



Judicial Conference of Australia

2012 ANNUAL REPORT

Introduction

It is a pleasure to present the 2012 Annual Report the members of the Judicial Conference of Australia.

Office bearers and members of the Executive Committee and Governing Council

The office bearers, the members of the Executive Committee, and the members of the Governing Council of the Judicial Conference of Australia as at the date of preparation of this report are as follows:

Office bearers

President: The Hon Justice David Harper AM
Vice President: The Hon Justice Philip McMurdo
Treasurer: His Honour Judge Brian Withers
Secretary: Mr Christopher Roper AM

Executive Committee

His Honour Federal Magistrate Michael Bauman AM, Federal Magistrates Court of Australia

The Hon Justice Alan Blow OAM, Supreme Court of Tasmania

Her Honour Judge Elizabeth Bolton, Chief Magistrate, Magistrates Court of South Australia

The Hon Justice David Harper AM, Court of Appeal, Supreme Court of Victoria

His Honour Judge Allan Fenbury, District Court of Western Australia

His Honour Judge Graeme Henson, Chief Magistrate, Local Court of New South Wales

The Hon Justice Peter Garling, Supreme Court of New South Wales

His Honour Magistrate Don Jones, Magistrates Court of Tasmania

The Hon Justice Judith Kelly, Supreme Court of Northern Territory

The Hon Justice Philip McMurdo, Supreme Court of Queensland

The Hon Justice Glenn Martin, Supreme Court of Queensland

The Hon Justice Hilary Penfold PSM, Supreme Court of the Australian Capital Territory

The Hon Justice Steven Rares, Federal Court of Australia

His Honour Magistrate Marc Sargent, Magistrates Court of Victoria

The Hon Justice Michael Walton, Industrial Court of New South Wales

His Honour Judge Brian Withers, Supreme Court of South Australia.

Governing Council

His Honour Magistrate Richard Bayly, Magistrates Court of Western Australia

His Honour Magistrate John Birch, Magistrates Court of the Northern Territory

The Hon Justice Alan Blow OAM, Supreme Court of Tasmania

Her Honour Judge Elizabeth Bolton, Chief Magistrate, Magistrates Court of South Australia

His Honour Judge Allan Fenbury, District Court of Western Australia

The Hon Justice Peter Garling, Supreme Court of New South Wales

Her Honour Magistrate Lee Gilmour, Local Court of New South Wales

His Honour Chief Magistrate Ian Gray, Magistrates Court of Victoria

The Hon Justice David Harper AM, Court of Appeal, Supreme Court of Victoria

His Honour Magistrate Don Jones, Magistrates Court of Tasmania

The Hon Justice Judith Kelly, Supreme Court of the Northern Territory

The Hon Justice Glenn Martin (co-opted), Supreme Court of Queensland

His Honour Judge Michael McInerney, County Court of Victoria

The Hon Justice Carmel McLure, President, Court of Appeal, Supreme Court of Western Australia

The Hon Justice Philip McMurdo, Supreme Court of Queensland

His Honour Judge Geoff Muecke, District Court of South Australia

Her Honour Magistrate Leanne O'Shea, Magistrates Court of Queensland

His Honour Chief Federal Magistrate John Pascoe AO CVO, Federal Magistrates Court of Australia

The Hon Justice Hilary Penfold PSM, Supreme Court of the Australian Capital Territory

The Hon Justice Steven Rares, Federal Court of Australia
His Honour Judge Michael Shanahan, District Court of Queensland
The Hon Justice Terry Sheahan AO, Land and Environment Court of New South Wales
The Hon Justice Michael Walton, Industrial Court of New South Wales
The Hon Justice Richard White, Supreme Court of South Australia
His Honour Judge Jon Williams, District Court of New South Wales
The Hon Justice Peter Young, Family Court of Australia.

The Governing Council has met on three occasions over the past 12 months: once each in Alice Springs (15 October 2011), Sydney (17 March) and Melbourne (16 June). Communication involving all members of the Council has taken place, as occasion requires, between meetings.

The Executive Committee met in telephone conference on 16 November 2011, 2 February, 19 April, 25 July and 13 September. As with the Governing Council, communication between members also takes place, as occasion requires, between meetings.

Changes in the composition of the Governing Council

There were during the past twelve months a number of changes in the composition of the Governing Council, as judicial officers retired or, because each court chooses its representative on the Council, internal changes in the allocation of responsibilities within courts dictated a corresponding change in Governing Council representation.

Those who resigned from the Council since October last were Justice Margaret Stone (Federal Court of Australia), Chief Magistrate Steven Heath (Magistrates Court of Western Australia), Magistrate Maria Doogan (ACT Magistrates Court) and Magistrate Julie Huber (Local Court of NSW). Justice Stone also resigned from the Executive Committee. All four contributed very substantially to the work of the Governing Council, while the wisdom, deep professional expertise and breadth of knowledge of Justice Stone made her, in addition, an outstandingly beneficial contributor to the work of the Executive Committee. The JCA is deeply in the debt of each of these four very fine judicial officers.

Justice Stone was replaced on the Governing Council by Justice Steven Rares, who also joined the Executive Committee. Chief Magistrate Steven Heath was replaced on the Governing Council by Magistrate Richard Bayly, and Magistrate Huber was replaced on the

Governing Council by Magistrate Lee Gilmour. Magistrate Karen Fryar will join the Governing Council in October as the representative of the ACT Magistrates Court in succession to Magistrate Maria Doogan.

The business of the Governing Council and Executive Committee

The following have been among the principal items of business of the Governing Council and the Executive Committee over the last twelve months:

Judicial pension entitlements

A sub-committee chaired by Justice McMurdo has prepared a Position Paper on judicial pension entitlements which is now uploaded to the JCA website. It is a document of which the JCA can be very proud. It examines the issues with objectivity and care, and will serve the JCA well as the debate about pension and superannuation benefits for a generally aging Australian population increasingly becomes a topic of public concern. Justice McMurdo and his sub-committee are to be congratulated on successfully completing a difficult project. It is indeed fortunate that the JCA has a statement of its position, set out in a carefully considered Paper developed not in response to the pressure of the moment, but demonstrably designed to contribute constructively to the wise formulation of policy in this area.

The Paper may be accessed on the JCA website.

Senate Inquiry into the Migration Amendment (Removal of Mandatory Penalties) Bill 2012

At the invitation of the Senate Legislation Committee on Legal and Constitutional Affairs, the Governing Council prepared a submission which it forwarded to the Committee. The submission may be accessed on the JCA website. The submission recognised the importance of the separation of powers, including the principle that the judiciary does not involve itself in political controversies. It noted, however, that sentencing was a matter for the judiciary alone, and that mandatory minimum sentences impact upon that aspect of judicial power: the administration of justice through the application of sentencing principles can be compromised by the necessity to impose a mandatory minimum term of imprisonment. It was for that reason, and because an invitation to make a submission had been received from the Senate Committee, that the JCA responded. Its purpose was at least as much to inform both the Committee and the public as it was to persuade.

Complaints against Federal Judicial Officers

During the course of this calendar year the Australian Government introduced legislation to establish mechanisms for dealing in a structured way with complaints against federal judicial officers. Complaints which if proven might warrant the dismissal of the judicial officer who was the subject of the complaint would be referred to a parliamentary commission, established pursuant to the legislation. The commission would report to Parliament which would then decide whether any recommendation for removal should be approved. If Parliament adopted a recommendation to remove, dismissal would follow.

Complaints which if proven would not warrant dismissal would be referred to the relevant head of jurisdiction who would then decide to exercise any and if so which of the powers conferred upon him or her by the legislation.

In the two papers previously prepared by the JCA on the issue of complaints against judicial officers, the position presently in place in NSW was supported, subject to such variations as are appropriate from court to court given differences in financial and other circumstances. The papers therefore envisaged as the ideal model the creation of an independent body such, as the Judicial Commission of NSW - which alone has the power to refer a serious complaint (i.e. one which, if made out, might warrant dismissal) to the NSW Parliament. The federal scheme, by contrast, does not include a standing commission, but rather the establishment of ad hoc commissions to investigate particular complaints. The process of investigation of a serious complaint will therefore be put in train not by an independent body but by Parliament (which may - in effect and in the particular case - be by the Executive Government).

The Governing Council of the JCA nevertheless recognises that what is appropriate for one jurisdiction may not be so for another. It also recognises that federal judicial officers are in a constitutionally unique position. It was for these reasons that, when invited by the Senate Legislation Committee on Legal and Constitutional Affairs to make a submission on the proposed legislation, the JCA confined itself to pointing to a clear distinction between a complaint which is referred to a head of jurisdiction and one which might result in dismissal. In the latter case, the reasonable costs of a judicial officer whose alleged conduct was such, if proven, as to warrant parliamentary consideration of his or her removal from office, will be met by the Commonwealth. This may be contrasted with the case in which the complaint, even if made out, would not warrant dismissal. In such instances, the costs of legal representation will be borne by the individual judicial officer against whom a complaint is made; and this

will remain so even if, because legal representation is warranted, those costs are large and the complaint without foundation.

A sub-committee of the Governing Council is examining the question of insurance cover for these costs.

Industrial Court of NSW

The Governing Council has followed with interest the debate about the future of the Court. Issues of judicial independence may arise as that future evolves.

Formulation of a general JCA policy on when and whether to make public pronouncements on proposed legislation.

A sub-committee, headed by Justice McMurdo, has prepared a paper on this subject which will be presented to the Governing Council at its Fremantle meeting.

Judicial independence in Papua New Guinea

The Governing Council was very concerned when, in May this year, each of the Chief Justice of Papua New Guinea (Sir Salamo Injia) and Justice Nicholas Kiriwom were at the instigation of the Government of that nation arrested and charged with sedition. The circumstances of the arrest of the Chief Justice, when in court attending to court business and with the Deputy Prime Minister in attendance apparently leading the arresting members of the police and armed forces, added to the concern that a serious infringement of the essential independence of the judiciary had – at least on the face of things - occurred.

The Council prepared and distributed widely two press releases in which that concern was expressed. In addition, I wrote to the Attorney-General (The Hon Nicola Roxon MP) and spoke to a senior official on the PNG desk at the Department of Foreign Affairs and Trade.

Following the PNG elections in July, the proceedings against the two members of the judiciary were withdrawn. Each is now executing the duties of his judicial office.

Chief Justice of Nigeria

In July, the Hon Aloma Mariam Mukhtar was appointed as the first female Chief Justice of Nigeria. She has a very high reputation as an outstanding and incorruptible lawyer and judge who is determined to ensure that Nigeria enjoys the benefits of the rule of law. I wrote to her to convey the congratulations and best wishes of the JCA.

Fremantle Colloquium

Once again Justice Glenn Martin and his organising committee have put together an excellent program with presenters to match. The JCA owes Justice Martin a huge debt of gratitude for his work over many years in organising outstanding Colloquia.

Other thanks

It has been a privilege to act as President of the JCA over the past two years. It is a position which returns rich rewards far beyond my deserving. One particularly inspiring aspect of the position is the contact it brings with some of the finest of Australia's servants of the public – its judicial officers. This has been my experience as a consequence of working with the members of the Governing Council and the Executive Committee, each one of whom is a wonderful colleague and very good friend. Another very great benefit has come from the support and friendship of Philip McMurdo, Brian Withers and Chris Roper. Each has offered wise and intelligent counsel whenever it has been requested, which has been often. Each has intervened on those occasions when, without their advice, the results of my unaided efforts would have been far less well-directed than otherwise. Each has acted, as of course, above and beyond the call of duty. I am deeply grateful to them; and I shall remain in their debt – as will the JCA itself.

D L Harper