

And on the face of it, it's really whether the matter's pleaded, I think, in paragraphs 8, 9 and so on of the response are made out. And if that's the case, then what Mr Wyvill and Ms Spur [sic] or Ms Laurie [sic] thought potentially ends up being neither here nor there, so any cross-examination of those witnesses would be very short indeed.

108 In the course of this hearing, in response to the Judge's observations, Mr Maurice QC said as follows:

MR MAURICE: Well, I guess we'd like to have the advantage of being able to put both before your Honour as reasons for declining the relief [s]ought. Because the - if I can just say this, the - the material that's been discovered, and for which legal professional privilege was initially claimed, does in our view give a quite inconsistent picture with what appears in that paragraph of the statement of facts, and of - and what appears in the affidavits of the plaintiff and her two legal advisors. It does seem to us that they would found a basis for the court finding that indeed the plaintiffs - the plaintiff and her legal advisors really set a trap for the defendant, and chose to ignore - and chose to ignore him, chose to not participate further in the inquiry in the hope that they would get some reason, some pretext for attacking whatever finding he made, and that indeed they did expect him to make adverse findings. They were well aware that he probably would.

109 On 14 January 2015, there was a further hearing before the Judge.⁸⁰ During that hearing, the Judge raised the difficulty with the reliance plea in Ms Lawrie's SFIC and stated that if that issue remains pressed, it "gives rise to what was the political strategy. Because the political strategy goes to the state of mind. Because the fact that there is a political strategy indicates that there is an anticipation of adverse comments being made by the Commissioner".⁸¹ During this hearing, Mr Maher informed the Judge that Mr David McLure had been briefed as junior counsel for Mr Lawler and that Mr Lawler was in a

⁸⁰ TB, B27, pp 338 to 353.

⁸¹ TB, B27, p 350.

position to proceed with the hearing which was listed for four days instead of two days.

110 That same day, Mr Maher sent an email to Ms Teresa Hart in connection with Mr Lawler's costs.⁸² In that email he stated:

4. Although Mr Maurice and I felt it highly unlikely that Alistair Wyvill and Cathy Spurr would make affidavits which were not true and accurate, we felt that at least we should explore the issue in order to satisfy our obligation to Mr Lawler. ...

...

7. The documents were only provided to me on the afternoon of 22 December 2014. Nothing effective could be done before Christmas. However, when Mr Maurice and I examined these documents we were surprised indeed. We had expected that they would confirm what Alistair Wyvill and Cathy Spurr had asserted in their affidavits, but the contrary was the case. ...

111 On 15 January 2015, the Judge made further discovery orders.⁸³

The Trial

112 On 27 January 2015 (being the first day of the trial before the Judge), Mr Wyvill made corrections to his earlier affidavit of 12 November 2014 as a result of his review of further documents and preparing to give evidence.⁸⁴ Ms Spurr also made an affidavit making a correction to her earlier affidavit.⁸⁵

113 On the same day, an Outline of Argument was filed on Ms Lawrie's behalf.⁸⁶ In that document, submissions were made as to Ms Lawrie's reliance on the letter from Mr Lawler dated 17 February 2014, including the submission at

⁸² TB, B77, pp 946 to 947.

⁸³ TB, B26.

⁸⁴ TB, B42, pp 407 to 431.

⁸⁵ TB, B43, pp 432 to 434.

⁸⁶ TB, B37, pp 386 to 396.

[26] that if “the plaintiff or her advisers had the subjective expectation that the representation would be fulfilled and relied on it to their detriment and lost an opportunity to make representations or submissions that will result in unfairness”.

114 During the first day of the trial, the Judge asked Ms Lawrie’s Counsel why “is reliance on the letter of 17 February 2014 pleaded at all” given that if “natural justice hasn’t been accorded then the letter’s irrelevant, isn’t it?”⁸⁷ The Judge also raised that the reliance plea had the effect of “exposing a number of the witnesses to quite serious cross-examination” with “potentially quite serious factual findings open at the end of the day”.⁸⁸ After an adjournment, counsel for Ms Lawrie informed the Judge that Ms Lawrie was no longer pressing the reliance plea and confirmed that Ms Lawrie was no longer relying upon the affidavits of herself, Mr Wyvill and Ms Spurr.⁸⁹ However, immediately after Ms Lawrie’s counsel confirmed that Ms Lawrie abandoned the reliance contention, Mr Maurice handed up a proposed Amended SFIC that inserted a contention that Ms Lawrie had waived any entitlement to additional procedural fairness.⁹⁰ Ms Lawrie’s Counsel did not object to Mr Lawler being given leave to introduce this contention, that is, the waiver contention.⁹¹

115 The trial continued on 28 January 2015.⁹² Mr Lawler sought to further amend his SFIC by adding the words “and deceptive” to the waiver contention that he had introduced on the previous day.⁹³ Counsel for Ms Lawrie did not object to leave being granted to make that further amendment.⁹⁴ Following this

⁸⁷ TB, B35, pp 375 and 376.

⁸⁸ TB, B35, p 376.

⁸⁹ TB, B35, p 379.

⁹⁰ TB, B35, p 380.

⁹¹ TB, B35, p 380.

⁹² TB, B116, pp 1501 to 1852.

⁹³ TB, B116, p 1502.

⁹⁴ TB, B116, p 1502.

amendment, Mr Lawler's waiver contention was pleaded in the following terms in [27A] to [27C] of his SFIC:⁹⁵

27A By no later than 15 April 2014, alternatively by no later than 18 June 2014, the plaintiff and or alternatively her legal representatives Mr Wyvill and Ms Spurr:

- a. understood the issues that were being examined by Mr Lawler that could lead to adverse findings about Ms Lawrie: and
- b. believed that it was likely that Mr Lawler would make one or more findings that were adverse to Ms Lawrie in his report.

27B On 15 April 2014 and at all times until Mr Lawler's report was made public on 19 June 2014, the plaintiff and her legal representatives adopted a deliberate and deceptive strategy of not engaging in dialogue with Mr Lawler about the substantive issues in the inquiry affecting the plaintiff. The motivation for the plaintiff's strategy was to avoid prompting Mr Lawler to provide additional measures of procedural fairness, so that once the report was made public the plaintiff could complain that she had been denied procedural fairness.

27C In the circumstances, the plaintiff waived any additional entitlement she had to procedural fairness.

116 During the second day of the trial and following the two amendments to Mr Lawler's SFIC, in response to an objection to its admission, Counsel for Ms Lawrie submitted with respect to Mr Lawler's letter of 17 February 2014 that while the "position we took yesterday was to no longer assert that we relied to our detriment on that aspect of the Lawler letter which said I will give advance notice", the "letter takes on a new relevance" in "view of the change to the defendant's pleadings".⁹⁶

⁹⁵ TB, B50.

⁹⁶ TB, B116, p 1505.

117 In response to this new plea by the defendant, Counsel for Ms Lawrie tendered an email sent on 16 March 2014 by Mr Wyvill. Counsel for Mr Lawler objected, unless Mr Wyvill were made available for cross-examination. The Judge ruled that the email would be admitted if Mr Wyvill was made available for cross-examination.⁹⁷ In response, Counsel for Ms Lawrie advised that Mr Wyvill would not be made available for cross-examination.⁹⁸

118 The trial entered its third day on 29 January 2015.⁹⁹ Counsel for Mr Lawler, Mr McLure, made extensive submissions regarding the waiver contention, in which he urged the Judge to make serious adverse findings against Ms Lawrie, Mr Wyvill and Ms Spurr.¹⁰⁰ In the course of those submissions, Mr McLure submitted that “when drawing inferences from the documents to which I’m about to come, your Honour will be entitled and indeed, with respect, duty bound, to take into account the fact that neither Ms Lawrie nor her legal representatives have given evidence”.¹⁰¹ He repeated this point toward the end of his submissions.¹⁰²

119 In this regard, Mr McLure identified reasons why Mr McCarthy was in a different position from Ms Lawrie, Mr Wyvill and Ms Spurr and, on that basis, did not invite adverse findings to be made against him concerning the so-called strategy.¹⁰³

120 By reference to the statement in Ms Spurr’s letter of 15 April 2014 (settled by Mr Wyvill) that “our clients have exhausted their ability to access pro bono

⁹⁷ TB, B116, p 1547.

⁹⁸ TB, B116, p 1547.

⁹⁹ TB, B117, pp 1583 to 1638.

¹⁰⁰ TB, B117, pp 1621 to 1638.

¹⁰¹ TB, B117, pp 1621 to 1622.

¹⁰² TB, B117, p 1637 to 1638.

¹⁰³ TB, B117, p 1634.

legal assistance”, Mr McLure submitted, and the Judge responded as follows:¹⁰⁴

The assertion in the letter that Ms Lawrie and Mr McCarthy had exhausted their ability to access pro bono legal assistance from Ms Spurr and Mr Wyvill was clearly untrue and in sorrow rather than anger we regret to submit must have been known to be untrue by Ms Spurr and Mr Wyvill, and of course by Ms Lawrie and Mr McCarthy. The significance of that is this - - -

HIS HONOUR: You say it constitutes a deliberate lie made to the commission.

MR MCLURE: We do urge that submission upon you.

121 Towards the conclusion of Mr McLure’s submissions during 29 January 2015, he submitted that the Judge “could be comfortably satisfied taking into account the principles in *Briginshaw* that there was a conscious, deliberate, dishonest strategy to avoid engaging with the Commissioner in order to be able to come to this [court] and falsely complain that Ms Lawrie had been denied procedural fairness”.¹⁰⁵ The Judge then indicated to Counsel for Ms Lawrie that the “last part of the submissions contain extremely serious matters, extremely serious matters”, and adjourned early at 3.48pm until the following morning to allow Counsel for Ms Lawrie to deal with them.¹⁰⁶

122 The trial was adjourned to the next day, 30 January 2015, which was the fourth and final day of the trial.¹⁰⁷ Counsel for Ms Lawrie filed written reply submissions,¹⁰⁸ in which they submitted, among other things, that the characterisation of the “supposed waiver as a strategy to ‘ignore, disengage and discredit’” does “not address the elements of waiver however defined. There was no deliberate act not to rely on an opportunity to make submissions in response to a notice of proposed adverse findings” ([6]). During the hearing,

¹⁰⁴ TB, B117, pp 1628 to 1629.

¹⁰⁵ TB, B117, p 1638.

¹⁰⁶ TB, B117, p 1638.

¹⁰⁷ TB, B118, pp 1639 to 1654.

¹⁰⁸ TB, B51, pp 457 to 462.

the Judge asked Counsel for Ms Lawrie whether he was “going to go through each of the documents that Mr McLure took me through yesterday, are you, to demonstrate why those inferences can’t be drawn on the whole of that conduct”, to which Ms Lawrie’s Counsel replied, “No, I’m not going to take you to those documents, your Honour”.¹⁰⁹ The following exchange then occurred:¹¹⁰

HIS HONOUR: Aren't they evidence of a plain course of conduct?

MR YOUNG: They're evidence of what was proposed as a course of conduct. But the course of conduct, even at its highest that is disclosed in that correspondence does not satisfy the definition of waiver. It falls a very long way short. Everything that Mr McLure said yesterday to your Honour may well – I don't concede that it is – it may well be true.

123 Ms Lawrie’s Counsel then submitted that even “if what Mr McLure says is true, it’s not to the point, it’s not waiver”.¹¹¹

124 By way of reply, Mr McLure submitted that what is an “entirely uncontroversial proposition” is that “the acts giving rise to the waiver must be intentional and deliberate” where there “is no question here that Ms Lawrie and her legal representatives intended to do what they did”.¹¹² The Judge reserved judgment.

Judgment and subsequent steps in the Proceeding

125 On 1 April 2015 the Judge delivered Judgment in respect of Ms Lawrie’s judicial review application and published reasons.¹¹³ The Judge dismissed Ms Lawrie’s application, finding that she had not been denied procedural fairness and that, in any event, she had waived the right to claim a denial of procedural fairness. The Judge’s reasons in respect of waiver were detailed and appear

¹⁰⁹ TB, B118, p 1645.

¹¹⁰ TB, B118, p 1645.

¹¹¹ TB, B118, p 1646.

¹¹² TB, B118, p 1652.

¹¹³ TB, B107, pp 1079 to 1200.

at [143] – [229] of the Judgment. As already noted, the Judge made serious findings about the conduct and state of mind of Ms Lawrie, Mr Wyvill and Ms Spurr. Those findings are accurately summarised in [7] – [9] of the Amended Particulars of Complaints. We will refer to those findings as the **Adverse Findings**.

126 As will be seen, a number of relevant things occurred in the immediate aftermath of the Judgment. We will return to the chronological narrative of those events in the course of making findings later in this report. For now, we focus on the Proceeding.

127 On 30 April 2015, there was a hearing before the Judge. During this hearing, the Judge made orders granting the Northern Territory Police leave to inspect the court file, including pleadings, affidavits, exhibits and transcripts.¹¹⁴ Mr O’Brien recorded a note of his attendance at this hearing, which referred to four other members of NT Police being in attendance.¹¹⁵

128 On 8 May 2015, Mr Lawler filed and served a Summons seeking, among other orders, a personal costs order against Mr Wyvill and Ms Spurr,¹¹⁶ together with a supporting affidavit of Mr Maher¹¹⁷ and an Outline of Argument.¹¹⁸

129 On 5 June 2015, there was a hearing before the Judge in relation to disqualification applications brought by Ms Lawrie and Mr Wyvill.¹¹⁹ While Mr Wyvill’s disqualification application was premised, in part, on the adverse findings that had been made by the Judge, that aspect of his application was adjourned.¹²⁰ The only aspect of the disqualification applications that was

¹¹⁴ TB, B57, p 472.

¹¹⁵ TB, A34, p 60.

¹¹⁶ TB, B59.

¹¹⁷ TB, B60.

¹¹⁸ TB, B61.

¹¹⁹ TB, B120, pp 1657 to 1720. Mr Wyvill’s disqualification application appears at TB, B62, pp 701 to 703. Ms Lawrie’s disqualification application appears at TB, B65, pp 711 to 713.

¹²⁰ At the hearing before the Judge on 10 September 2015, the Judge explained that that aspect of Mr Wyvill’s disqualification application was adjourned “sine die”: TB, B105, p 1067.

before the Judge on 5 June 2015 concerned matters pertaining to the involvement of the Judge's wife.

130 On 22 July 2015, the Judge delivered reasons for the dismissal of the disqualification applications that were heard on 5 June 2015: *Lawrie v Lawler* [2015] NTSC 40.¹²¹

131 On 10 August 2015, there was a hearing before the Judge in relation to costs.¹²²

132 On 14 August 2015, the Judge delivered reasons for ordering that Ms Lawrie pay Mr Lawler's costs in an amount totalling \$214,876: *Lawrie v Lawler (No 2)* [2015] NTSC 46.¹²³

Appeal against the Judgment

133 On 2 June 2016, the Northern Territory Court of Appeal delivered their reasons for dismissing Ms Lawrie's appeal against the Judgment: *Lawrie v Lawler* (2016) 168 NTR 1.¹²⁴ The majority found that there was no breach of the requirements of procedural fairness. In so finding, their Honours said as follows:

[216] In fact, from about 31 March 2014, relying on advice from Mr Wyvill, Ms Lawrie had made a decision not to supplement her evidence. Ms Lawrie did not want to give Mr Lawler any opportunity to strengthen the case against her arguments, or to attack arguments that she might put forward. Ms Lawrie had no desire to supplement the material she had put before Mr Lawler.

...

[232] One can be confident, in our opinion, that if Mr Lawler had informed Ms Lawrie that he no longer intended to follow the procedure outlined in his letter, Ms Lawrie would not have made further submissions to him. She would have said nothing. She would have waited until the Report was published, and then would have mounted a complaint about the failure to disclose draft findings. That is the strategy that she and her advisers had adopted.

¹²¹ TB, B114.

¹²² TB, B122, pp 1728 to 1790.

¹²³ TB, B109.

¹²⁴ TB, B123.

134 The majority agreed with Heenan AJ that the Judge had erred in relation to waiver. Their Honours considered that the effect of the letter of 15 April 2014 turned on its meaning and effect, to be determined objectively, so that there was no reason to scrutinise the motives or strategy that lie behind the letter. See [244] – [252].

135 On 9 September 2016, the Northern Territory Court of Appeal delivered their costs judgment: *Lawrie v Lawler (No 2)* [2016] NTCA 4.¹²⁵ At [9], Doyle and Duggan AJJ found that whilst there was “no reason for the Judge to explore the motives and strategies behind the conduct of Ms Lawrie and her advisers”, “we did not find that the material introduced under this head was entirely irrelevant”. Their Honours quoted what they had said at [232] of their Reasons. At [12], their Honours were “not prepared to find that Mr Lawler was wrong to undertake the defence of the proceedings, in the circumstances”, nor “do we attach any improper motive to his decision to raise the issue of waiver”. Their Honours continued, “Mr Lawler raised an alternative defence that failed. We would go no further than that. We are not persuaded that it was inappropriate for him to do so, and accordingly there is no cause for a corrective order”.

Tribunal Disciplinary Proceedings

136 On 11 December 2020, the Legal Practitioners Disciplinary Tribunal (**LPDT**) chaired by the Hon. Peter Evans handed down reasons for its decision to dismiss the Law Society’s allegations of professional misconduct against Mr Wyvill.¹²⁶

¹²⁵ Exhibit JCP-4.

¹²⁶ TB, E2, pp 3180 to 3268.

137 The Complainants made their complaints against the Judge to the Commission in the months following this decision.¹²⁷

138 The LPDT decision is relevant for present purposes only by way of background. The LPDT was concerned with quite different issues – essentially the propriety of Mr Wyvill’s conduct in various respects – and involved different parties. Its conclusions do not bear on the issues for resolution by the Panel. Consequently, we will not detail the reasoning and conclusions of the LPDT.

The issues before the Panel

139 Counsel Assisting summarised the issues as including the following:

- (1) Should the Panel dismiss the Complaints under s 44, as submitted by the Judge?
- (2) Secondly, assuming a negative answer to the first question, to what extent did the Judge engage in the conduct identified in section B of the Amended Particulars of Complaints (**Particulars**), as set out in [26] above? More specifically, did the Judge refer Mr Wyvill and Ms Spurr’s conduct in the Proceeding to the Law Society for investigation (Particulars [10])?
- (3) Thirdly, to what extent did the Judge engage in the conduct identified in section C of the Particulars, as set out in [29] above? Issues in that regard include whether the Judge acted disingenuously in offering Mr Wyvill and Ms Spurr an opportunity to be heard (Particulars, [11.8], [12.7]); and whether the Judge caused his Associate to contact a detective and to report

¹²⁷ Initial complaints were made by Mr Young and Mr Wyvill to the then Attorney-General on 11 February 2021 and 21 June 2021: TB, E1, pp 2979 to 2982 and TB, E2, pp 2983 to 4106.

that false affidavits may have been filed in the Proceeding (Particulars, [11.9], [12.8], [13.5]).

- (4) Fourthly, having regard to the findings made by the Panel in resolving the first two issues, and having regard to any other findings of fact made by the Panel of other relevant facts and circumstances, can an inference be drawn that the Judge acted with malice towards Ms Lawrie, Mr Wyvill and Ms Spurr, or any of them, in engaging in the conduct identified in Section B of the Particulars?

Should the complaints be dismissed under s 44?

140 We have already resolved the issue as to the scope of the concept of behaviour in the Act. That was one of the bases on which it was submitted on behalf of the Judge that the Complaints should be summarily dismissed. Through Senior Counsel the Judge also submits that the complaints should be dismissed under pars (d), (e) and (f) of s 44. He submits that the matter was the subject of legal proceedings and an appeal, which was the appropriate means of dealing with the complaint. He says further consideration of the Malice Allegation would involve the re-litigation of a dispute that has been finally determined. In addition, he submits that the events occurred so far in the past that the Malice Allegation does not justify further consideration.

141 We do not accept these submissions. We do not think it is appropriate to exercise our powers under s 44. While the appeal against the Judgment determined that the Judge erred in law in making the Adverse findings, investigation and determination of whether the judge acted maliciously will not in substance involve relitigating what the appeal determined. The complaints were made years ago, concerning events that occurred more than 10 years ago. The Malice Allegation is by its nature a very serious allegation. In our view, having conducted an investigation and held a hearing, it is

appropriate and in the public interest for the Panel to determine the merits of the Malice Allegation. We turn to doing so.

Fact-finding and inferences

142 The Panel’s task is to make findings of fact and then to determine if the Malice Allegation is substantiated.

143 The events the subject of the Panel’s investigation occurred about 10 years ago. In those circumstances, in weighing the evidence, primary weight is to be given to the contemporaneous documents and to the objective probabilities; oral testimony is to be evaluated in light of those matters.¹²⁸

144 Whether the Malice Allegation is substantiated requires a finding to be made as to the Judge’s state of mind. That necessarily involves the drawing of an inference.

145 Drawing an inference involves making a deduction from primary facts.¹²⁹ The drawing of an inference has been described as “an exercise of the ordinary powers of human reason in the light of human experience”.¹³⁰ The tribunal of fact has regard to its perception of “the common course of human affairs” in determining what inferences to draw.¹³¹

146 An inference can be drawn if the fact-finder is satisfied that the fact to be inferred is more probable than any other inference that might arise from the proven facts and circumstances.¹³² Before an inference can be drawn, there must be more than two conflicting inferences of equal probability.¹³³ A fact-finder must, of course, avoid conjecture, but the distinction between

¹²⁸ *Watson v Foxman* (1995) 49 NSWLR 315, 318 – 319; *Fox v Percy* (2003) 214 CLR 118, [31].

¹²⁹ *Martin v Osborne* (1936) 55 CLR 367, 375.

¹³⁰ *G v H* (1994) 181 CLR 387, 390; *Fazio v Fazio* [2012] WASCA 72 [46].

¹³¹ *Martin v Osborne*, 375.

¹³² *Luxton v Vines* (1952) 85 CLR 352, 358.

¹³³ *Luxton v Vines*, 358.

permissible inference and conjecture occurs on a continuum in which there is no bright line division.¹³⁴

147 In determining whether to draw an inference, a fact-finder must have regard to the circumstances as a whole; the significance of facts is not to be viewed in isolation.¹³⁵

148 Given the seriousness of the Malice Allegation, it is necessary to have regard to the principles enunciated by Dixon J in *Briginshaw v Briginshaw*.¹³⁶ In *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*,¹³⁷ Mason CJ, Brennan, Deane and Gaudron JJ summarised the position:

The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary “where so serious a matter as fraud is to be found”. Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct. As Dixon J commenced in *Briginshaw v Briginshaw*:

“The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved...”

149 Those principles apply here. The Malice Allegation is serious: it amounts to an allegation that the Judge acted contrary to his oath. Judges do not ordinarily make findings based on malice. The consequences of finding the allegation proved are grave: potentially it may constitute grounds for the Judge to be

¹³⁴ *Seltsam Pty Ltd v McGuiness* (2000) 49 NSWLR 262, [84]; *Fazio v Fazio*, [50].

¹³⁵ *R v Hillier* (2007) 228 CLR 618, [46] - [48]; *QBE Insurance v BB* [2022] WASCA 61, [134].

¹³⁶ (1938) 60 CLR 336 at 362.

¹³⁷ (1992) 110 ALR 449, 450.

removed. We have approached our assessment of whether the evidence establishes the Malice Allegation on this basis.

150 We turn to make our findings as to the events following the delivery of Judgment. In the course of so doing, we will resolve issues as to matters alleged in Sections B and C of the Particulars.

The events after delivery of Judgment

151 On 1 April 2015, after the delivery of the Judgment, the Law Society published a media release regarding the Judgment.¹³⁸ In that document the then President of the Law Society was quoted as saying that upholding the “standards of the legal profession is a responsibility that the Law Society Northern Territory takes very seriously”.¹³⁹

152 On 2 April 2015 at 8.45am, the Judge’s Associate at the time, Mr Lachlan Spargo-Peattie, sent an email to Ms Megan Lawton of the Law Society stating that the Judge had “determined to refer to the Law Society for investigation Alistair Wyvill SC’s conduct during the Stella Maris Inquiry and his representation of Ms Lawrie”.¹⁴⁰ He asked “to whom the referral should be addressed”.¹⁴¹

153 Approximately four minutes later, the Judge’s Associate sent a letter on behalf of the Judge to Mr Wyvill stating:¹⁴²

... his Honour has determined that your conduct during the Stella Maris Inquiry and your representation of Ms Lawrie, including whether you may have sworn a false affidavit, should be referred to the Law Society for investigation. The Law Society will also be asked to consider whether there

¹³⁸ TB, A7, p 18.

¹³⁹ TB, A7, p 18.

¹⁴⁰ TB, A8, p 19.

¹⁴¹ TB, A8, p 19.

¹⁴² TB, A9, pp 20 and 21.

are any matters which should be referred to the Director of Public Prosecutions.

His Honour has asked me to inquire into whether you would like an opportunity to be heard before the matter is referred to the Law Society. Please advise me accordingly.

154 It would seem that the foundation of the allegation of acting disingenuously is that the email to the Law Society preceded the email to Mr Wyvill. However, the email to the Law Society is not the referral; rather, it is an enquiry as to the process. This is borne out by what followed. As will be seen, throughout the process, the Judge awaited hearing from Mr Wyvill and Ms Spurr before making any complaint or referral.

155 At 9.26am, Mr Wyvill sent an email to the Judge's Associate in which, among other things, he indicated that he would be seeking advice and consulting with his insurer.¹⁴³

156 On the same day, the Judge's Associate sent a letter on behalf of the Judge to Ms Spurr in similar terms to the letter to Mr Wyvill.¹⁴⁴ It was stated that the Judge has "asked me to inquire into whether you would like an opportunity to be heard before the matter is referred to the Law Society".¹⁴⁵ A letter was sent on behalf of Ms Spurr later that day by Mr Richard Henschke of Halfpennys, in which he asked if the Judge would allow Ms Spurr to advise next week about the foreshadowed Law Society referral.¹⁴⁶

157 Also on that same day at 9.40am, Ms Kellie Grainger of the Law Society sent an email to the Judge's Associate explaining the procedure involved in making a formal complaint to the Law Society.¹⁴⁷ The Judge forwarded that email to

¹⁴³ TB, A10, p 22.

¹⁴⁴ TB, A14, p 29.

¹⁴⁵ TB, A14, p 29.

¹⁴⁶ TB, A15, pp 30 to 31.

¹⁴⁷ TB, A11, p 23.

The Hon. Chief Justice Michael Grant, the then Solicitor-General and Statutory Supervisor, at 12.21pm.¹⁴⁸ In that email, the Judge stated:¹⁴⁹

I have decided to refer the conduct of Alistair Wyvill QC and Cathy Spurr arising out of the Stella Maris Inquiry and their representation of Delia Lawrie at the Inquiry and in *Lawrie v Lawler* to the Law Society for investigation.

My Associate has written to each of them asking if they wish to be heard before I make the referral. They have asked for time to consider their position.

If they do not wish to be heard before the referral, is the best course for me to make the referral to you as the Statutory Supervisor?

158 The effect of this email was that the Judge proposed to refer the conduct in question, but subject first to hearing from Mr Wyvill and Ms Spurr. In our view, that was the Judge's consistent position throughout the period after delivery of the Judgment.

159 At 12.31pm, Mr Grant sent an email to the Judge's Associate stating that he would be "obliged if you could inform his Honour Justice Southwood that I have determined to make a complaint to the Law Society in relation to this matter" and that if "his Honour considers it appropriate to make any referral to me in my capacity as Statutory Supervisor, I will incorporate that referral as part of my complaint".¹⁵⁰ The Judge's Associate replied to Mr Grant at 2.25pm, in which he stated that the Judge "does think it appropriate for a referral to be made to you in your capacity as Statutory Supervisor" and his "Honour has asked me to prepare the necessary documentation, which will be forwarded to you next week".¹⁵¹

¹⁴⁸ TB, A12, p 25.

¹⁴⁹ TB, A12, p 25.

¹⁵⁰ TB, A13, p 28.

¹⁵¹ TB, A16, p 32.

160 Also on 2 April 2015 at 2.37pm, Mr Maurice sent an email to Mr Maher regarding the findings made in the Judgment.¹⁵² In that email Mr Maurice stated that “the conduct of all three (Wyvill, Lawrie and Spurr) in swearing the affidavits filed in the proceeding should be reported to and investigated by the police”.¹⁵³

161 On 7 April 2015, the then Attorney-General of the Northern Territory, Mr John Elferink, sent a letter to the then Commissioner of Police, Mr Reece Kershaw, reporting the findings made in the Judgment. While the Panel was unable to obtain a copy of that letter in its investigations, we find that Mr Elferink sent such a letter. The fact of that letter can be inferred from, among other matters,¹⁵⁴ the letter sent by Mr Kershaw to Mr Elferink of 17 April 2015 in which Mr Kershaw thanked Mr Elferink for his “letter dated 7 April 2015 in relation to the judgement of the Supreme Court of the Northern Territory in *Lawrie v Lawler*”.¹⁵⁵ It is also supported by the evidence of Mr Elferink who deposes that he recalls that he referred the matter of his own motion, based on his practice of referring any matter which appeared to involve potentially criminal conduct.¹⁵⁶

162 In his letter of 17 April 2015, Mr Kershaw confirmed that he had “referred the matter to the Commander Peter Bravos”.¹⁵⁷

163 On 9 April 2015, the solicitors then acting for Mr Wyvill, Carter Newell, sent a letter to the Judge’s Associate requesting further time to provide submissions concerning the foreshadowed Law Society referral.¹⁵⁸

¹⁵² TB, A17, p 33.

¹⁵³ TB, A17, p 33.

¹⁵⁴ The inference can also be drawn from the internal communications within NT Police: see TB, A23, pp 43 and 44 and TB, A24, pp 45 and 46, both referred to below.

¹⁵⁵ TB, A22, p 42.

¹⁵⁶ TB, G1, [9.6] and [13].

¹⁵⁷ TB, A22, p 42.

¹⁵⁸ TB, A19, p 39.

164 On the following day, the Judge’s Associate notified Mr Grant that “his Honour has now been advised that Mr Wyvill SC and Ms Spurr are seeking advice” and “granted both Mr Wyvill and Ms Spurr a further period of 14 days”.¹⁵⁹ He continued that “his Honour has asked me to advise you that the documentation referred to in my email below will not be forwarded to you until after the expiration of that period”.¹⁶⁰ This communication reflects the general tenor of the communications from or on behalf of the Judge: the step of formally referring the conduct would await the response from Mr Wyvill and Ms Spurr.

165 On 17 April 2015, an officer at the Crime and Specialist services branch sent an email to Peter Bravos with an attachment in the following terms:¹⁶¹

Following the recent judgement of the Supreme Court of the Northern Territory in *Lawrie v Lawler* we have received correspondence from the Attorney-General and Minister for Justice John Elferink.

Minister Elferink has brought a number of matters to the attention of Police that arose during the course of Justice Southwood’s judgement. Those matters relate to potential breaches of the criminal law of the Northern Territory. Before any conclusion can be made as to whether breaches have occurred a thorough investigation is required.

The general scope of the investigation will surround Justice Southwood’s findings that Ms Lawrie and others’ did provide false information to the Court through sworn documents.

The matter has been referred to Acting Assistant Commissioner, Crime & Specialist Services Peter Bravos.

166 Shortly after that, on the same day, Peter Bravos sent an email to Zoe Langridge with the subject heading “Media-Delia Lawrence.” The attachment to the email was in the following terms:¹⁶²

¹⁵⁹ TB, A20, p 40.

¹⁶⁰ TB, A20, p 40.

¹⁶¹ TB, A23, p 44.

¹⁶² TB, A24, p 46.

Northern Territory Police have received a referral from the Northern Territory Attorney General with respect to the recent judgement of the Supreme Court of the Northern Territory in *Lawrie v Lawler*.

The matter relates to possible breaches of the criminal law in the Northern Territory and has now been referred to A/ AC Peter Bravos for investigation.

At this stage the investigation is in an assessment phase and no determination has been made as to whether or not a prosecution will eventuate. No further information is able to be provided until the Police investigation into the matter is completed.

167 On 18 April 2015, an article was published in SBS News titled, “NT Labor leader referred to police”.¹⁶³ It was stated in that article that “Police said on Saturday that the NT Attorney-General referred to them the recent judgment of *Lawrie v Lawler*, which will be investigated by Commander Peter Bravos of a new specialised investigative unit”.¹⁶⁴ It is open to infer, and we do infer, that this article followed publication by a media person in the Police Force of a press release to the effect of the attachment to Mr Bravos’ email referred to in [166] above.

168 On 20 April 2015, an article was published in *The Australian Business Review* titled “NT Labor leader Delia Lawrie resigns”.¹⁶⁵ It was stated in that article that Ms Lawrie will “defend a police investigation in whether she attempted to ‘obstruct, prevent, pervert or defeat the course of justice’, or ‘knowingly made false declarations under oath or false statements to a judicial proceeding, as Attorney-General John Elferink wrote in his letter to police referring the matter for investigation earlier this month”.¹⁶⁶

169 On that same day, Ms Pauline Benaim, a Senior Executive Assistant at NT Police, sent an email to Mr Bravos indicating that a file had been opened titled, “HQ2015/0573 (CRIME PREVENTION AND DETECTION –

¹⁶³ TB, G1, pp 4494 to 4495.

¹⁶⁴ TB, G1, p 4494.

¹⁶⁵ TB, G1, p 4496.

¹⁶⁶ TB, G1, p 4496.

INVESTIGATIONS – Alleged Misconduct Delia Lawrie – Lawrie v Lawler)”, which was to “go to you”.¹⁶⁷

170 On 21 April 2015, David Proctor (the then Acting Assistant Commissioner) sent an email to James O’Brien, Detective Superintendent of the Special References Unit.¹⁶⁸ In the email, Mr Proctor reported on a phone call he received earlier today regarding the “DELIA LAWRIE INQUIRY”.¹⁶⁹ Mr Proctor stated that “I advised that Peter [Bravos] is on leave and that you are the Superintendent who is reporting to Peter in relation to the investigation”.¹⁷⁰

171 Based on the documents in [161] – [170] above, we find that by 21 April 2015, in response to the referral from the Attorney-General of 7 April 2015, the Commissioner of Police referred the matters for investigation by Commander Peter Bravos, and Detective Superintendent O’Brien was tasked to report to Commander Bravos in relation to the matter.

172 On 23 April 2015, Mr Wyvill’s solicitors notified the Judge’s Associate that Mr Wyvill “does not wish to have an opportunity to be heard prior to his Honour’s foreshadowed referral of the matter to the Law Society”.¹⁷¹

173 On 27 April 2015, the Judge’s Associate sent an email to himself with the subject line, “James O’Brien”, which contained details only for a mobile number.¹⁷² Later that same day, the Judge’s Associate sent an email to Ms Lawrie, together with Mr Wyvill and Ms Spurr’s solicitors, stating that “Northern Territory Police have contacted the Court and requested access to material held on the above file. His Honour has asked that I notify you of the request. Would you please advise by close of business today whether you wish

¹⁶⁷ TB, A25, p 47.

¹⁶⁸ TB, F4, p 4276.1.

¹⁶⁹ TB, F4, p 4276.1.

¹⁷⁰ TB, F4, p 4276.1.

¹⁷¹ TB, A25, pp 48 to 49.

¹⁷² TB, G2, Affidavit of Mr Spargo-Peattie, [19].

to be heard prior to his Honour making a determination about Police access to the Court file”.¹⁷³

174 It is uncontroversial that there was a telephone conversation between Mr O’Brien and the Judge’s Associate on 27 April 2015. There was conflicting evidence as to the substance of what was said and as to whether there was a meeting between Mr O’Brien, Mr Bravos and the Judge’s Associate on 27 April 2015. We will outline the respective evidence before returning to the chronological narrative and resolving the conflict.

175 Commander O’Brien gives evidence as to interactions with Mr Spargo-Peattie, including a meeting in the ground floor of the court complex where, to the best of his recollection, the gist of the discussion was that Mr Spargo-Peattie talked about what the Judge believed was a criminal matter, being whether affidavits that had been filed in the Proceeding were inaccurate. More specifically, his affidavit includes the following:

4. My independent recollection of the investigation into Ms Lawrie and my involvement in it arose out of a phone call that I received from Justice Southwood’s Associate (**Initial Conversation**). To the best of my recollection:
 - 4.1. Justice Southwood’s Associate introduced himself as the Associate to Justice Southwood; and
 - 4.2. Justice Southwood’s Associate asked me to attend Court to meet to discuss a matter that Justice Southwood wished to refer to NT Police.
5. I recall attending the court complex in Darwin very shortly after this Initial Conversation with Mr Bravos to meet with Justice Southwood’s Associate (**Initial Meeting**). To the best of my recollection:
 - 5.1. I attended the Initial Meeting with Mr Bravos and Justice Southwood’s Associate at the ground floor of the court complex of the Supreme Court behind the sheriff’s office;
 - 5.2. while I do not now recall precisely what was said by Justice Southwood’s Associate, the gist of the discussion was that

¹⁷³ TB, A27, pp 50 and 51.

Justice Southwood's Associate talked about what Justice Southwood believed was a criminal matter, being an issue concerning whether affidavits which had been filed in proceedings before his Honour were inaccurate;

5.3. Justice Southwood's Associate had a number of folders with him during the Initial Meeting which I understood comprised the court file for the proceedings the subject of the investigation; and

5.4. Ruth Brebner of the NT Police Legal Branch was engaged to navigate the legal issues in connection with obtaining access to the court file following this Initial Meeting and steps were subsequently undertaken to access the court file. I cannot now recall who within NT Police engaged Ms Brebner.

...

8. I have now been shown a copy of an email that I sent to Justice Southwood's Associate on 29 April 2015. Exhibited hereto and marked "**JOO-2**" is a copy of this email. Having been shown a copy of this email:

8.1. the reference to "*our brief conversation of 27 April*" is, to the best of my recollection, a reference to the Initial Conversation; and

8.2. the reference to "*the subsequent advice provided on behalf of Justice Southwood relating to the 'Stella Maris' matter*" is, to the best of my recollection, a reference to a further conversation I had with Justice Southwood's Associate in connection with obtaining access to the entire court file.

176 Mr Spargo-Peattie gives evidence as to his recollection of the Proceeding, the Judgment and its immediate aftermath, including his involvement in communications pertaining to the Judge's referral of Mr Wyvill and Ms Spurr to the Law Society. Mr Spargo-Peattie gives evidence that he does not recall having any meeting with Commander O'Brien, Mr Peter Bravos (the then Assistant Commissioner of Police) or any other member of NT Police in connection with the Proceeding. He gives evidence that it seems highly unlikely that such a meeting occurred because it would have been a significant and unusual event for him having regard to his administrative duties and where, by contrast, he can clearly recall meetings with members of NT Police

in the Judge's chambers on matters involving *ex parte* applications for search warrants because the presence of an officer in chambers was a significant matter to him.

177 As to the email he sent to himself on 27 April 2015, referred to in [173] above, Mr Spargo-Peattie says that his practice at the time was to send himself such an email to record a person's number if they left him a telephone message.

178 We do not doubt that Commander O'Brien was doing his genuine best to recall events of 10 years earlier. However, the contemporaneous documents are not consistent with Commander O'Brien's evidence and strongly support Mr Spargo-Peattie's recollection.

179 First, as we have explained, the earlier documents demonstrate that a police inquiry was already in existence, and Commander O'Brien was involved, before 27 April 2015.

180 Secondly, the absence of any record by Commander O'Brien of the conversation of 27 April 2015 is telling. As he acknowledged in cross-examination, a report from a judge of possible criminal conduct was a matter of which he would have made a record.

181 Thirdly, as explained below, Mr O'Brien's email of 29 April 2015 to Mr Spargo-Peattie, set out in [187] below, is in terms that do not sit comfortably with Mr O'Brien's recollection of events.

182 Fourthly, Mr Spargo-Peattie's practice, as explained in [177] above, seems to us to accord with the objective probabilities and to suggest that Mr O'Brien called and left a message for Mr Spargo-Peattie.

183 Fifthly and significantly, Mr Spargo-Peattie's email of 27 April, sent to Ms Lawrie and representatives of Mr Wyvill and Ms Spurr, stated that "Northern

Territory Police have contacted the Court and requested access to material held on the above file.” That statement was substantially contemporaneous with the events it described. On Commander O’Brien’s version of events, that statement would have been materially misleading. We find that the statement accurately summarised what had occurred. Pursuing his task as part of the inquiry under Commander Bravos, Commander O’Brien contacted Mr Spargo-Peattie to request access to the court file.

184 Sixthly, the steps taken and communications over the few days after 27 April 2015 support this conclusion.

185 Returning to the chronological narrative, on 28 April 2015, Mr O’Brien sent an email to Ruth Brebner of the NT Police Legal Branch containing a draft email to the Judge’s Associate.¹⁷⁴ It was stated in that draft email, “I refer to and thank you for our brief conversation of 27 April and the subsequent advice provided on behalf of Justice Southwood relating to the ‘Stella Maris’ matter”.¹⁷⁵ It was also stated, “I confirm that I am investigating an allegation of criminal conduct in relation to submissions made to the Supreme Court during a recent civil proceeding initiated by Delia Laurie [sic], with reference to the findings made by Mr John Lawler subsequent to his inquiry on behalf of the Northern Territory Government”.¹⁷⁶

186 On the following day, the Judge’s Associate sent an email to Ms Brebner referring to their “recent telephone conversation” and advised that “I have included the Supreme Court file numbers in the subject line of this email for your information”.¹⁷⁷ Ms Brebner forwarded this email to Mr O’Brien and Mr

¹⁷⁴ TB, A28, p 52.

¹⁷⁵ TB, A28, p 52.

¹⁷⁶ TB, A28, p 52.

¹⁷⁷ TB, A29, pp 53 and 54.

Bravos, stating that these are the “court file numbers (in heading) for the files you seek access to”.¹⁷⁸

¹⁸⁷ Also on that same day, Ms Brebner sent an email to Mr O’Brien following her discussion with the Judge’s Associate.¹⁷⁹ In that email, she stated that “its very important to get this email sent off to the associate today”, and otherwise indicated that she had made a few changes to the proposed email.¹⁸⁰ The final version of the email that was sent by Mr O’Brien to the Judge’s Associate on 29 April 2015 stated:¹⁸¹

I refer to and thank you for our brief conversation of 27 April and the subsequent advice provided on behalf of Justice Southwood relating to the ‘Stella Maris’ matter.

I confirm that I am investigating an allegation of criminal conduct in relation to materials, including affidavits not read onto the court record, filed with the Supreme Court during a recent civil proceeding initiated by Delia Lawrie, with reference to the findings made by Mr John Lawler subsequent to his inquiry on behalf of the Northern Territory Government. I confirm my request to access the entire court file in relation to those proceedings. I understand the file is currently held by Southwood J.

I have briefed Ms Ruth Brebner of the Northern Territory Legal Branch to appear on behalf of Commissioner Reece P Kershaw at the Supreme Court at 10am Thursday 30 April 2015. As the Officer in Charge of this investigation I will also be in attendance.

¹⁸⁸ Commander O’Brien evidently took care in drafting this email, sending a draft to Ruth Brebner. We find that its contents were accurate. Specifically, the second paragraph reflects what occurred. Mr O’Brien was investigating the

¹⁷⁸ TB, A29, pp 53 and 54.

¹⁷⁹ TB, A30, pp 55 and 56.

¹⁸⁰ TB, A30, pp 55 and 56.

¹⁸¹ TB, A31, p 57. This email was resent by Mr O’Brien on the following day to the Judge’s Associate as “it would appear that this email did not go through yesterday”: TB, A32, p 58.

allegations of criminal conduct in the Proceeding and requested access to the court file for that purpose. We do not accept that the interactions described by Mr O'Brien and set out in [175] above occurred.

189 Thus, particular [11.9] is not established. Consequently, particular [11.10] falls away.

190 On 30 April 2015, there was, as already noted, a hearing before the Judge. During this hearing, the Judge made orders granting the Northern Territory Police leave to inspect the court file, including pleadings, affidavits, exhibits and transcripts.¹⁸² Mr O'Brien recorded a note of his attendance at this hearing, which referred to four other members of NT Police being in attendance.¹⁸³

191 By 6 May 2015, it can be inferred that Ms Spurr had notified the Judge's Associate that she did not wish to be heard in relation to the foreshadowed Law Society referral. That inference can be drawn from the drafts of the proposed letter to Mr Grant that were exchanged between the Judge and the Judge's Associate on 6 May 2015.¹⁸⁴ In particular, it was stated in the revised draft circulated by the Judge on 6 May 2015:¹⁸⁵

... his Honour Justice Southwood has been informed that Mr Wyvill SC and Ms Spurr do not wish to be heard prior to his Honour referring their conduct to the Law Society. Accordingly, his Honour has determined to refer Mr Wyvill's and Ms Spurr's conduct during the Inquiry in Stella Marris [sic] by Mr Lawler and their conduct in Supreme Court proceeding No 68 of 2014 to you in your capacity as the Statutory Supervisor under the Legal Profession Act (NT).

¹⁸² TB, B57, p 472.

¹⁸³ TB, A34, p 60.

¹⁸⁴ TB, A35, pp 61 to 65 and TB, A36, pp 66 to 69.

¹⁸⁵ TB, A36, p 67.

192 On 7 May 2015, the Judge’s Associate sent a letter to Mr Grant repeating the first sentence set out in [191] above and stating that “his Honour has determined to refer Mr Wyvill’s and Ms Spurr’s conduct during the Inquiry into Stella Marris [sic] by Mr Lawler and their conduct in Supreme Court proceeding No 68 of 2014 to you in your capacity as the Statutory Supervisor”.¹⁸⁶ In that letter, it was stated that the conduct of Mr Wyvill and Ms Spurr “may also constitute an offence contrary to one or more of the following sections of the Criminal Code (NT).” The letter concluded that “his Honour asks that you please consider these matters and formulate whatever complaints you deem appropriate”.¹⁸⁷

193 This letter was sent only after receipt of responses from Mr Wyvill and Ms Spurr. For reasons explained there is, therefore, no substance in any suggestion that the Judge acted disingenuously. The allegation in Particular [11.8] is not made out.

194 On 8 May 2015, Mr Lawler filed and served a Summons seeking, among other orders, a personal costs order against Mr Wyvill and Ms Spurr,¹⁸⁸ together with a supporting affidavit of Mr Maher¹⁸⁹ and an Outline of Argument.¹⁹⁰

195 After obtaining copies of the body of Mr Maher’s affidavit and Outline of Argument directly from Mr Lawler’s solicitors,¹⁹¹ the Judge’s Associate circulated those documents to Mr Grant and indicated that “any responses to these submissions will also be forwarded to you”.¹⁹² This conduct is identified in Particulars [11.12] in which it is also said that the Judge did not notify the lawyers for Mr Wyvill or Ms Spurr. But the taking of this step is not in any

¹⁸⁶ TB, A38, p 71.

¹⁸⁷ TB, A38, p 73.

¹⁸⁸ TB, B59.

¹⁸⁹ TB, B60.

¹⁹⁰ TB, B61.

¹⁹¹ TB, A40.

¹⁹² TB, A39.

sense suggestive of malice, given that (1) the Judge had already invited submissions from Mr Wyvill and Ms Spurr concerning his proposed referral of their conduct for investigation; (2) Mr Wyvill and Ms Spurr had declined to make submissions; and (3) the forwarding of these documents was in pursuance of the referral already made by the Judge.

196 On 27 May 2015, Mr Grant sent an email to the Judge’s Associate attaching a hard copy of the complaint that Mr Grant had sent to the Law Society on the previous day.¹⁹³ Mr Grant incorporated the matters raised in the letter from the Judge’s Associate of 7 May 2015 as part of his complaint.¹⁹⁴

197 On 3 June 2015, the Judge’s Associate sent an email to Mr Grant stating that the Judge had asked to be kept informed of the progression of the complaint, to which Mr Grant replied, “Will do”.¹⁹⁵

198 We turn now to the critical issue: whether the Malice Allegation is substantiated.

Is the Malice Allegation substantiated?

199 The short answer to this question is ‘no’ - the Malice Allegation is not substantiated. The evidence as a whole falls well short of satisfying us that, in making the Adverse Findings, or in any step he took after delivery of the Judgment, the Judge acted with malice. To us, having regard to the whole of the available material and to our findings of fact set above, there is a markedly more probable inference: that the Judge made the Adverse Findings in the genuine belief that the findings were necessary and appropriate to make, having regard to the pleaded issues and to the submissions and evidence before him.

¹⁹³ TB, A41, pp 99 to 119.

¹⁹⁴ TB, A41, p 100, [5].

¹⁹⁵ TB, A43, p 121.

200 In our view, a number of considerations point to this conclusion. By contrast, nothing in what the Judge did and said, understood in its context, provides a foundation for an inference of malice.

201 We have, as is required, considered the evidence and the circumstances as a whole, mindful of the need to consider the combined force of a circumstantial case. For ease of exposition, we will make observations about topics individually.

202 We begin by reference to the way in which the Proceedings developed once the Judge became involved.

203 The Judge first became involved in the proceedings in late 2014. His Honour presided in the matter for the first time at a directions hearing on 9 January 2015. The parties approached that hearing on the basis that the trial, then currently listed for late January 2015, would have to be vacated having regard to the need, which had just arisen, for Mr Wyvill and Ms Spurr to be cross examined. In exchanges with Counsel the Judge explored the necessity and significance of the plaintiff's plea of reliance (which had given rise to the prospect of cross-examination).¹⁹⁶ His Honour's object in doing so is readily apparent: to see whether the trial dates could be preserved. Such an approach from a judge who is about to hear a matter is entirely unexceptionable, indeed it is commonplace. Its relevance for present purposes is that it tends against ascribing to the Judge any improper intention, at least at that stage. Far from wanting to harm Ms Lawrie, Ms Spurr or Mr Wyvill by making findings about them, at this hearing the Judge was exploring with counsel for the plaintiff (Ms Lawrie) whether the reliance plea – that gave rise to the possibility of such findings – should be maintained.

¹⁹⁶ See [107] above.

204 The Judge continued in a similar vein at the directions hearing on 14 January and on the first day of the trial on 27 January 2015.¹⁹⁷ Following these observations counsel for Ms Lawrie abandoned the reliance plea. However, the defendant's amendment to his defence pleaded a 'deliberate and deceptive strategy' on the part of Ms Lawrie and her advisers, Ms Spurr and Mr Wyvill. No objection was raised to the amendment. Thus, whether Ms Lawrie, Ms Spurr and Mr Wyvill engaged in the pleaded 'deliberate and deceptive strategy' was a live issue in the trial.

205 The defendant's counsel, Mr McClure, made detailed and elaborate submissions in support of this part of the defendant's case. Those submissions occupy 20 pages of transcript. Most of those submissions focused on the factual findings invited, by way of inference from the documents, by the defendant. The submissions were made by reference to a close analysis of numerous documents.

206 There is no basis to suggest that in making these submissions counsel for the defendant, Mr McLure, did other than genuinely attempt to discharge his duty. (In that regard, it should be noted that during January 2015, before the trial, both Mr Maurice QC¹⁹⁸ and Mr Maher¹⁹⁹ expressed views along the lines of the submissions made at trial.) This creates an obstacle to a conclusion that, in making the findings urged by Mr McLure, on the basis urged by Mr McLure, the Judge acted maliciously.

207 At the conclusion of Mr McLure's submissions, the Judge raised with Ms Lawrie's counsel the seriousness of the matters that had been raised by Mr McLure. The judge then indicated that he would adjourn for the day to allow Ms Lawrie's counsel to address those matters in the morning. In that way, the

¹⁹⁷ See [114] above.

¹⁹⁸ See [108] above.

¹⁹⁹ See [106] and [110] above.

Judge sought to ensure that Ms Lawrie's counsel had a proper opportunity to address what had been said by Mr McLure.

208 The nature and extent of the response to these submissions by Ms Lawrie's counsel is also significant. Counsel did not attempt to challenge or answer the submissions by reference to the facts. Rather, Ms Lawrie's Counsel submitted that even if facts were as Mr McLure had submitted, that would not be sufficient to make out a waiver defence.²⁰⁰ While counsel submitted that the facts alleged by Mr McLure were legally insufficient to amount to a waiver, there was no submission in terms that the Judge should not make any findings as to the matters alleged by Mr McLure. Moreover, the Judge specifically enquired of Ms Lawrie's counsel whether he intended to address whether the inferences contended by Mr McLure arose from the documents to which he had referred. To us, that tends to indicate a genuine concern on the part of the Judge to receive counsel's assistance as to whether the findings urged by Mr McLure should be made.

209 Nothing in any of these exchanges at trial, or in any other exchange at trial, seems to us to provide any indication of malice on the part of the Judge.

210 The factual correctness of the Adverse Findings made by the Judge is not an issue that is appropriate or necessary for us to consider and we do not do so. The following point should however be made. The detailed analysis of the evidence in both the defendant's submissions and in the Judgment, together with the absence of any factual challenge to the submissions advanced on behalf of the defendant, mean that it cannot be said that the findings lacked a plausible and rational foundation. We so observe because a contrary conclusion would be one indicator tending in favour of malice.

²⁰⁰ See [123] above.

211 In his reasons, the Judge found, in accordance with the defendant’s primary submissions, that there was no breach of procedural fairness before turning to the question of waiver. In that sense, it was not strictly necessary for the Judge to make findings related to the question of waiver. It was open to the Judge to have rested his decision on his conclusion that there was no breach of procedural fairness. However, judges at first instance commonly make findings beyond those necessary to reach a conclusion. It is not uncommon for judges to rest their decision on two alternative bases, or otherwise to make factual findings so as to resolve all issues joined in the proceeding. To so act is conducive to efficiency in the event that an appellate court takes a different view in some material respect. Indeed, the High Court has said that “[i]t is a matter of long-standing practice in most trial courts that, where possible, all issues be the subject of adjudication.”²⁰¹

212 Here, the Judge dealt with the case on both of the two alternative bases advanced on behalf of the defendant. For the reasons in the preceding paragraph, his doing so provides no indication of malice.

213 It is true, as Particulars [11.1], [12.1] and [13.1] allege, that the Court of Appeal held that the findings were not required to be made and did not support a defence of waiver. But, self-evidently, the Judge did not know of the appeal court’s view at the time he made his decision. And at trial the Judge received competing submissions as to the defence of waiver, including as to whether the findings in question would sustain that defence. In accepting Mr McLure’s submission the Judge was ultimately found to have erred in law. But to err in law is a hazard of the judicial task. In itself, it does not bespeak malice. Having reviewed the written and oral submissions made at trial, we are satisfied that there is no basis to suggest that the Judge knew the defendant’s submissions

²⁰¹ *Prince Alfred College Inc v ADC* (2016) 258 CLR 134, [116].

to be legally erroneous. Indeed, the contrary inference – that the Judge accepted the legal correctness of Mr McLure’s submission – is, to us, compelling.

²¹⁴ In this regard, we note that, in its costs decision, the majority of the Court of Appeal rejected a submission that the defendant was wrong to raise the defence of waiver, or that doing so was in any way improper. Rather, the majority considered, the defendant merely raised a defence that (ultimately, on appeal) failed.²⁰² In a sense, the position of the Judge might be seen to be analogous. In upholding the defence of waiver and making the findings urged by the defendant as germane to the defence, the Judge erred, but he cannot be said to have acted improperly, and specifically he cannot be said to have acted maliciously, in so doing.

²¹⁵ We turn to the matters alleged in Particulars [11.3] –[11.6]: in summary, the fact that Mr Wyvill was not a party to the Proceedings yet in making the Adverse Findings the Judge did not so state, in circumstances where, by contrast, the Judge explained that Mr McCarthy was not a party and had not been given an opportunity to be heard, so that adverse findings should not be made against him. In substance, these particulars raise two matters; first, the making of adverse findings against Mr Wyvill who as a non-party was not given a fair opportunity to be heard before such findings were made; secondly, the differential treatment of Mr McCarthy in the Judgment, which was apt to create an impression that Mr Wyvill had been given an opportunity to be heard.

²⁰² See [135] above.

216 It is, of course, to be remembered that we are considering these matters through the prism of the question of malice, not with a view to determining whether the Judge's approach was optimal.

217 In his closing submissions, counsel for the defendant, Mr McLure, repeatedly emphasised that the plaintiff Ms Lawrie and her legal advisers Ms Spurr and Mr Wyvill had filed affidavits in the proceedings but Ms Lawrie had elected not to rely on those affidavits.²⁰³ Both at the outset and at the conclusion of his submissions in support of the Adverse Findings, Mr McLure submitted that the court could more confidently draw the inferences he invited because Ms Lawrie had so elected.²⁰⁴

218 Ms Lawrie, Ms Spurr and Mr Wyvill having sworn affidavits upon which Ms Lawrie was intending to rely at the commencement of the trial, it can be taken – and the Judge could fairly have taken it – that the three were available to give evidence if required. Moreover, counsel for Ms Lawrie did not suggest otherwise in his submissions following Mr McLure's submissions. More generally, he did not make any submissions concerning any absence, on the part of Mr Wyvill or anyone else, of opportunity to be heard as to the findings invited by Mr McLure.

219 While Mr Wyvill was not present in court during the trial, he had been counsel for Ms Lawrie at an earlier stage of the Proceedings. In his submissions, Mr McLure evidently treated Mr Wyvill as being in the same camp as Ms Lawrie and Ms Spurr. We infer that the Judge did the same. In the circumstances we have outlined, so approaching the matter is not in our view indicative of malice.

²⁰³ TB, B116, p 1566; TB, B117, pp 1617, 1621-1622 and 1637-1638.

²⁰⁴ TB, B117, pp 1621-1622 and 1637-1638.

220 Nor, in our view, is the differential treatment of Mr McCarthy indicative of malice towards Mr Wyvill (or Ms Lawrie or Ms Spurr). There are several reasons why it is understandable that the Judge took a different approach to Mr McCarthy, as compared to Mr Wyvill. We have mentioned two of those reasons. Mr Wyvill had been Ms Lawrie's counsel in the Proceeding. And Mr Wyvill had sworn an affidavit and could be taken to have been available to give evidence. More significantly, unlike Mr McCarthy, Mr Wyvill's state of mind was a matter specifically pleaded by the defendant. Finally, Mr McLure submitted that no findings should be made against Mr McCarthy, in marked contrast to his submissions in relation to Mr Wyvill.

221 For the above reasons, we do not consider that the matters in Particulars [11.3] – [11.6] provide any significant support for an inference of malice. For like reasons, the same is true of the matters in Particulars [12.3] – [12.5] which make like allegations as to Ms Spurr, who was Ms Lawrie's solicitor throughout the Proceedings and who was present for substantially all of the hearing.

222 The Particulars also point to the Judge's conduct after publication of the Judgment. In that regard we point to our earlier findings as to what the Judge did and did not do. We are satisfied that nothing in the Judge's post-Judgment conduct is at all suggestive of malice. The Adverse Findings were, by their nature, very serious findings of misconduct. In our experience, if a judge made such serious findings of misconduct, including by legal practitioners, it would be far from unusual for the judge to take some steps to refer the conduct in question for further investigation. In the present case, the steps the Judge took after delivery of the Judgment are entirely consistent with the Judge having genuinely made the Adverse Findings and then been concerned by the conduct reflected in those findings and concerned to ensure that proper standard of conduct, both by legal practitioners and by all citizens, be maintained. We note

that others – including Mr Maurice QC²⁰⁵, the Solicitor-General²⁰⁶ and the Attorney-General²⁰⁷ – evidently shared concerns as to the conduct the subject of the Adverse Findings.

223 In relation to Ms Lawrie, unlike in relation to Mr Wyvill and Ms Spurr, the Particulars allege that one of the Adverse Findings lacked a reasonable basis. Particular [13.1] so alleges in relation to the findings that Ms Lawrie’s evidence during the inquiry was ‘dissembling’ and that ‘she was not conscientiously endeavouring to assist the inquiry.’

224 Conclusions were not invited in these terms by Mr McLure. However, he submitted that, whereas Ms Lawrie’s evidence to the Inquiry was that she was very disappointed to learn that her department had failed to follow proper procedure, in fact Ms Lawrie had instructed her department not to follow proper process. The Judge made findings along these lines. We emphasise that we are not suggesting the findings were justified. Our focus is on the question of malice. We do not consider the findings to have been so lacking any plausible basis so as to suggest malice on the part of the Judge. In any event, in the context of all the other findings we have made and conclusions we have drawn, even if we considered that this single sentence of the judgment lacked any sound basis, that would not support an inference of malice, as distinct from error, on the part of the Judge.

225 There is no evidence suggestive of any motive for why the Judge would have formed an intention to harm Ms Lawrie, Ms Spurr or Mr Wyvill.

226 For completeness, we record that we have had regard to the affidavit of Mr Crowley concerning the hearing on costs on 10 August 2015. While the

²⁰⁵ See [160] above.

²⁰⁶ See [159] above.

²⁰⁷ See [161] above.

manner in which the Judge interacted with counsel is regrettable, given how long after the Judgment it was, and given that it followed the unsuccessful application for the Judge to disqualify himself on grounds of apprehended bias, we do not consider this evidence bears in any significant way on the issue before us.

227 We have not found anything in the course of our examination of the record of the Proceeding, including its trial, that seems to us to suggest malice on the part of the Judge.

228 Because we have concluded that the Malice Allegation is not substantiated, it is not necessary for us to determine whether it could justify consideration of the Judge's removal from office.

Conclusion

229 For these reasons, the Malice Allegation is not substantiated. We therefore dismiss the Complaints (which are before us only insofar as they raise the Malice Allegation).

Date: 27 August 2025



Chairperson The Hon. Patricia Kelly SC



Member The Hon. Andrew Beech SC

A handwritten signature in black ink, appearing to read 'Patricia Howes', with a large, sweeping flourish at the end.

Member Patricia Howes