



GOVERNING COUNCIL

MINUTES OF MEETING: 2012/1

Held on **Saturday 17th March 2012** at the Federal Court of Australia, Sydney.

The meeting commenced at 10.00am.

Present

Justice David Harper AM
(in the Chair)

Magistrate John Birch

Justice Alan Blow, OAM
Judge Allan Fenbury
Justice Peter Garling
Magistrate Lee Gilmour
Justice Judith Kelly

Justice Glenn Martin
Judge Michael McInerney
Justice Carmel McLure
Justice Philip McMurdo
Magistrate Leanne O'Shea
Justice Hilary Penfold, PSM
Judge Michael Shanahan
Justice Terry Sheahan, AO

Justice Margaret Stone
Judge Jon Williams
Justice Richard White
Justice Peter Young

In attendance

Judge Brian Withers
Christopher Roper, AM

Supreme Court of Victoria

Magistrates Court of the Northern
Territory

Supreme Court of Tasmania
District Court of Western Australia
Supreme Court of New South Wales
Local Court of New South Wales
Supreme Court of the Northern
Territory

Co-opted
County Court of Victoria
Supreme Court of Western Australia
Supreme Court of Queensland
Magistrates Court of Queensland
Supreme Court of the ACT
District Court of Queensland
Land and Environment Court of New
South Wales
Federal Court of Australia
District Court of New South Wales
Supreme Court of South Australia
Family Court of Australia

Treasurer
Secretary

Apologies

Apologies were received from:

Chief Magistrate Elizabeth Bolton
Chief Magistrate Ian Gray

Magistrates Court of South Australia
Magistrates Court of Victoria

Chief Magistrate Steven Heath
Magistrate Don Jones
Judge Geoffrey Muecke
Chief Federal Magistrate John Pascoe
AO, CVO
Justice Michael Walton

Magistrates Court of Western
Australia
Magistrates Court of Tasmania
District Court of South Australia
Federal Magistrates Court of
Australia
Industrial Court of New South Wales

Alternates

Alternate
Justice Trish Kavanagh
Deputy Chief Magistrate Peter Lauristen

Representating
Justice Michael Walton
Chief Magistrate Ian Gray

Resolved

That the apologies be noted and received.

1 Welcomes

The President welcomed Justice Carmel McLure and Magistrate Lee Gilmour as new members of the Governing Council, and Justice Trish Kavanagh and Deputy Chief Magistrate Peter Lauristen, attending as alternates for Governing Council members.

2 Confirmation of minutes of the previous meetings of the Governing Council

The minutes of the meetings of the Governing Council held on 15th October 2011 had been circulated.

Resolved

That the minutes of the previous meetings held on 15th October 2011 be confirmed.

3 Minutes of meetings of the Executive Committee held since the last meeting

The minutes of the Executive Committee meetings held on 24th November 2011 and 2nd February 2012 had been circulated.

Resolved

That the minutes of the meetings of the Executive Committee held on 24th November 2011 and 2nd February 2012 be noted.

Reports

4 President's Report

The President reported on the following matters –

Chief Justice of Papua New Guinea

The President expressed concern for the judiciary in Papua New Guinea following the arrest of the country's Chief Justice, Sir Salamo Injia. Following the arrest, Sir Salamo had been taken to a police station, where he was charged with perverting the course of justice. He was then released and subsequently returned to the Court, where he continued with his duties.

The President noted the importance of the JCA acting judiciously in all that it did. Rushing to judgment was inconsistent with such an approach. It was also important to avoid both the actuality and appearance of mere intermeddling. Neither precept, however, stood in the way of the JCA taking a very close interest in instances of serious real or possible encroachment by the executive or parliamentary branches of government upon the independence of the judiciary, whether in Australia or elsewhere. Papua New Guinea was a country with which Australia had close ties of both history and geography. He suggested that the JCA should keep itself as fully informed as possible.

Justice Garling stated that there was a strong unresolved political split between the O'Neill Government, which had the support of two thirds to three quarters of the members of Parliament, and Sir Michael Somare and his supporters. He said that the present Chief Justice was appointed by Sir Michael Somare and after his appointment had been very successful in obtaining funding for his Court. He presided over the bench which held that, because Sir Michael had not been properly removed as Prime Minister, he continued to be the lawful occupant of that office. The Court made orders which reflected this judgment.

Justice Garling added that an element in the dispute between the Chief Justice, the O'Neill government and some members of the Court arose out of the administration of the estate of a former judge, the late Justice Tim Hinchcliffe. Some three to four years previously, a court cheque had been drawn in favour of a beneficiary of the late judge's estate. The Chief Justice had ordered that the cheque not be paid. About three to four months later a cheque was, in fact, paid to the beneficiary.

It was this incident which resulted in the Chief Justice being charged with perverting the course of justice. Since then the Supreme Court has ordered that the National Court permanently stay those proceedings.

Justice Garling reported that a number of minor complaints about the Chief Justice had been referred to a Constitutional Inquiry, which was headed by a respected, retired non-national judge, and two national judges. That Inquiry had not been convened because an election has been called.

Justice Garling proposed that the JCA keep itself up to date with developments, while avoiding any suggestion of intermeddling and saying nothing publicly at this stage. He noted that the Papua New Guinea political system is complex, that the judiciary appears to be divided in its views about the legal issues surrounding the two claims to the prime ministerial office, and that it is very hard to get an accurate picture of the factual basis for those claims or of the background to the controversy surrounding the Chief Justice.

The President asked the Secretary to report on the information he had received from sources to which he had access. Mr Roper recounted conversations he had had with two senior officers of the Department of Foreign Affairs & Trade. The officers had

said that the position to be taken by the JCA was a matter for the JCA, but that the Department's approach was not to intermeddle or appear to be intermeddling. The Department would not encourage the JCA to do anything publicly. In this and other respects the Secretary's understanding coincided with the account given by Justice Garling.

Justice Stone mentioned that two judges of the Federal Court, Logan and Collier JJ, had been appointed to the Supreme Court of Papua New Guinea and that it might be worthwhile to seek their views. She also said that the Deputy Chief Justice of the Papua New Guinea Supreme Court had issued a statement deploring the manner of the Chief Justice's arrest.

Judge Williams mentioned that two former Papua New Guinea judges, Judges Andrews and Wood, were acting judges of the District Court of New South Wales.

Justice McMurdo observed that the appointment of the two Federal Court judges to the Papua New Guinea Supreme Court gave the JCA a special connection and, if anything were to be done, we should obtain their views and perhaps those of the Chief Justice of the Federal Court.

The President suggested that, for the present, the JCA should keep an active watch on the situation, communicate with the two Federal Court judges, and write to the Commonwealth Attorney General indicating the JCA's interest in the matter. Otherwise, it should take no action before a further review of the unfolding position.

Resolved:

To endorse the President writing to the Commonwealth Attorney General indicating the JCA's interest in this matter, and to his approaching the Chief Justice of the Federal Court and Justices Logan and Collier to inform them of the interest of the JCA, and with a request for such assistance in further consideration of the JCA's position as they are properly able to provide.

The President said that the PNG conflict had led him to favour an amendment to the objects clause (Clause 3) in the JCA's Rules. He suggested that rule 3(c) and rule 3(e) might be amended to reflect the fact that, while recognising the practical and diplomatic limits on any action it might contemplate, the JCA necessarily was concerned when the rule of law and the independence of the judiciary were in jeopardy in other parts of the world. He suggested that the two sub-clauses to which he referred be amended as follows (amendments underlined) –

- (c) to achieve a better public understanding and appreciation, in Australia and internationally, of the benefits of the rule of law and of the role of the judiciary in the administration of justice.
- (e) to maintain, promote and improve the quality of the judicial system, as an instrument of the rule of law, in Australia and internationally.

The President said that he would distribute the Rules with the amendments to Governing Council members with a view to further discussion at the July meeting and, if thought appropriate, to the Governing Council making a recommendation to the Annual General Meeting in October.

There was then some discussion of various international organisations which share a similar interest.

Senate Standing Committee Inquiry into the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill

The President reported that, after advising members of the JCA that the JCA had made a submission to this Inquiry, and after providing copies to the members, he had received five responses, all of which were favourable to the JCA's submission. He quoted from one of the responses.

The Hon Michael Murray, QC

The President recommended that, pursuant to rule 4A(2) of the Rules of the JCA, the Hon Michael Murray be appointed as an honorary member of the JCA.

Resolved:

That the Hon Michael Murray, QC be appointed as an honorary member of the JCA.

Bills before the Commonwealth Parliament in regard to the dealing with complaints against federal judicial officers

Justice Stone reported that these bills had been discussed in the Federal Court when they were in draft form.

Justice McMurdo said it would be interesting to know what the Law Council proposed to say in regard to the bills. He noted that the model proposed is not the same as in New South Wales, which is the JCA's preferred model, and that rather a commission would be constituted on a vote of both houses of parliament.

Judge McInerney noted that as presently proposed the complaints body in Victoria would also be differently constituted to the New South Wales body, the breadth of behaviour which might be brought before it was broader, and that there was no role for heads of jurisdiction on it. He said that at this stage there was no draft legislation available for consideration.

Justice Garling said that the Commonwealth model varied from that which the JCA approves. He therefore felt that the JCA should advise parliamentarians of the JCA's views. He noted that there are other jurisdictions considering similar legislation and so it would be good for them to be reminded of what the JCA considered to be the appropriate model.

Justice Penfold suggested this would need to be done carefully and that it would not be sufficient just to send the reports the JCA had already prepared, but to make comments in regard to the specific proposed legislation.

Justice Stone agreed with Justice Penfold. Because federal courts are established pursuant to Chapter 3 of the Constitution, the JCA could not merely refer others to its reports; it should itself prepare for the need to express an opinion about the constitutional issues. She said that the Federal Court has decided not to respond now to the Commonwealth's initiative; but that may change were a constitutional point to be raised as a live issue.

Justice Young said that he felt the JCA should wait until the federal courts had formed a view.

The President suggested that he should write to each of the heads of jurisdiction of the three affected federal courts (the Federal Court, the Family Court and the Federal Magistrates' Court) indicating the JCA's interest in this matter and mentioning that the JCA had produced two reports on the topic. He would in his correspondence point out that neither of the reports directly addressed any Constitutional problems which might arise as a result of the introduction of mechanisms for handling complaints against members of Chapter 3 courts. The meeting endorsed this action.

5 Secretary's report

A report from the Secretary had been circulated. In addition to the matters mentioned therein he also reported that the JCA Secretariat would be asked to move out of its room at the Faculty of Law, University of Sydney. He said that there had been a risk that the Secretariat would be asked to move out of the building altogether; but, it appeared that the relocation would be to another, smaller room in the same building.

The Secretary also referred to a practice in another organisation with which he has worked, the Council of Australian Law Deans, of recording photographically the members of the Governing Council while in meeting mode. It was agreed that at each Governing Council meeting, and at the Colloquium, some photographs should be taken in order to build up a photographic archive of the JCA's activities.

6 Treasurer's report

A profit & loss statement for the period 1st September to 31st December 2011 had been circulated. The Treasurer reported that the financial situation was as planned, and that the total funds with the bank were about \$480,000. The President expressed the thanks of the meeting to Judge Withers for his continued work as Treasurer.

7 Membership report

A membership report as at 31st December 2011 had been circulated. The Secretary reported that there had been no significant changes since then, and the agenda recorded that the current membership at 28th February 2012 was 649.

The President reminded members that among their most important duties was that of providing him with timely notice of new appointments to their courts.

Activities, projects and matters of concern

8 2012 Colloquium

Justice Martin reported that a draft program would be available in about four to six weeks. He said that the social program had been organised and that a committee comprising Justice McLure, Justice McKerracher and Judge Fenbury was planning the sessions, concentrating on local people as presenters.

A draft contract with AM Meetings Plus had been circulated for the 2012 and 2013 colloquia.

Resolved:

That the contract with AM Meetings Plus be signed subject to a change to item 9 whereby the address for service of notices would be the Secretary at the Secretariat.

The President introduced a proposal that a float of say \$3000 be made available to AM Meetings Plus shortly before each colloquium to enable them to pay expeditiously any last minute bills where the supplier required immediate payment.

Resolved:

That a float of \$3000 be made available to AM Meetings Plus shortly before each colloquium to enable them to pay expeditiously any last minute bills where the supplier required immediate payment.

9 Longer term colloquium planning

Justice Martin proposed that there be a rolling three year planning process whereby the venues for colloquia for the ensuing three years would be fixed, thus enabling members to plan and seek support for attendance. This would also enable better longer term planning of the colloquia. He said that he would, if the concept were approved, bring to the next meeting possible venues for 2013 to 2015.

Resolved:

That the proposal that planning for colloquia be undertaken by means of a three year forward planning cycle be endorsed, and that the proposed venues for the 2013 to 2015 colloquia be considered by the Executive Committee prior to them being submitted to the next Governing Council meeting.

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

A memorandum from Justice White had been circulated. Justice White introduced the item by suggesting that there were two questions – does the JCA want to have such a policy and, if so, what should it be? He suggested that the first question only be considered at the meeting.

There was some discussion in which there was agreement that it would be valuable if there were a policy which was disengaged from any particular topic, and that such a policy would be of assistance to the President as a point of reference. It was pointed out that the matters raised by Justice White in his memorandum already suggested what the policy might be.

Resolved:

That a sub-committee, comprising Justices McMurdo, Kelly, Penfold and White, together with the Secretary, be appointed to develop a draft policy for consideration at a future meeting of the Governing Council.

11 Language and the Law Conference, Darwin, May 2012

A request for financial support for this conference had been circulated. There was extensive discussion of the matter.

Justice Kelly introduced the item and referred to a memorandum from her to members of the Governing Council, which had been circulated before the meeting, in which she set out reasons why the conference was particularly worthy of JCA support, and why such support would not set an undesirable precedent.

The Treasurer noted that the JCA had never made a contribution to such a conference. He thought it might be seen as opening a door. He said that a number of questions should be considered. First, what benefit the JCA's broader membership would receive (for example, would the conference papers be available for distribution to all members); secondly, what information should the JCA require before giving consideration to requests of this kind (the treasurer referred to the requirements of law foundations in that regard); thirdly, an amount would need to be included in the budget for such support, and guidance would be needed about the extent of any such provision; fourthly, there would need to be a process for receiving and determining applications, without the need for them individually to go to the Governing Council; and, finally, consideration in each case and perhaps generally would need to be given to the most appropriate means of using the JCA's funds.

He said that in outlining these issues he was making no comment on the merits of this particular application.

The President said that he thought that the JCA probably had power to give such support under Rule 3(e).

Judge Williams said that there were many such conferences, all of which are worthwhile. He therefore agreed with the Treasurer that a protocol for the consideration of such applications was required.

Justice McLure suggested that this conference could be dealt with as being in an exceptional category, given the size of the jurisdiction and the importance of the matter being dealt with at the conference. She said she thought there would not necessarily be any flow-on consequences.

Justice Garling said that the JCA has an educational objective which it chooses to apply in its colloquia. He observed that alternatively the JCA could choose to apply that object by spreading its funds around a number of conferences. He said he would prefer that the JCA concentrated on its own colloquium and not distribute its educational funds through individual conferences.

Justice Sheahan said that he thought this involved an access to justice issue and that it should be treated as an exception.

Justice Stone said that she thought it could be treated as an exception. She said the JCA's colloquia are not just about education but that they also give life to the organisation. She said the conference is about access to justice for a very disadvantaged group in a jurisdiction where that problem is extreme. She thought that the JCA should make a contribution and form a longer term policy.

Judge Shanahan said he was cautious about the issue but would be happy if support for the conference were to be treated as an exception. He said he felt the JCA should confine its support for conferences only to exceptions.

The President said that his own view was that this conference could be regarded as an exception.

Justice Kelly said she was fairly confident that the papers could be made available to the JCA's membership generally.

Justice White also supported it being exceptional on the grounds that (i) the Northern Territory is a small jurisdiction; (ii) the conference deals with a disadvantaged sector of the community; (iii) it involves interaction with the judicial system; and (iv) it reflects the recommendations of the Deaths in Custody Report.

Justice Penfold suggested that the minutes record why the Governing Council considers this conference to be exceptional. She said if support for a conference were to be exceptional then it was appropriate that the decision should be considered by the Governing Council.

Judge McNerney noted that the theme of the conference had a direct correlation with the session on interpreters at the JCA's last Colloquium.

Magistrate O'Shea asked if invitations had been extended to persons beyond the Northern Territory. She said the Magistrates Court of Queensland was not aware of it and yet it has similar issues to confront. She noted that the government should be responsible for the cost of interpreting, and it should not be borne by courts out of their own budgets.

Justice Blow said he would agree to supporting the conference on the basis that such support was exceptional. He said it is not what the JCA's members pay their subscriptions for. He proposed that the Executive Committee obtain more financial information and a budget, as a basis for determining what support the JCA should be giving, and that the Executive Committee be empowered to determine the amount.

Judge Williams agreed, using an illustration of a case from New South Wales. In his opinion, this request was sufficiently worthy to warrant it being placed in the exceptional category that this is a sufficiently extraordinary conference warranting the JCA's interest.

Resolved:

That, whilst stressing the responsibility of the executive government to provide interpreters in all courts, the Governing Council was of the opinion that the "Language and the Law" Conference to be held in Darwin next May was sufficiently exceptional to warrant such financial support from the JCA as the Executive Committee might think appropriate after consideration by that Committee of such financial information (including a budget) as the conference organisers were in a position to provide.

12 Judicial pension entitlements

A report prepared by a sub-committee chaired by the Vice President, Justice McMurdo, had been circulated, together with correspondence from Judge Henson to the President.

Justice McMurdo, in introducing the report, said that it had focussed on matters of principle. He reminded members that at the meeting 12 months ago, Justice Stone had argued for a statement of principles that the JCA could use whenever their application was suitable for the particular case.

Justice McMurdo further commented that the JCA recognised the fact that, alone among judicial officers save for members of the Supreme Court of Tasmania, magistrates were not provided with a pension on retirement, and that the argument for the abolition of this distinction between judicial officers was a strong one. In this context, Justice McMurdo noted that it is one thing to say that the general parameters of judicial remuneration should reflect the same values and objects no matter what the level of the judiciary, and another thing to say that all have an *entitlement* to pensions as a necessary condition of judicial independence. For this reason, the draft report does not take the latter position. It seeks to express principles only.

Justice McMurdo referred to the current litigation in the Federal Court in which the federal magistrates are arguing that the Constitution gives them a right to a pension. The paper does not seek to deal with the merits of that litigation.

Deputy Chief Magistrate Lauristen said that, if the paper is only dealing with matters of principle, it seems to treat state and federal magistrates separately. There is only a specific reference to their situation in the last two paragraphs of the paper. He argued that the paper should be trying to say what, from a cross-jurisdictional point of view, should be addressed. He said that the sentence beginning "For example, ..." in paragraph 19 of the report could be taken as meaning the paper was opposed to the provision of pensions to magistrates.

Justice Blow referred to the situation in Tasmania. He said that the reality is that pensions are desirable, but the judges in his State will not get them. He queried whether the arguments of the JCA would fall on more receptive ears if they concentrated upon the adequacy of retirement benefits rather than upon the particular virtues of a pension.

Magistrate Birch said that the report could state the same principles but propose that there be an increase in superannuation contributions to make the superannuation entitlement closer to the benefits which enure to those in receipt of a pension.

Magistrate O'Shea stated that she believed that if magistrates did not *perceive* that the JCA was supporting the provision of pensions to magistrates then the magistrates would withdraw their support from the JCA because they would not see it as representing their interests.

Judge Shanahan said that if this is a document of principles, then the principle should be that every magistrate should be entitled to a pension.

Justice Young said that if the JCA were to lower its starting point and not state this as a matter of principle, there would be disappointment amongst magistrates.

Magistrate Gilmour supported this view and said the result would be the loss of support from magistrates.

Magistrate Birch said that the position of the Association of Australian Magistrates is that magistrates are entitled to pensions.

The President said that the calls upon magistrates to display daily all of the judicial virtues are at least as demanding as they are on judicial officers in other courts. It ought therefore to be axiomatic that the JCA regard magistrates as judicial officers in every sense. He said he would be disappointed if magistrates held a different perception of the JCA's regard for them.

Justice Kelly suggested that the document should make a general statement but that the sentence to which Deputy Chief Magistrate Lauristen referred could be removed.

Justice Stone said that the fact is that a pension for judicial officers is an important factor in the recruitment and retention of all judicial officers, judges and magistrates. So the point is not so much that judges and magistrates are all judicial officers, but that this principle in regard to recruitment and retention applies across the board.

Justice Young suggested that the wording in paragraph 11 of the report should say that the JCA maintains its support rather than the last few words.

Magistrate Gilmour suggested that, when the report was finalised, it be distributed electronically to members. She added that she proposed to print it and distribute it to magistrates in her Court as part of a membership drive.

Justice McMurdo said that the draft report would be reviewed with this helpful debate in mind. He then referred to the correspondence received from Judge Wall. He said that his view is that the JCA can make no case for salary sacrificing as an essential element of a judicial pension scheme. He suggested that the response to Judge Wall should be that, whilst salary sacrificing does exist in some jurisdictions, it is the JCA's view that salary sacrificing need not be part of a remuneration scheme for judicial officers.

Resolved:

That the President write to Judge Wall and express the view that the Governing Council believes salary sacrificing is not an essential element of a judicial pension scheme.

**13 Senate Legislation Committee on Legal and Constitutional Affairs:
Inquiry into the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012**

The President said that he appreciated the assistance which members of the Governing Council had provided in the drafting of the JCA's submission to the Senate Committee on this Bill. The submission was much the better for it.

14 Industrial Court of New South Wales

Justice Kavanagh said that a report due on 22nd March 2012 from the New South Wales Government may recommend the abolition of a New South Wales Chapter 3 court. She asked if the JCA President could be authorised to point out to the New South Wales Attorney General the protections which Chapter 3 judges have under the New South Wales Constitution and under the Beijing Principles.

Justice Garling said that the JCA should keep this matter under observation and respond where appropriate. He suggested it be a matter for the Executive Committee to deal with, as appropriate.

15 Thanks for use of the Federal Court conference room

The President expressed the thanks of the meeting to Justice Stone for the opportunity to use the Federal Court judges' conference room.

16 Next meeting

The next meeting will be held at the Supreme Court of Victoria, Melbourne on Saturday 16th June 2012.

It was agreed that the first meeting in 2013 would be held at the Supreme Court of Queensland.

There being no further business, the meeting concluded at 1.00pm.

Signed as a true record:

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President