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CONDUCT OF MAGISTRATE BRIAN MALONEY

[*Attendance of Magistrate Brian Maloney at the Bar of the House.*]

The PRESIDENT: Order! I propose to call Magistrate Brian Maloney to appear at the Bar of the House and address members in relation to the report of the Conduct Division of the Judicial Commission of New South Wales, dated 6 May 2011, and show cause why he should not be removed from office. I ask members to extend to Magistrate Maloney the usual courtesies during his address. I remind people in the public gallery and in my gallery that the address is to be heard in silence. Anyone who transgresses that direction will be immediately removed from the Chamber. I remind members that the resolution does not allow members to address questions to Magistrate Maloney at the conclusion of his address. I direct the user of the Black Rod to admit Magistrate Maloney and conduct him to the lectern at the Bar of the House.

[*Magistrate Brian Maloney was conducted onto the floor of the Chamber by the Usher of the Black Rod.*]

MAGISTRATE MALONEY: Mr President, honourable members, today I stand before you to be judged both as a man and as one who holds judicial office. You are a jury of my peers. I have been diagnosed with bipolar II; an illness I did not chose to have but one I acquired. The reasons for this illness are irrelevant. I unconditionally accept the diagnosis and take up the challenge to conquer it. I am not alone. Many community leaders, politicians, high-profile personalities and legal practitioners have also been diagnosed with bipolar II. Like me, John Brogden, Andrew Robb and Geoff Gallop face the personal, medical and social challenges of mental illness, and have been prepared to speak out about it. Interestingly, research has found that 40 per cent of law students, 20 per cent of barristers and 33 per cent of solicitors have a mental illness. It is from that demographic that a judicial officer is drawn. In the past 12 months three barristers have sadly taken their own lives. In recent years, two judges have also sadly taken their own lives. The Bar Association, the Law Society, the medical profession and many other professional institutions have schemes in place to assist members with mental illness.

Mr President, honourable members, thank you for giving me the opportunity to address you about what is clearly one of the most important and humiliating issues that has ever affected my life. A bit about me first, if I may be forgiven. I attended Christian Brothers at Waverley, and I grew up in Bondi. There was no privileged upbringing in any of this. One of the things I learnt early on was the importance of equality between people and of seeking to honour that equality and respect for others in all that we do. My father, Vince, left school when he was 13 years old. He was too young to start a trade. He began as a tailor's cutter and went on to become a bespoke tailor. I am proud of what Vince Maloney achieved. I know how tirelessly he worked: six days in the shop and then he drove a taxi on Sundays. I learnt early the value of hard work. I am proud that all I have done on the Bench has been predicated on my commitment to hard work and decent and honest toil. But I also learnt early in life what it was like to be the underdog.

When I was growing up there was a real sense of humility in the community. There was also profound disadvantage. I suppose what led me to becoming a lawyer was that I wanted to help redress the imbalance and try to help people along the way. In 1971 I had the opportunity of working with a fine man: the late Judge Alfred Goran QC. I was his associate.
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He had no children; he treated me like a son. His parents, like mine, came from humble upbringings—a fruit shop next to the Three Swallows Hotel at Bankstown. He was a judge who did not wear fools lightly but he was fair and just to all who appeared before him. He was well liked and respected. I chose him as my tutor and my model.

I started out as a private solicitor for about 18 months and then I joined the Legal Aid Office in Sydney. I worked there for about five years. I did criminal work representing people who could not afford to be privately represented. That sat well with me. I think I related to such people and I did my best for them as an advocate. My philosophy was that the quality of representation should not be dependent upon how much one paid or how much one could afford to pay. I still believe

representing people from deprived backgrounds is a very good grounding in the law. I have always believed that those people too are entitled to justice.

After the Legal Aid Office I worked at the Office of the Director of Public Prosecutions in Sydney for about 12 months. I felt I needed experience in acting for the prosecution and I felt that this gave me a good grounding in understanding the criminal justice system. I returned to private practice until I was honoured to be appointed to the Local Court bench on 8 July 1996.

Initially I worked in various courts. They call it boundary riding. I was posted to the Bourke and Wollongong circuits. You travelled to Bourke one week and then to the Wollongong circuit on alternative weeks. Working in the Bourke circuit gave me an insight into the difficulties faced by indigenous Australians, not only in the community but in accessing justice. I worked as hard as I could; I always have. I think people would say that I gained true empathy with the Aboriginal community.

Indeed, I was once told by a registrar at Brewarrina Local Court that during my time on the circuit there there had been a marked improvement in the quality and disposition of Aboriginal people coming to my court. There had been a natural reluctance of people to attend court. I think I succeeded in encouraging them to understand that an important part of our community approach and culture is the need to embrace the justice system. Aborigines were reluctant to accept white man's justice. I understood that and I tried to make them comfortable in my courtroom. To do that I sometimes spoke at length. Sometimes I was more than frank. I do not apologise for that personality trait. I have always wanted to make a difference as a magistrate. I did not want to be a one-dimensional person. I wanted to be someone who could make a real difference in people's lives.

Shortly before my appointment to the bench I separated from my first wife. I am sure there are members here who have experienced a failed marriage and the heartbreak that that brings. From 1996 to 1998, like many others I was embroiled in family law litigation. Let me tell you, members, it takes its toll. I was working long hours and doing my best as a magistrate. I feel I should say that the existence of a judicial officer can be a lonely one. Looking back and putting it all together, I most probably was not handling everything very well at that time. Marital difficulties impose significant personal stress.

In that period I was the subject of several complaints of being loquacious and using inappropriate humour. This led to an undertaking I gave to the Conduct Division in 1999. At the time that I dealt with those complaints I inwardly believed that a factor affecting my work was my marital position. I did not understand that even then I had a depressive illness. I now wish I had learned about it then.

After 1999 I worked at Sutherland Local Court, then at Fairfield Local Court and then at the Downing Centre Local Court up until recently. In my period at Fairfield Local Court I dealt with many cases involving people from diverse ethnic groups. Fairfield, as you probably know, has something like 65 nationalities and over 100 languages in its local government area. My time at Fairfield was most enjoyable and enriching. I enjoyed a good rapport with the prosecution, the legal profession, the staff and the litigants before me. I bore a very large caseload, yet I worked extremely hard and diligently to reduce the waiting time for all defended matters. I dealt with huge lists on a daily basis. Invariably, people before me did not have a good command of the English language. I went out of my way to ensure that they had an interpreter or that they received any practical help that they may have needed to understand the particular issue before the court.

In 2002 I had cervical spine surgery following a serious surfing accident. I had lost the use of my right arm. Following surgery I now have a 20 per cent functional loss of use in that arm. After leaving Fairfield at the end of 2003 I came to work at the Downing Centre Local Court, the major Local Court in New South Wales. There are 18 courts, including the Central Local Court, working to full capacity. Pretty much after I was assigned to the Downing Centre Local Court I was directed to Court 5.1. Then as the years went by I was assigned to the court more than others. Let me tell you what Court 5.1 entails.

Court 5.1 contains all matters listed for hearing on a daily basis that have not otherwise been allocated as a special fixture. The list will include up to four one-day civil matters, perhaps an equal number of one-day criminal matters and other matters of a criminal nature ranging from one to three hours in length. There will also be general court attendance matters involving prosecution by local councils and parking and traffic matters. There can be anything up to 30 matters in the list on a daily basis.

To deal with these, as you can imagine, you have to apply yourself to a variety of issues. There would be a number of criminal matters listed for hearing, then a number of civil matters listed for hearing, together with various pleas. My role was to go through the list in order to ascertain the preparedness of the parties and, in particular, their compliance with the practice directions of the Chief Magistrate. Once I was satisfied that the matter was capable of being properly allocated, I would allocate it to a particular court.

Whilst doing this, I would also need to deal with a number of pleas and invariably deal with people who were unrepresented. I would, therefore, need the assistance of voluntary barristers and solicitors who were in attendance at the Downing Centre. I also worked closely with, for instance, the Salvation Army, the Court Chaplaincy Service and the Probation and Parole Service. I would also hear matters in circumstances where a colleague was unwilling to take a particular matter or where there was no available magistrate to hear that particular matter, or even in circumstances where the parties, for urgent reasons, needed the matter to be finalised. Throughout these years I would be directed to attend regional courts to undertake special fixtures or provide relief and assistance to other magistrates. I adopted the approach that if I ever was asked by the Deputy Chief Magistrate, I would gladly agree to accept such a direction.
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In the Judicial Commission Conduct Division hearing the former Deputy Chief Magistrate, now Judge of the District Court, Her Honour Judge Syme, gave evidence. If I may be permitted to read from her evidence in chief in respect to my workload:

> I, and to my knowledge, others involved in listings frequently called on Magistrate Maloney from time to time to assist at the last minute and he was always helpful and willing to assist. Not all magistrates who I dealt with were as cooperative as Magistrate Maloney. Without exception he would put himself out to assist.

Her Honour later said:

> By 2006, when I took over responsibility for listings and magistrate allocation to courts, Magistrate Maloney had qualified himself as a person who could handle a heavy workload, efficiently and without complaint. (Either from him or litigants). I am not aware of any complaints about his behaviour in court over and above those currently before the Commission. From time to time in my position I would receive informal "grumbles" about a particular magistrate being, for example, tardy in the delivery of decisions. No such complaints were made to me about Magistrate Maloney, either about his in court or out of court behaviour.

I table that report. By 2008 I had spent the best part of four years working in court 5.1. It was about this time that my prostate started playing up. I was waking up six times a night and, I have to say this to you—and this is very difficult for me to talk about, but I feel that to defend myself I must—I had two transperineal biopsies done, I had the rotation of a urethral blockage which was a very painful experience and, how do I say this, I was obviously anxious about having my prostate surgery that was recommended, because without a prostate one cannot conceive children.

My wife and I were trying to conceive our second child, and I hope I am forgiven for saying to you that it is humiliating that I have to discuss this in order to properly represent myself. But this was massive pressure. I had married for the second time in 2004. Sleep deprivation throughout this time was a daily occurrence. Anxiety over all of this lived every moment with me, and there was a whole heap of other issues as well. If there was to be a second child we needed an extra bedroom and an extension to the house. But I, as is my wont, took a hands-on approach to all matters, whether it was a question of design or submission to council or engaging builders or checking quotes, or engaging an architect and instructing him to do things in accordance with my vision—a vision I shared with my wife.

In March 2009 my wife conceived through IVF. It was not our first attempt. During her pregnancy, perhaps halfway through, I suffered another urethral blockage that required immediate surgery and total removal of the prostate. In May 2009 we moved out of our home and lived with my wife's parents just prior to the surgery, and the renovations were completed in November 2009. But in 2008 I was the subject of a complaint in respect of a subpoena issue that arose at the Downing Centre Local Court. I set aside a subpoena that had been issued by a defendant in circumstances where the subpoena had been addressed to parties that did not even exist. That litigant, though previously represented by counsel, was unrepresented on the day that I dealt with this matter. The other party, who was seeking to have the subpoena set aside, was represented by a barrister and a solicitor instructed by the Commonwealth Crown Solicitor's office.

I carefully considered all the documents. In the course of an exchange with that particular litigant

he conceded that the subpoenas had been issued for what in legal terms was a collateral purpose. On any view, the subpoenas had to be set aside as they amounted to an abuse of process. I did so. I then ordered that gentleman to pay costs that flowed from my having set aside the subpoenas. The litigant who had the subpoenas issued was convicted in the District Court of perjury and corporate fraud and was brought to the Conduct Division in custody to give evidence against me. I do not believe it was ever suggested that I did anything wrong in setting aside those subpoenas. But the Conduct Division took issue with me having ordered the man to pay the costs of the other side without giving him the opportunity to be heard.

I guess in hindsight I probably should have listened to what he would have had to say. But I can say this to you all: In the circumstances, as I sat there, I would have found it very difficult to do anything other than the just thing—to order him to pay costs, which is what I did. Members of this House, I think it should be kept in mind that the litigant concerned had already been put on notice on prior occasions that if he pursued the subpoenas there would be an application to have them set aside and costs would be sought. That was a prior occasion when the matter was listed before one of my colleagues, not me. I go to 2009. I was doing a case management list at the Burwood Local Court. There were many matters in the list. One of those was between a gentleman and a lady who worked at a hospital in Sydney. The list is a relatively busy one at Burwood. I was not aware that there were in fact three applications brought by the disputing parties that were in my list.

The gentleman concerned wanted to have a hearing in his matter before me that day. The lady against whom he was seeking orders told me that she had been to the Community Justice Centre and she was quite happy to settle the matter on the basis of formal undertakings. In view of the fact that they worked together I thought it might have been a sensible way to consider resolving the matter. As the gentleman did not have a good command of the English language I suggested to a court officer that he might like to assist the gentleman concerned. After the litigant had spoken to the officer he still insisted on having a hearing. I did my best to explain to him that due to the state of the list and the normal listing arrangements he could not get a hearing that day, and my court officer alerted me to the existence of a cross-application.

Eventually the matter was set down for hearing and that gentleman got, as he was entitled to get, his day in court some months later. At that time I was endeavouring to deal with a busy list and to try, if I was able to do so, to encourage the parties to resolve the matter. In this case it seemed a sensible way to go. I was unsuccessful in that attempt. Perhaps, again in hindsight, I may have gone about it in a different way. This meant that there were two issues I was confronting: the 2008 matter had not been resolved, and then the second complaint. Remember, honourable members, among the thousands of matters that have come before me this was getting me down. In the latter part of 2009 my physical health was deteriorating. I was losing weight, my mood was low and at times I felt sad and depressed.
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Just before Christmas 2009 I was asked to go to the Caritas Centre at St Vincent's Hospital and the Kiloh Centre at Prince of Wales Hospital to do the mental health lists. This was on a day when all other magistrates were rostered off. I was directed to go there without any court officer and without any recording equipment. I went because that was what I did when I was directed by the Chief Magistrate's Office.

At these informal hearings there is always present an experienced solicitor from the Legal Aid office who represents the patients. The hearings are conducted in a small room. They are very informal. As always, my approach in dealing with such matters is to endeavour to make the patients feel as comfortable as possible. I asked some questions of them to convey to them that I was interested in them. At the Caritas Centre, I dealt with a number of cases. I understand that I was never the subject of any complaint about the matters that I heard there that day. I then went to the Kiloh Centre, where again I dealt with a number of cases. Ms Peck, a very experienced solicitor in the Legal Aid office, was present. The case involved a patient who was too ill to attend. In fact, it was the last case that day. A psychiatric registrar attended and spoke to me in the presence of Ms Peck. At the time my wife was just about to give birth to our second child. I noticed that the psychiatric registrar, a doctor, was pregnant. I asked her to stand and I spoke to her about her stage of pregnancy. I was joyous about the impending birth of my second child and wanted to share that with her. I did make a quick comment about the pain of childbirth, but did not do this—I repeat: I did not do this—in a sexualised way.

In the Conduct Division hearing, the doctor agreed that I said to her the following, "How pregnant are you? How many weeks do you have to go to birth? Is this your first baby? My wife is expecting a baby. Do you go to antenatal classes?" I raised the benefit or lack of benefit of attending

antenatal classes and I raised the problems of childbirth and the pain associated with childbirth. She formed a view that my comments and gestures were of a person suffering a bipolar disorder or, more particularly, a hyper-manic episode. I ask honourable members that my remarks be seen in context. They were not in any way meant to have caused offence to the doctor. Members, I have referred to the presence of Ms Peck, who is a very experienced Legal Aid officer. She was present at the time. Let me quote from her evidence.

> Q: Did you, even though you had only half an ear open to this, draw a conclusion about whether the magistrate was or was not being deliberately or in any way offensive?
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> A: My recollection was it was discussion about pregnancy and babies, because the magistrate had just had a baby or his wife was expecting a baby or some such thing. New babies were involved in his life and people who are into babies and are having babies tend to have those sorts of discussions about, you know, when you're due and that sort of thing. That was the kind of conversation as I remember it, was it your first, that sort of thing.
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> Q: Do you think the tone of the conversation was offensive?
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> A: No.
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> Q: Your answer?
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> A: No. Some people don't like getting asked about being pregnant. I mean, it's a personal thing, but it was just one of those general conversations as far as I can hear about, you know, how long have you got to go and things like that.
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> Q: Can I ask you this, did you think the magistrate was sexualising this part of the conversation?
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> A: No.

Members, in or about late January last year I received a complaint relating to the Kiloh Centre. Upon learning of the complaint against me, I felt utterly devastated and ashamed. I am not being melodramatic here when I say that when I learnt of this complaint I just could not sleep that night, and for many nights after it. I contacted my friend and attorney Greg Walsh. He met with me immediately and he said to me, "You've lost a lot of weight. What's wrong?" I told him about the Kiloh complaint and he said that he was worried about me. He said, "I'm going to contact Dr Olav Nielssen to get an urgent appointment. With that, arrangements were made for me to see Dr Nielssen, who I believed to be a wonderful human being and a truly outstanding medical practitioner and psychiatrist. About this time I was given leave by the head of jurisdiction, which preceded by some four days the birth of our son. The occasion should have been met with much joy. I wish that were the case. Any joy was overridden by my new predicament.

Dr Nielssen was concerned about me. In time, he diagnosed me as suffering from a major depressive illness, namely, bipolar II. He placed me on medication and I have faithfully taken that medication since then. Dr Nielssen has continued to a treat me since February 2010. I continue to see him and will continue to see him on a regular basis. Dr Nielssen has spent a considerable amount of time educating me about my illness. In taking a very detailed history from me, he has led me to believe that I have suffered in this way for many years. When I was first diagnosed, I naturally felt relief that I had been diagnosed with an illness that at least gave me some understanding about a number of my problems over the years. But I would be less than honest if I did not say that I felt a great deal of shame. I had on literally hundreds of occasions since my appointment dealt with people before me in respect of what are called section 32 applications under the Mental Health (Forensic Provisions) Act of New South Wales, that is, applications that defendants be diverted from the criminal justice system because of their mental illness. Sadly, I was learning that, like them, I had such a problem. In time, I have done much to educate myself and my wife and friends about my problems. But, members, I am proud to tell you today that I am no longer ashamed of being diagnosed with such an illness. Indeed, may I say this: I am proud of the work I have undertaken since being diagnosed, ministering to literally thousands of matters in my professional capacity and hopefully in what I do not only administering justice but adding to the good name of the judiciary and the profession.

The scourge of mental illness affects many within our society. It just does not affect judicial officers but also medical practitioners, lawyers, teachers, dentists and politicians. Mental illness is often organically based. Members, I urge you in the only plea I make of you today to understand that at the end of the day no-one chooses to be mentally ill. One of the most eminent members of the medical profession, Professor Ian Hickie of the Black Dog Institute, made this point in the context

of mental health and the judiciary:
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> Judges are in the public profile in an unusual way but to really make progress we really need to say, its okay to get treatment and to continue in the role … the current stigma encourages judges to not get treatment and continue in the job regardless, which is actually worse.

Since the Conduct Division hearing became public, I have received literally hundreds of telephone calls and emails, as has Mr Walsh. Eminent experts such as Professor McGorry and Professor Mitchell, who are regarded by this country as leaders in their field, together with Professor Ian Hickie, are all of the view that it is far better for a judicial officer to seek professional assistance and to accept, if appropriate, diagnosis and treatment. Or, as Matthew Kean, the young member for Hornsby, said only last week in this Parliament about mental illness when he recalled the death from suicide of an 18-year-old friend:

> … there is no debate that we are better talking about it than ignoring it.

I submit that the approach of the Judicial Commission has failed to embrace that—what is at the end of the day a fundamentally important message to the Australian community. The first complaint relating to the subpoena arose in September 2008, then the apprehended violence order matter at Burwood in January 2009. The Kiloh Centre complaint arose in December 2009. By the time of the Kiloh Centre complaint the Conduct Division had been appointed. It is with deep regret, sadness and a sense of humiliation that I report to you, members, that the case against me before the Conduct Division went on for over 12 months. The hearing ultimately took place on January 2011, this year. I turn to the screensaver complaint. The event occurred in February 2002 but the complaint was not made until August 2003—18 months later. In 2003 the Judicial Commission referred the matter to the head of jurisdiction without there having been a hearing. Yet it became the subject of the fourth complaint for which I was prosecuted. This situation would not occur in any court of law in this State.

I have been a magistrate for 15 years. I have dealt with thousands and thousands of issues—criminal cases, bail applications, apprehended violence orders, civil motions, civil hearings, traffic matters and even parking matters. There are four complaints against me. May I respectfully assure you that these proceedings have taken their toll on me. They were conducted after a number of interlocutory hearings where particulars and other matters were debated. All this has been hanging over my head for a considerable time—almost three years. I wonder why. I ask myself why. I ask myself whether there is an agenda. I ask myself why I have been made to suffer and my family has been made to suffer in this way. I respectfully suggest that many people outside this Chamber are asking the same questions.

In February 2010 I first attended Dr Nielssen. He initially diagnosed a major depression. In accordance with his advice I took sick leave with the approval and support of the Chief Magistrate, Judge Henson. I was on leave from February until July 2010. In that time I took the opportunity faithfully to attend Dr Nielssen for treatment and to take my medication. As I said, I found Dr Nielssen to be a truly remarkable psychiatrist. He spent many hours with me explaining the nature of my illness. He assisted me in gaining a proper understanding of my illness. He helped me to become aware of signs that might reveal any further episode of that illness. I Googled the internet and read books about bipolar and depression. I have done my best to gain a full and comprehensive understanding of my predicament.

In discussion with Dr Nielssen he told me, as he told the Conduct Division, that it was more than likely I would suffer another episode before the end of my working life—12 years from now. However, in discussion with Dr Nielssen I have become aware of the symptoms and signs of depression. I have acknowledged the importance of unreservedly accepting my diagnosis and maintaining my treatment. This involves not only taking my prescribed medication but also attending upon Dr Nielssen. I have never stopped seeing Dr Nielssen. I value his assistance and support so highly that I continue to see him. He is always happy to see me and I always look forward to seeing him. He assures me that over time the frequency of such attendance may reduce. He assures me that I should be comfortable with my condition, that many of his patients are members of professions, and that all sorts of occupations attend him for ongoing treatment. I would not stand before you today to defend the indefensible. My profession urges objective assessment of evidence. I hope that principle applies to me. In sworn evidence to the Conduct Division Dr Nielsson indicated that my prognosis was positive. This was because I accepted the need for treatment. I have good insight into my condition. I will take immediate and appropriate action if required.

I turn to Dr O'Dea. Dr Jeremy O'Dea is the Judicial Commission's appointed psychiatrist, an

eminent psychiatrist practising in Macquarie Street. I was examined by him at the request of the Judicial Commission. Dr O'Dea gave evidence to the Conduct Division that I should be permitted to perform my judicial functions and official duties subject to specific structured psychiatric treatment. This treatment includes an ongoing review of medication, and that medication includes mood stabilising medication. The process requires close monitoring. It involves antidepressant medication and even psychotherapy is recommended. But I submit to you that Dr O'Dea gave sworn evidence that I had gained sufficient insight into my health to protect against the risk of performing duties when incapacitated. Dr O'Dea argued the prognosis for recovery was very favourable.

Dr Jonathan Phillips is one of Australia's most eminent psychiatrists. I saw him at the request of the Judicial Commission. Like Dr Nielssen and Dr O'Dea, he agreed with the diagnosis of bipolar II disorder. In his evidence he accepted that appropriate treatment made it far less likely that I would reoffend. But he argued that it was appropriate that I continue to attend upon a psychiatrist for ongoing treatment; perhaps also to undergo a six-monthly review. Dr Phillips referred to the possibility that if a relapse occurred I may need to take two to six weeks from work.
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The medical opinion in respect of my condition is not just limited to my treating psychiatrist, Dr Nielssen. A joint report of all the psychiatrists was made to the Conduct Division, and I refer you to paragraphs 219 to 292. The joint report was to the following effect:

> Mr Maloney is presently properly treated without symptoms. Properly treated, he is unlikely to have any further occurrence and any such reoccurrence would be mild. Mr Maloney wants to be properly treated.

I have done everything possible to be psychiatrically assessed. I have done everything that the Judicial Commission has asked of me. At its request, I was examined by two very eminent, very experienced and well-regarded psychiatrists. Members, you, as well as I, have the clear evidence of not just one treating psychiatrist but three treating psychiatrists that I accept my diagnosis, that I accept my treatment, that it is unlikely I would have a further reoccurrence, that if I did it would be mild, and that I will continue to adhere faithfully to my treatment regime.

Honourable members, I must refer you with abject puzzlement to the findings of the Conduct Division at paragraphs 337 to 338. A number of the particular complaints were indeed made out. The Conduct Division found that the cause was a bipolar disorder with a result that no misconduct could be established in respect of any of the complaints or related complaints of the breach of the earlier undertaking. There is therefore no proven misbehaviour within the meaning of section 15 of the Judicial Officers Act and section 53 (2) of the Constitution Act of New South Wales. There was no issue about my current capacity. The Conduct Division, at paragraph 344, seems to have sought to consider such a capacity not from the immediate present but from some variable period, which was measured in years. Members would be aware that I and my legal representatives very much disputed this approach of the Conduct Division. It is important for you to understand that the Conduct Division referred to the view of Dr Nielssen, Dr O'Dea and Dr Phillips that I was currently fit to discharge my judicial duties. At paragraph 363, Dr Nielssen says:

> I would add in addition to that, that bipolar disorder, particularly bipolar II or the less severe bipolar disorder that Magistrate Maloney has been diagnosed with, is probably one of the most treatable psychiatric conditions. It's very treatable and very responsive to treatment and there are many treatment options available for people that will, I guess, give a much greater potential for relapses to be few, far between and minor. The other thing that I would add is that often people who are bipolar and who have frequent relapses are people with other, as we call it, co-morbid conditions, particularly drug and alcohol problems, unemployment.

At paragraph 364, Dr Phillips stated:

> The science literature strongly suggests that the moment a proper treatment plan is put in place, the risk of future illness diminishes in its frequency and even when an illness develops, in terms of illness intensity ... once treatment is initiated and once there is compliance, generally people with a bipolar disorder do very well, much better than the treatment of people with various other psychiatric disorders.

The Conduct Division then, notwithstanding the evidence, considered that I would not be properly supervised and would thus remain untreated. This conclusion is not based on any available evidence. Yet somehow, and upon some unknown basis, it came to the view that I would give up my treatment regime at some unspecified time. I simply cannot believe that the Conduct Division would, or could, come to this view based upon the overwhelming evidence of Dr Nielssen, Dr O'Dea, Dr Phillips and my own evidence. At no stage was it ever suggested to any of those

psychiatrists that I lacked proper insight or was resisting to accept a diagnosis and treatment. Nor did the psychiatrists express an opinion that it was likely that I would have suffered a major relapse. Indeed, the evidence is quite to the contrary. Honourable members, I do not resile from my position and that of my legal advisers that the Conduct Division on this critical issue got it wrong.

I challenged the approach of the Conduct Division in the Supreme Court. I was unsuccessful. The challenge was limited in administrative law terms to a question of law and, having regard to the issue that the Conduct Division ultimately had to consider, Justice Hoeben was of the view that I had not demonstrated that the Conduct Division had fallen into error. Well then, let me outline briefly the sequence of the Conduct Division findings:

> A. There will be feelings of wellbeing at which time Magistrate Maloney will abandon treatment, which he promised in the proceedings to maintain.
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> B. Mr Maloney will be the subject of a hypermanic episode.
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> C. Neither he, nor his family, nor a professional colleague will detect that a hypermanic episode is emerging in time for him to obtain treatment.
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> D. He is likely at some time in the course of his judicial office to return to past behaviours.

It is inconceivable that the Conduct Division can form an opinion about my life, my family and my colleagues without having had the opportunity to call them as witnesses at the hearing. Past behaviours? Out of thousands and thousands of matters that I have dealt with, I am facing four complaints. The approach, I submit, of the Conduct Division is fundamentally flawed. May I suggest that if a medical practitioner, or a legal practitioner, or an engineer, or an architect, or indeed a member of Parliament suffering bipolar disorder took appropriate steps to accept diagnosis and treatment, then they would be allowed to continue with their particular profession. Surely we need look no further than Andrew Robb and John Brogden who have gone on, subject to diagnosis and treatment, to undertake very important work in their respective areas of employment.

No-one appreciates the independence of the judiciary better than I do, but surely it cannot be the case that because a judicial officer suffers from a mental illness, is properly diagnosed and accepts treatment they can no longer discharge their duties as a judicial officer. To adopt such an approach seems to be inconsistent with the concept of common sense, let alone the provisions of a very important Act of this Parliament—namely, the Anti-Discrimination Act 1977. But, most importantly, if accepting your condition and seeking appropriate treatment leads to a professional ban being imposed on an individual, then we are surely driving the issue of mental illness underground. I am willing to communicate with the head of jurisdiction, His Honour Judge Henson. I have a good relationship with Judge Henson. He granted me leave to undertake treatment. In discussions with His Honour, he has acknowledged that I am certainly not the first member of a Local Court who has been granted leave to undertake treatment for a mental illness.
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When I was on leave I forwarded to my head of jurisdiction certificates and reports from Dr Nielssen as to my diagnosis and my undertaking of treatment. At all times I kept His Honour Judge Henson fully informed as to my undertaking such treatment. Dr Nielssen has cooperated fully with the Conduct Division. He has provided very comprehensive reports and has given sworn evidence. I was examined by two eminent psychiatrists at the request of the Judicial Commission. I cooperated fully with that investigation. I have never indicated that I would be unlikely to accept my diagnosis. I have never indicated I would not continue with my treatment. I have never indicated that I would not liaise with and accept proper consultations and supervision from my head of jurisdiction.

Members, there is a provision in the legislation, section 39 , whereby the Conduct Division could have referred this matter back to the head of jurisdiction—namely, His Honour Judge Henson. I contend that that would have been the correct approach. Instead, my fate is in your hands. Dr Nielssen has provided the further report dated 25 May 2011. In that report Dr Nielssen states:

> With respect, I believe the Commission has misstated the psychiatric evidence provided during the hearing. I disagree with the conclusion that Magistrate Maloney has an incapacitating condition and that he is unfit to perform his duties as a magistrate. I also disagree with the finding that his prognosis is for further episodes of illness that would affect his fitness for duty or that he is likely to stop treatment against medical advice.

Members, in that report Dr Nielssen made the following points:

(1) Magistrate Maloney's condition is in the milder end of the spectrum with complete remission from symptoms between episodes.

(2) He has never been admitted to a psychiatric hospital.

(3) His condition had not prevented him from working as a magistrate until the onset of a more severe episode of depression accompanied by disabling anxiety in the last year.

(4) He has since returned to work.

(5) He has been an extremely energetic and productive magistrate making as many as 5,000 decisions in a year.

(6) The criticism of him has been to do with his manner and not his legal decisions.

(7) Those criticisms in themselves are relatively trivial and have not had a significant impact on cases he had heard or on any individual.

(8) He had never previously been diagnosed with a disorder or made aware of the nature of his symptoms.

(9) He has now received a diagnosis and commenced appropriate treatment.

(10) He is, in my opinion, a rational person with good insight regarding the nature of his condition and a strong commitment to continuing treatment regardless of the outcome of this hearing.

(11) He has a condition that is generally responsive to treatment and he should remain well while receiving treatment.

(12) Treatment is readily available in Sydney.

(13) His adherence to treatment can be readily checked.

(14) Bipolar disorder affects as many as one per cent of the population. There are many other highly successful people in Sydney with more severe forms of bipolar disorder who carry out a range of important roles.

Members, I am pleading with you to understand the condition that I suffer from in a compassionate and constructive way based on the evidence before you. The problem of mental illness is readily apparent to many in our community. As you look around you in this Chamber you may see someone who has the same or a similar problem to the one I have. You would know a loved one or a friend who has been touched by this illness. Honourable members, judges by their very nature are conservative creatures. It may well be that this conservatism has meant that the judiciary has been somewhat reluctant to deal with this problem of mental illness. Members, I ask you rhetorically: Do you agree with the view expressed by the former President of the New South Wales Court of Appeal, Keith Mason, when he said in the context of mental illness, and in the further context of the judiciary, "It is an area where for all sorts of reasons it can't be dealt with publicly. It's a problem for the judiciary"?
Members, fortunately or unfortunately—and somewhat humiliating for me—the problem has become one that is being dealt with very publicly. I truly regret that that has become a reality. However, at the end of the day I believe that this is a fundamental issue that should be treated not by way of condemnation and censure but in an appropriately understanding and compassionate manner. Members, I have been true to my oath of office. I love being a magistrate. I have worked hard. I am conscientious. I seek to make a difference. I try to help those for whom there is often no help. I have made mistakes, but the Judicial Commission has found no misbehaviour based on mental illness. I have not been charged nor found guilty of an offence at law. I have not committed any act that is morally reprehensible, and I have not brought the judiciary into ill-repute.

Where offence was taken, although unintended, I apologise. I tendered an apology to each complainant at the time of each complaint. I repeated each of those apologies under oath at the Conduct Division hearing. And I do so again, publicly, in this Chamber. In February 2010 I learnt that I suffered from a treatable illness. I have done my best to address this problem and will continue to do so. This case is more important than I am. Upon your decision in this case depends whether a person suffering from a mental illness will dare to seek medical assistance. I do not bear

the stigma of mental illness, as I will hereafter use my voice to advance acceptance, develop understanding and remove prejudice.

Human progress is neither automatic nor inevitable. Every step towards the goal of justice requires sacrifice, suffering and struggle, and the tireless exertions and passionate concern of dedicated individuals. Today you can seek to reinforce the stigma and intolerance of the nineteenth century, which is so out of step with the values of many members of the wider community. Alternatively you have an opportunity to join me, Andrew Robb, John Brogden, Geoff Gallop and many others in a campaign against the injustice of intolerance of those who suffer mental illness. Honourable members, I sincerely thank you for your time.

[*Magistrate Maloney was escorted from the Chamber by the Usher of the Black Rod*.]

The Hon. GREG PEARCE (Minister for Finance and Services, and Minister for the Illawarra) [4.39 p.m.]: I seek leave to table a document on behalf of Magistrate Maloney.

Leave granted.

Document tabled.