



## President's Annual Report

October 2011

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### [2011 JCA Colloquium](#)

The 2011 JCA Colloquium is to be held in Alice Springs beginning at 2.00 pm. on Friday 14 October. Registrations remains open. The program is excellent, Alice Springs is a town like no other, and the collegiality of the JCA is something which adds a very valuable element to the professional and personal lives of all judicial officers fortunate enough to experience it. Whatever your court, you will be most welcome in The Alice in this, the centenary year of the Supreme Court of the Northern Territory.

### [Complaints Against Judicial Officers](#)

The JCA occupies a unique and important place in the Australian judicial scene. Its principal concern is the maintenance of the rule of law and of judicial independence. Since these are essential elements of a democratic society and, in their absence, the judicial oath or affirmation of office would be devoid of effective content, all judicial officers ought to identify closely with them, and with the work of the JCA in their protection and advancement.

That work has many facets. One is the support of appropriate mechanisms for dealing with complaints against judges and magistrates. The JCA has adopted a position on this subject, which is that the NSW Judicial Commission has worked successfully. Indeed, its success has been such as to warrant its now serving as a model for other jurisdictions, although this is not to say that one size will fit all. Modifications will be required for effective transfer to some States or Territories.

The Victorian government has under consideration a proposal which departs in some important respects from that tried and tested north of the Murray – particularly in the role of the Heads of Jurisdiction in the complaints-handling process. In the opinion of the Governing Council of the JCA, any mechanism for dealing with complaints against judicial officers must be transparent, fair to both complainant and judge, and allow no opportunity for an outside body such as a judicial commission to interfere in the autonomy of any court, or compromise either judicial independence or the authority of any head of jurisdiction.

### *Title of Judge for Magistrates*

The JCA continues its strong support for the proposition that, because magistrates are judicial officers exercising judicial power, and are required – at least as much as any other judge – to exhibit the judicial virtues in every aspect of what they do, they ought to have the title of judge conferred upon them. The JCA will continue to put this position to all Australian Attorneys-General.

### *Superannuation for Judicial Officers*

Adequate benefits for judicial officers and their dependents on the officer's retirement is another subject being actively pursued by the JCA. Movement in this regard is necessarily influenced by the progress of the litigation in the High Court initiated by Federal magistrates. The JCA position is that superannuation for magistrates and for some judges is inadequate at both theoretical and practical levels, and that adequate judicial pensions for the remaining members of the judiciary are an essential element of a judicial structure in which the rule of law can be maintained. Given the unique position of the Tasmanian judiciary in this respect, negotiations with the Tasmanian Government were opened last year. They will be pursued. In the meantime, the JCA has this very important aspect of judicial remuneration and independence to the forefront of its concerns.

### *Media Commentary on Sentencing and the Courts*

Some elements in the media consistently present, in news stories and in commentary, a picture of an Australian judiciary as frequently being too lenient in the punishments it imposes on offenders. The consequence is a loss of public confidence in the administration of criminal justice, and flowing from that a diminution in community confidence in the judiciary as a whole. The issue therefore impacts upon all courts and all judicial officers; and in so doing diminishes the capacity of the third arm of government properly to play its part in the governance of a democratic society committed to the rule of law.

Another consequence could impact at a direct and personal level. No judicial officer could, consistently with his or her oath or affirmation of office, decide upon an appropriate sentence and then, so as to avoid expected media criticism, increase the punishment which would otherwise be imposed.

To the extent that Attorneys-General no longer accept the responsibility of defending the judiciary in circumstances in which judges and magistrates, and the decisions they make, are subjected to unjustified criticism, the JCA will provide whatever support it can to the judicial officer concerned. The members of the Governing Council, drawn from every Australian jurisdiction, are available as a first point of reference should any judicial officer seek whatever assistance the JCA can give. In the meantime, the JCA will continue to develop a position paper or papers about sentencing in the hope that by this means a sound perspective on a very difficult

subject will be readily available to the judiciary, the media and the public. That development will incorporate and reflect the most recent changes in those jurisdictions such as Victoria in which sentencing is under vigorous review. Because change is presently occurring with unusual rapidity, the timing of the preparation of the papers has to be adjusted in response.

### *High Court Decision on Off-shore Processing*

In my absence on sabbatical leave, the Prime Minister made an inappropriate comment about the decision of the High Court in a recent case involving refugee law. I am most grateful to the Vice-President of the JCA, Justice Philip McMurdo, and others, who responded very appropriately to ill-directed criticism of the Court, criticism which was encapsulated especially in the suggestion that the Court missed an opportunity to assist in giving effect to a policy position of the executive government. Courts have the power and the obligation to declare the law and to administer justice according to that law; and they have a duty not to exceed that power, or go beyond that obligation.

### *Retired JCA Members List*

A recent initiative of the JCA which is bearing fruit will be of interest to some members whose retirement is in the not too distant future. All Attorneys-General have been informed that the JCA has a list of retired judges and magistrates who are or might be interested, in principle, in being approached to serve in a number of ways. Those positions are –

- Acting judicial officers
- Royal Commissions
- Statutory or cognate commissions of inquiry
- Adjunct or other academic appointments
- Public advocacy bodies
- Mentoring programs

Apart from Attorneys-General, a variety of people and bodies, law schools and AusAID, have been told about the existence of this list. The JCA may receive an approach, from time to time, asking us to bring a possible appointment to the notice of those on the list. In those cases, our practice will be to advise all those on the list, and invite any who are interested to make direct contact with the organisation that approached us. Of course, the decision to add your name would be entirely yours.

The response from Attorneys-General has been very positive.

To end as I began: the Colloquium is not to be missed if the chance to attend is one that can be taken. You will be most welcome, and I look forward to catching up with as many judicial colleagues as possible in Alice Springs.

David Harper AM  
President  
Judicial Conference of Australia