

MEDIA STATEMENT

Attorney General Greg Smith SC made the following statement a short time ago in the Legislative Assembly of the NSW Parliament.

He also tabled the conduct report of the Judicial Commission into Magistrate Brian Maloney and Mr Maloney's response to the report.

This will be Mr Smith's only media comment on the matter until the process – described below – is completed.

Mr Maloney has been invited to address Parliament. So has Magistrate Jennifer Betts. Mr Smith will advise Parliament when dates have been set.

An electronic version of both reports – and the responses of the magistrates – will be available shortly on the NSW Parliamentary web site, under the tabled papers section.

The conduct reports will also be on the Judicial Commission's website.

www.judcom.nsw.gov.au

Ministerial Statement

The Hon Greg Smith (Attorney General and Minister for Justice):

Honourable Members would be aware that I have recently tabled a report of the Conduct Division of the Judicial Commission of NSW in relation to Magistrate Jennifer Betts.

Members may be aware that Magistrate Brian Maloney is also the subject of a report of the Conduct Division and that this matter has been the subject of recent proceedings before the Supreme Court of NSW.

Today I table both the Conduct Division report and a document prepared on behalf of Magistrate Maloney at my invitation, being the Magistrate's response to the report.

The report of the Conduct Division, dated 6 May 2011, found a number of complaints against Magistrate Maloney to be partly substantiated and also found that he had breached an undertaking given by him in 1999, but that the breaches were substantially caused by his bipolar 2 disorder.

The Conduct Division found that Magistrate Maloney is and will remain incapacitated for the performance of judicial duties by his bipolar 2 disorder and that the matters referred to in its report could justify Parliamentary consideration of his removal from office on the ground of proved incapacity.

I have previously outlined for the benefit of Members the procedures for investigating complaints against judicial officers as provided for under the Judicial Officers Act 1986.

Relevantly, Part 6 of that Act sets out the procedures to be followed when a complaint is made in relation to a judicial officer.

The function of the Conduct Division is to conduct an examination of complaints referred to it by the Judicial Commission. For this purpose it may initiate such investigations into the subject matter of the complaint as it thinks appropriate.

The jurisdiction of the Conduct Division is not disciplinary. It is protective and designed to protect both the public from judicial officers who are found to have misbehaved, rendering them unfit for office, or are suffering from incapacity and therefore unable to discharge the duties of office. It also protects the judiciary from unwarranted intrusions into judicial independence.

If the Conduct Division is of the opinion that a judicial officer about whom a complaint has been made may be physically or mentally unfit to exercise efficiently the functions of a judicial office, the Conduct Division may also request the officer to undergo a medical or psychological examination.

If the Conduct Division decides that a complaint is wholly or partly substantiated, it may form an opinion that the matter may justify parliamentary consideration of the removal of the judicial officer from office.

If it forms such an opinion, the Conduct Division must present a report to the Governor setting out its findings of fact and opinion as to whether the matter could justify parliamentary consideration of the removal of the judicial officer from office.

Section 41 of the Act and section 53 of the New South Wales Constitution Act 1902 provide that a judicial officer may only be removed from office on the grounds of misbehaviour or incapacity.

The provisions of the Constitution Act cannot be invoked unless and until a Conduct Division of the Commission has made a finding that the matter could justify parliamentary consideration of the removal of the judicial officer from office.

Under the Constitution Act a holder of judicial office can be removed from office by the Governor on an address from both Houses of Parliament in the same session seeking removal on the grounds of proven misbehaviour or incapacity.

For the assistance of Members I will now provide an overview of the factual context of the Conduct Division's report.

The Conduct Division considered a number of complaints relating to incidents that occurred between 2002 and 2010.

The Conduct Division was requested to consider these complaints having regard to the undertakings given by Magistrate Maloney to the Conduct Division in respect of his conduct referred to in an earlier report from 1999. That undertaking was that he not be loquacious, not interrupt solicitors, not introduce matters reflecting his personal experience, to be more judicial and to allow matters to run their course without interfering.

The Conduct Division accepted that Magistrate Maloney's inappropriate behaviour had been substantially caused by his bipolar 2 disorder.

However, the Conduct Division expressed the view that if Magistrate Maloney continues as a magistrate there is a very real risk that he will suffer hypomanic attacks or mood changes which will result in events such as those reflected in the complaints considered by the Conduct Division. The report of the Conduct Division

stated that the likelihood of such attacks or changes, taken together with their probable consequences, constitute an unacceptable risk which would have to be taken for Mr Maloney to continue as a magistrate.

The Conduct Division found that Magistrate Maloney is and will remain incapacitated for the performance of the office of Magistrate and formed the opinion that that incapacity could justify parliamentary consideration of the removal of Mr Maloney from office on the ground of proved incapacity.

Magistrate Maloney recently brought proceedings in the Supreme Court seeking orders, including:

- a declaration that the decision of the Conduct Division and Judicial Commission that he is incapacitated for the performance of the office of magistrate is invalid and an order quashing this decision; and
- a declaration that the act of the Conduct Division and the Judicial Commission in referring its report to the Governor of NSW is invalid

The case was restricted to issues of law arising under administrative law principles. The judgment of the Court was that the errors of law identified had not been made out and the Court dismissed the summons. Also tabled is a copy of the judgement.

The Court had previously lifted a restraining order preventing me from tabling the report of the Conduct Division in both Houses of Parliament.

The Judicial Officers Act requires that the report be tabled as soon as practicable and I meet that obligation in tabling the report today.

I will shortly give notice of motion to invite Mr Maloney to appear at the bar of the House to show cause why Parliament should not request the Governor to remove him from office.

I ask Members of the House to consider the report of the Conduct Division in detail.