

**GOVERNING COUNCIL**

**MINUTES OF MEETING**

Held on **Saturday 13 March 2021** at the Federal Court of Australia Law Courts Building, Sydney.The meeting commenced at 10.00 am.

**Present in person**

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| Justice Glenn Martin AM (Chair) | Supreme Court of Queensland |
| Magistrate Jennifer Atkinson | Local Court of New South Wales |
| Justice Michael Baumann | Family Court of Australia |
| Justice Jenny Blokland | Supreme Court of the Northern Territory |
| Deputy Chief Magistrate Janelle Brassington | Magistrates Court of Queensland |
| Justice John Burns | Supreme Court of the ACT |
| Deputy Chief Magistrate Michael Daly | Magistrates Court of Tasmania |
| Judge Graham Dart | Supreme Court of South Australia |
| Deputy Chief Magistrate Brett Dixon | Magistrates Court of South Australia |
| Justice Steven Dolphin | South Australian Employment Tribunal |
| Justice Rene Le Miere | Supreme Court of Western Australia |
| Justice Neil McKerracher | Federal Court of Australia |
| Justice Steven Moore | Supreme Court of Victoria |
| Magistrate Peter Morrison | Magistrates Court of the Australian Capital Territory |
| Judge Garry Neilson | District Court of New South Wales |
| Vice President Daniel O’Connor OAM | Industrial Court of Queensland |
| Justice Nicola Pain | Land & Environment Court of New South Wales |
| Judge Anthony Rafter | District Court of Queensland |
| Judge Rauf Soulio | District Court of South Australia |
| Justice Michael Walton | Supreme Court of New South Wales |

**Present by teleconference**

Chief Justice Alan Blow AO Supreme Court of Tasmania

Judge Michael Cahill County Court of Victoria

Judge Andrew Stavrianou District Court of Western Australia

Judge Gerard Winter Judges Association of New Zealand

#### In attendance

Christopher Roper AM CEO

Lillian Lesueur CEO

# Apologies

Apologies were received from:

Judge Alexandra Harland Federal Circuit Court of Australia

Magistrate Andree Horrigan Magistrates Court of Western Australia

Magistrate Jan Maclean Magistrates Court of Victoria

President Fleur Kingham Land Court of Queensland

Chief Judge Elizabeth Morris Local Court of the Northern Territory

*Resolved (2020/21)*

That the apologies be noted and received.

The President welcomed Justice Michael Brett who was attending as an alternate to Chief Justice Alan Blow of the Supreme Court of Tasmania, Judge Rauf Soulio of the District Court of South Australia who was attending his first meeting, and President Fleur Kingham who was attending her first meeting in person.

The President also advised the meeting that this would be the last meeting attended by Judge Rachelle Lewitan AM who would be retiring as a judge of the County Court of Victoria in the early new year.

# 1 Confirmation of minutes of the previous meeting of the Governing Council and resolutions obtained by flying minute

The minutes of the meeting of the Governing Council held on 13th June 2020, the resolution obtained by flying minute circulated on 25th June 2020, the resolution obtained by flying minute circulated on 11th September 2020, the resolution obtained by flying minute circulated on 5th October 2020, and the resolution obtained by flying minute circulated on 2nd November 2020, had been circulated.

*Resolved (2020/22)*

That the minutes of the previous meeting held on 8th June 2019, the resolution obtained by flying minute circulated on 25th June 2020, the resolution obtained by flying minute circulated on 11th September 2020, the resolution obtained by flying minute circulated on 5th October 2020, and the resolution obtained by flying minute circulated on 2nd November 2020 be confirmed.

# 2 Minutes of the meetings of the Executive Committee held since the last meeting

The minutes of the Executive Committee meeting held on 23rd July and 29th October 2020 had been circulated.

*Resolved (2020/23)*

That the minutes of the meetings of the Executive Committee held on 23rd July and 29th October 2020 be noted.

# 3 President’s Report

The President had reported at the Annual General Meeting. The following matters were discussed.

***3.1 Revision of Chapter 7 of the* Guide to Judicial Conduct**

The President introduced this item and referred to the discussion paper prepared for the Council of Chief Justices and a memorandum prepared by a sub-committee of the Executive Committee comprising Chief Justice Blow, Deputy Chief Magistrate Dixon and Magistrate Maclean, both of which had been circulated.

The matter was discussed at length. A number of the comments made were:

* The rate of superannuation for those judicial officers who did not receive pensions and were under superannuation schemes was usually 9.5%.
* A blanket ban on post-judicial work would have problems for recruitment for many courts.
* If so many exceptions have to be made to the ban the question arises as to whether there should be a ban in the first place.
* Bar associations and law societies have rules which, in some cases, would deal with these situations.
* In some jurisdictions, if a retired judicial officer takes out a practising certificate, that officer’s pension ceases whilst the practising certificate is held; and this applies in those cases to state judicial officers but not federal judges.
* It needs to be borne in mind that part of the reason for a pension is to assist in ensuring that judges have an appropriate degree of independence.
* A problem is the perception amongst the public of former judges earning a high amount and, at the same time, receiving a pension paid for by taxpayers. This could result in a knee-jerk reaction to abolish pensions for judicial officers.
* The fundamental problem is the perception of a person earning a pension paid for by taxpayers whilst also earning an income by other means.
* The best approach may be that if a retired judge wishes to practise as a lawyer then the pension is suspended.
* But what should be the situation if the retired judge is practising as a mediator or arbitrator, which do no require a practising certificate?
* There is also a distinction between being a mediator or arbitrator and appearing before them. There may also be a distinction between a mediator and an arbitrator.
* The media’s interest may not be so much in how retired judicial officers earn their income but how much they earn.
* The best defining rule might be whether or not a retired judicial officer is holding a practising certificate.
* There also needs to be a distinction between appearing subsequently in one’s own court and in another court, and also between appearing in one’s court and a higher court.

Justice Walton suggested that the JCA’s retired members should be consulted and surveyed. Justice Baumann suggested such a survey could be extended to those about to retire.

Judge Winter reported that in New Zealand a judge on appointment signs an undertaking not to go back and practise at the Bar, ie. they cannot after retirement appear in any court at any level. They can, however, do arbitrations and mediations. Justice Martin said that a similar position applies in England although this was crumbling away.

The President suggested that a sub-committee be appointed and that, in addition, all Governing Council members be asked to ascertain the views of the members of their own courts, and that this information be transmitted to the sub-committee. Justice Martin agreed and said anything the JCA might say would have added weight if we can say that we have consulted the members of the courts throughout Australia, as well as retired judicial officers.

In regard to such a consultation, the President reminded members of the Governing Council that the Council of Chief Justices’ Discussion Paper cannot be circulated more widely. Judge Neilson suggested that, in introducing the matter, it simply be said that the issue had arisen. Justice Martin suggested that the President ask Chief Justice Grant what wording should be used.

*Resolved (2020/24)*

That a Post-Retirement Income & Restrictions on Practice Sub-Committee be appointed comprising Chief Justice Blow, Justices Martin, Pain and Walton, Magistrates Atkinson and Maclean, and two retired judicial officers who are members of the JCA, to develop a response to the Discussion Paper of the Council of Chief Justices.

***3.2 Proposed sub-committee in regard to the elimination of inequality of outcomes for indigenous people in Australian courts***

The President referred to the resolution of the Executive Committee, which had been recorded in the agenda papers. She outlined the history of the matter, commencing with the JCA’s letter to the Editor of the *Sydney Morning Herald* on 12th June 2020 in response to a comment by a young lawyer who had said there was systemic racism in the courts. She reported that there had been both positive and negative feedback to the JCA’s letter, which had led to the development of the discussion forum on the Members’ Section of the JCA website; which had hardly been used.

The President reported that there had then been a suggestion from Chief Justice Kourakis that a committee be formed to look at this issue; which he was willing to chair.

There was general agreement that such a committee be formed. Justice Martin noted that it would not be necessary that it only comprise Governing Council members.

Magistrate Morrison asked what was meant by the term ‘inequality of outcomes’ and the President suggested it probably principally applied to the higher proportion of aboriginal people in prisons. Judge Soulio suggested that the committee’s terms of reference be changed to read “… in an effort to ensure equality of outcomes …”.

President Kingham noted that equality of outcomes applies not only in criminal matters, and indicated that she would be willing to serve on the committee.

Justice Pain noted that its membership need not include only judicial officers.

The names of a number of potential members of the committee were then mentioned. It was agreed that the Secretary would send out an email to Governing Council members seeking names of people who might be members of the committee, and that he would issue a similar invitation to retired members of the JCA.

*Resolved (2020/25)*

That an Equality of Outcomes in the Courts Sub-Committee be formed, to be chaired by Chief Justice Kourakis and to comprise a membership yet to be determined, with the following terms of reference:

To examine and report to the Governing Council on whether there is anything in the structural way courts operate, in their administrative and judicial aspects, which can be improved in an effort to ensure equality of outcomes for indigenous people.

# 4 Media releases issued since the last meeting of the Governing Council

There had been no media releases issued, or letters to the editor or articles submitted, since the last meeting.

# 5 Accommodation for the Secretariat and appointment of a new Secretary/Chief Executive Officer

Justice Martin reported that Ms Lillian Lesueur, at present the CEO of the National Judicial College of Australia, had been appointed as the next Secretary of the JCA, and that she would be starting her duties in early February 2021.

He said that he had, on the previous day, met with Professor Sally Wheeler, the Dean of Law at the ANU College of Law, and inspected the room to be allocated to the JCA. He said that the Dean continued to be enthusiastic about the JCA’s presence at the ANU College of Law. He reported that a MOU would be entered into and this was presently being discussed.

# 6 Proposed change of name of the Association

This matter had been dealt with at the Annual General Meeting.

# 7 Secretary’s report

The Secretary had nothing to report.

# 8 Treasurer’s report

The Treasurer had nothing to report, having reported at the Annual General Meeting. A profit and loss statement for the period 1st July to 30th September 2020 had been circulated and was noted.

# 9 Membership report

The Governing Council noted the following reports:

* showing the state of membership as at 19th November 2020
* listing newly appointed judicial officers to whom letters of congratulations and invitation to join the JCA have been sent since the last Governing Council meeting
* listing members who have joined the JCA since the last meeting of the Governing Council.

A memorandum in regard to possible arrangements where all members of a court were JCA members had been circulated, and was discussed. Justice Le Miere pointed out that a significant difficulty would arise if a court were to consider entering in to such an arrangement but one or more members of the court did not wish to do so: this could cause considerable internal difficulties.

Justice Martin suggested that, perhaps, if a court were to seek to have all its members as members of the JCA a lower membership rate could apply, say 85%. There could also be differentiation depending on the level of the court and the size of the court.

Justice Baumann noted that there was a lower take-up in JCA membership in the magistrates’ courts. He noted that they have their own representative bodies, which may explain the lower take-up rate.

Judge Dart suggested that the JCA’s change of name may assist in attracting members from the lower courts.

President Kingham suggested that the JCA seek to have someone speak about its role at the National Magistrates Orientation Program. Justice Martin asked whether the JCA might also seek to speak at the conferences of the Association of Australian Magistrates (AAM). (The next conference would be in Hobart in March.) Both suggestions were supported.

Justice Martin then raised the question of whether there should be a reconsideration of the merger of the JCA and the AAM. He said this possibility had been raised about ten years ago but not proceeded with.

It was noted that some magistrates consider that the JCA does not respond to their needs, and thus there may need to be some changes to the JCA’s structure to respond to this.

Deputy Chief Magistrate Daly said that the Tasmanian magistrates ‘bought in’ to the JCA because it was seen as seeking to defend judicial officers from unwarranted attacks, whereas the AAM is seen mainly as a provider of professional development.

Deputy Chief Magistrate Dixon said that he thought the proposed merger was not proceeded with ten or so years ago because magistrates thought that their interests would be overlooked in the merged organisation: however, he felt the time was now ripe for a reconsideration of a merger. Magistrate Maclean agreed that now was the time to reconsider this.

Justice Martin asked that details of the AAM’s office bearers be sent to the Secretary.

Then was then discussion as to how the matter might be initiated. Deputy Chief Magistrate Dixon suggested that the President write to the President of the AAM asking if now was the time to start discussions. Alternatively, he said that he could raise it as the AAM’s next meeting and suggest that the AAM President write to the President of the JCA.

*Resolved (2020/26)*

That the President open discussions with the Australian Association of Magistrates with a view to some form of merger or amalgamation of the two bodies.

# 10 Meeting dates in 2021

The Executive Committee has recommended the dates as shown in the proposed resolution on which the Governing Council meets in 2021.

*Resolved (2020/27)*

That the meetings of the Governing Council in 2021 be held as follows –

March 13 venue: Sydney

June 19 venue: Melbourne

October 9 venue: Auckland

**Elections**

# 11 President

Justice Glenn Martin was nominated for the position of President. There were no other nominations.

*Resolved (2020/28)*

That the Hon Justice Glenn Martin AM be elected President of the Judicial Conference of Australia.

# 12 Vice President

Justice Michael Walton was nominated for the position of Vice President. There were no other nominations.

*Resolved (2020/29)*

That the Hon Justice Michael Walton be re-elected Vice President of the Judicial Conference of Australia.

# 13 Executive Committee

The following members of the Governing Council were nominated for membership of the Executive Committee:

Justice Michael Baumann

Chief Justice Alan Blow

Justice John Burns

Deputy Chief Magistrate Brett Dixon

Magistrate Jan Maclean

Justice Neil McKerracher

Justice Steven Moore

Judge Anthony Rafter

Judge Andrew Stavrianou

*Resolved (2020/30)*

That Justice Michael Baumann AM, Chief Justice Alan Blow AO, Justice John Burns, Deputy Chief Magistrate Brett Dixon, Magistrate Jan Maclean, Justice Neil McKerracher, Justice Steven Moore, Judge Anthony Rafter and Judge Andrew Stavrianou be elected to the Executive Committee.

# 14 Intermediate Courts Representative

*Resolved (2020/31)*

That Judge Rauf Soulio be elected as the Intermediate Courts Representative on the Governing Council and Executive Committee.

# 15 Magistrates/Local Courts Representative

*Resolved (2020/32)*

That Magistrate Jan Maclean be elected as the Magistrates/Local Courts Representative on the Governing Council and Executive Committee.

# 16 Vote of thanks to Judge Rachelle Lewitan AM

The President noted that this meeting would be the last attended by Judge Rachelle Lewitan, as she would be retiring from her Court in the early new year, although continuing as an acting judge.

*Resolved (2020/33)*

To express the thanks of the JCA to Judge Rachelle Lewitan AM for her outstanding contribution to the work of the JCA as a member of the Governing Council and of the Executive Committee.

**Projects and Activities**

# 17 Colloquium and conference organisers

Justice Martin reported that Justice Walton would now chair the Colloquium Planning Committee. He noted that Judge Lewitan would retire from the Committee and proposed that Vice-President O’Connor be co-opted to the Committee. He said that planning was proceeding on the basis that the Colloquium would be held in Auckland in October 2021 as planned.

Justice Martin then advised members that a tender had been sent to five organisations inviting them to submit proposals to be the JCA’s conference organisers for the next four years. He reported that an ad hoc committee, comprising himself, Justice Walton and Justice Baumann, had considered the proposals and recommended that Conference Design be appointed to the role.

*Resolved (2020/34)*

That Conference Design be appointed as the JCA’s conference organisers for the next four years on the terms as set out in its proposal dated 20th November 2020.

# 18 International Association of Judges

There was no report in regard to this matter.

# 19 Online course: The Modern Judiciary

Justice Martin said that he had raised this matter with Professor Sally Wheeler, the Dean of the ANU College of Law, and she had said the law school would be keen to be involved, possibly jointly with the University of New South Wales (UNSW).

He said the course had been conducted in England and Wales in January/February of this year. He said several JCA members had joined in and thought it was well done. He set out what he thought would be the audience for such a course.

He also reported that he had spoken to Andrew Lynch at UNSW, who had a connection with James Lee of Kings College London, where the English course had been developed. He said James Lee was also an honorary professor at the ANU College of Law.

Justice Martin said that one reason why the course was successful in England was that it had the support of the English judiciary, and so it would be important to get the support of the Councils of Chief Justices, Chief Judges and Chief Magistrates in Australia. He said such a project would be a good way for the JCA to communicate more broadly with the general public. He said he would come back to the Governing Council with a proposal which would include the cost, how long it would take to develop the course, and how to obtain the involvement of the Councils.

It was agreed that the JCA would go ahead with this proposal as outlined by Justice Martin.

# 20 Judicial Incapacity

Justice Martin referred to an article in the *Federal Law Review* by Lynch and Blackham which pointed to the problems for courts when judicial officers are incapacitated.[[1]](#footnote-1) He suggested that the JCA should have a view on this, and that indeed the article also suggested this. He asked that it remain on the Governing Council’s agenda.

# 21 Vote of thanks to the retiring Secretary

The President reminded members that this would be the last meeting attended by Christopher Roper as Secretary of the JCA. She said that he had been the JCA’s Secretary through much of its existence and had made a significant contribution to its work over many years and she wished to thank him for that on behalf of all members of the Governing Council.

It was proposed that he be appointed an Honorary member of the JCA.

*Resolved (2020/35)*

To express the sincere thanks of the JCA to Christopher Roper for his work as its Secretary.

To appoint Christopher Roper as an Honorary member of the JCA.

# 22 Vote of thanks to the retiring President

Justice Martin noted that at the conclusion of this meeting Justice Judith Kelly’s term of office as President would end. He reminded the meeting of the huge amount of work Justice Kelly had done as President, as evidenced in part by the enormous number of letters she had sent or received. He said that she had been on call on a 24/7 basis and had worked under quite substantial pressure. She had dealt with matters at the highest level of professionalism and had produced many excellent documents.

*Resolved (2020/36)*

To express the sincere thanks of the JCA to Justice Judith Kelly for her outstanding work as its President over the last two years.

# 23 Next meeting

The next meeting will be held on Saturday 13th March 2021 in Sydney.

There being no further business, the meeting concluded at 11.15am.

Signed as a true record:

………………………………………………..

President

1. (2020) 48 (2) Federal Law Review 214-246. [↑](#footnote-ref-1)