Judicial Conference of Australia

A BRIEF HISTORY OF THE EARLY DAYS OF THE JUDICIAL CONFERENCE OF AUSTRALIA

Prepared by the Secretariat of the Judicial Conference of Australia

2016

Contents

Abbreviations

AIJA	Australian Institute of Judicial Administration
CJA	Canadian Judges Association
IAJ	International Association of Judges
JCA	Judicial Conference of Australia
SFCJC	Supreme and Federal Court Judges' Conference

Associations of judicial officers

It was not until the 1970s that Australian judges met together in a formal, regular or structured way, except for meetings held within their own courts.[1] In the early years of the 1970s the value of judges meeting informally to discuss problems that arose in the course of their work was identified, and this led to the establishment in 1972 of an annual conference, called the Supreme and Federal Court Judges' Conference (SFCJC).[2]

The steering committee for that conference identified two goals – to conduct an 'occasion' for discussion of topics of interest to Supreme Court judges and to establish a "permanent organization which might organize on a long term basis various activities of interest to judges in relation to their work".[3]

It was not until the 1990s that there was discussion about the value or prospect of a permanent organisation.[4]

At the SFCJCs, which began in 1972, there was general acceptance of the proposition that the Conference had no representative function.[5] So, although, as will be described below, the Judicial Conference of Australia (JCA) arose out of the SFCJC, that Conference never sought to perform the role which the JCA assumed.

The protection of judicial independence

The opportunity to meet together to discuss topics of mutual interest has continued to be of value to judicial officers, and the annual SFCJCs have been held every January up to the present time. It was a more fundamental reason, a concern to protect judicial independence, which led to the establishment of the JCA.[6]

The judicial oath is "to do right to all manner of people, according to law, without fear or favour, affection or ill will". To fulfil this oath, a judicial officer must be independent, and there must be ways to protect that independence.

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1 A national association for magistrates, the Australian Stipendiary Magistrates Association, was founded in 1978. It was subsequently renamed in 1994 as the Association of Australian Magistrates.

2 Sometimes also called the Supreme Courts and Federal Court Judges' Conference.

3 Dowsett J, "The Conference – 40 Years On", a paper presented at the Supreme Court and Federal Court Judges' Conference, Melbourne, 21-25 January 2012, at p 4.

4 ibid, p 5

5 ibid, p 5.

6 What David Angel called "the importance yet fragility of judicial independence" in Angel, D, "The Early Days of the Judicial Conference", *Judicial Conference News*, no. 1, p 2.

This concern was particularly being expressed in the early 1990s in conference papers and journal articles by Justice Richard McGarvie of the Supreme Court of Victoria, and journal articles by Justice Robert Nicholson, then of the Supreme Court of Western Australia.[7]

Justice McGarvie's initial paper in 1990

In July 1990 Justice McGarvie presented a paper entitled "The Foundations of Judicial Independence in a Modern Democracy" at the Australian Bar Association Conference in Darwin.[8] In that paper His Honour raised concerns that there were great challenges to judicial independence from the rising power of cabinet and the public service and from social changes. He argued that some of the safeguards of judicial independence in fact lacked real strength and that the institutional framework should be repaired and extended so that it gave effective protection to judicial independence.

Justice McGarvie outlined a number of, what he called, foundations of judicial independence but did not propose an association of judicial officers as one of those foundations.[9] He did however say:

> In Australia, it is proper and expected that leaders within the legislative arm and the executive arm of government are alert and active to ensure that their arm is adequately sustained and protected. It is for judges to act in the same way in respect of their arm of government.[10]

Justice McGarvie said "This article is designed to sound alarm."[11] And it appears that it did so.

Justice McGarvie's second paper in 1992

Eighteen months later, in January 1992 his Honour presented a further paper, *The Ways Available to the Judicial Arm of Government to Preserve Judicial Independence,* at the annual SFCJC in Canberra.[12] This paper also considered the dangers that threatened the good health of judicial independence and proposed steps to preserve that health. He argued that the judicial arm of government needed to organise and assert itself "in the

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7 Later a judge of the Federal Court of Australia.

8 This paper was later published in the *Journal of Judicial Administration* as McGarvie, RE (1991) "The Foundations of Judicial Independence in a Modern Democracy", *Journal of Judicial Administration* (1991), 1, pp 3 – 45.

9 In fact, at p 39, he explicitly acknowledged that he had not dealt with "organisations such as a Judicial Conference of Australia …".

10 ibid, p 22.

11 ibid, p 8.

12 This paper was later published in the *Journal of Judicial* Administration as McGarvie, RE (1992) "The Ways Available to the Judicial Arm of Government to Preserve Judicial Independence", *Journal of Judicial Administration* (1992), 1, pp 236 - 280.

manner necessary for the preservation of judicial independence in the modern democratic world".[13] Justice McGarvie noted that "only latterly has the judiciary displayed a commitment to doing what is necessary to meet the challenges to judicial independence.[14]

On this basis. His Honour proposed an organisation with two parts. The first would be a standing Australian courts committee, and the second would be "an Australian judicial conference with some of the features of the Canadian Judges Conference".[15] He envisaged both parts of the organisation being involved, not with judicial administration or continuing education, but in "the policy concerns of the judicial arm of government".[16]

He saw the Australian Vice-Chancellors' Committee (AVCC) as the model for the courts committee, as the AVCC acts as the voice of the combined institutions (the universities) on many issues. He contemplated that members of the courts would have an opportunity to raise within their courts, and express views on, items to be considered by the committee.

Sitting alongside this would be the judicial conference which, he suggested, could be similar to the Canadian Judges Conference, whose membership was open to judges and whose finance came from annual membership fees. Its first mandate was "to be constantly vigilant and committed to assuring the preservation of a strong and independent judiciary". Its work was to put forward the point of view of its members and make recommendations to governments.[17] It is clear that Justice McGarvie considered that both judges and magistrates at all levels of courts should be members of the judicial conference.[18]

In regard the relationship between these two parts, he suggested that:

> the committee and the conference should be concerned with the same kinds of subjects. It would be open to the conference to do no more than consider and express its opinion on a subject. It would only be the committee which could take action on a subject and, while not bound by an opinion of the conference, it would take it into account. Only the committee could make a representation to a government, parliament or other body, make recommendations to courts or other components of the judicial arm of government, or issue a press release.[19]

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13 ibid, p 243.
14 ibid, p 244.
15 ibid, p 259.
16 ibid, p 259.
17 ibid, p 262.
18 ibid, p 23.
19 ibid, p 262.

Justice Nicholson's 1992 study and his 1993 article

Justice Nicholson had provided a commentary on Justice McGarvie's paper at the January 1992 Conference, in which he supported the call for a body like that proposed by Justice McGarvie.[20] He said:

> The proposed Australian Judicial Conference would give encouragement to the development of a trans-Australia and trans-court viewpoint among members of the Australian judiciary.[21]

Later in the same year Justice Nicholson was on leave from the Supreme Court of Western Australia for three months, which he spent as a Visiting Judicial Fellow at the United States Federal Judicial Center. Whilst there he received a communication from Justice Ian Sheppard asking him to investigate the history and purposes of the Canadian Judges Conference and the United States Judicial Conference. Because he was working in Washington DC he was readily able to carry out that assignment in relation to the United States body. In relation to Canada, he made contact with it by telephone on several occasions, obtaining relevant materials. He wrote a report and sent it to Justice Sheppard.

In 1993 Justice Nicholson published the results of his work in a further article in the *Journal of Judicial Administration*, entitled "Judicial Independence and Judicial Organisation: a Judicial Conference for Australia?".[22] He reviewed in that article an organisation in the United States known as the Judicial Conference of the United States. Although having a name similar to the JCA's, it is different in nature and differently constituted. It is not examined further in this history. He also reviewed the Federal Judges Association whose purposes include "to preserve and protect … the independence of the Federal judiciary from intrusion, intimidation, coercion or domination from any source".[23]

As events unfolded, it appears that it was Justice Nicholson's review of the Canadian Judges Conference, as well to some extent of the Canadian Association of Provincial Court Judges, that proved to be most influential in the establishment of the JCA in Australia. The Canadian Judges Conference's principal mandate, like the JCA's, is to preserve a strong and independent judiciary.

Justice Nicholson's paper concluded with an outline of a proposed model for Australia. He first considered what needs should occasion the formation of

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20 This commentary was also published in the *Journal of Judicial* Administration as Nicholson, RD (1992), "A Comment on Mr Justice McGarvie's Paper", *Journal of Judicial Administration* (1992), 1, pp 281 – 292.

21 ibid, p 289.

22 Nicholson, RD (1993), "Judicial Independence and Judicial Organisation: a Judicial Conference for Australia?", *Journal of Judicial Administration* (1993), 2, pp 143 – 161.

23 Quoted by Nicholson J at ibid, p 152.

an Australian body, and set out a list broader than that proposed by Justice McGarvie. He suggested that at the core of Justice McGarvie's understanding was the need for the judiciary to "be involved in the policy concerns of the judicial arm of government" and, for that purpose, that there be a "representative body of the whole Australian judiciary capable of being consulted by or bringing influence to bear on the Commonwealth Government".[24] Justice Nicholson then set out a very useful agenda for discussion which could lead to the formation of a suitable body.

The decision to establish an association of judges

At the 1992 gathering of the SFCJC Justice McGarvie proposed that a steering committee be set up to investigate the feasibility of this proposal and report to the 1993 Conference. This was done and a Steering Committee, chaired by Justice Ian Sheppard, then of the Supreme Court of New South Wales, began its work and its report was completed in December 1992.[25]

The Steering Committee's report essentially made the following points regarding a possible Australian judicial conference:

1. It was essential to define what is meant by judicial independence, in order to identify what sort of matters might properly concern a body whose principal object was to see to it that judicial independence was preserved.[26] Thus, for example, although salaries and conditions of service might be seen to be an essential aspect of judicial independence, it would be unfortunate if any new body established to foster the preservation of judicial independence were perceived to be nothing more than a trade union of judges. Should questions about judicial pensions, or the establishment of bodies with power to inquire into judges' conduct, be topics such a body should consider as prejudicially affecting judicial independence?

2. The Steering Committee's preference was that membership of the proposed body should be only judges, not magistrates or members of administrative tribunals.[27]

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24 supra, n 7 at pp 259 and 260.

25 The other members of the Steering Committee were Justices Angel, Bollen, Carruthers, Cox, de Jersey, Gallop, Kennedy, Nicholson and Tadgell, all of their respective Supreme Courts.

26 The Steering Committee's report contains a very useful discussion in this regard, which is reproduced in Annex B of this history.

27 At the fourth Governing Council meeting in September 1994 it was resolved that magistrates be admitted to membership.

3. The body would be unlikely to receive government funding, even if this were seen as appropriate, which meant that it would need to rely on members' subscriptions.

4. The governing body should comprise one representative from each of the High Court, Supreme Courts, Federal Court and Family Court, with two further members representing the District and County Courts, and another member representing courts such as the Land and Environment Court of New South Wales.

There was already in existence the Australian Institute of Judicial Administration (AIJA), but it was realised that it had a different function and was differently constituted. Its constitution assigned it different responsibilities and its need to appeal to a wider range of people – not just judicial officers but also court administrators and the profession. This meant that it could not promote the exclusive interests of judicial officers.

The role of the Attorney-General to defend the judiciary

These developments were occurring at the same time as, what Chief Justice French has recently called, "a debate about who would speak for the judges".[28] Concerns were being raised in respect of the failure of some Attorneys-General to accept any responsibility for the defence of the judiciary against the not infrequent and mostly unfair attacks made upon it and individual judges. Although it is said that this led to consideration of the formation of an association for all branches of the judiciary, the Steering Committee's report made no reference to the role of the Attorney-General as a defender of the judiciary.

It is not correct, as is sometimes assumed, that the JCA was established because the Attorney-General at the time had expressed the view that he saw his role as no longer being a defender of the judiciary. These views were indeed expressed by Daryl Williams, QC, the Commonwealth Attorney-General, but he served as Attorney-General from 1996 to 2003, several years after the JCA was already established.

In 1994 Mr Williams, then a member of the House of Representatives, spoke at a conference in Canberra, at which he observed that judges recognised a need to ensure that the public was properly informed about judicial processes and the importance of maintaining judicial independence, and that they increasingly accepted that the judiciary itself must play a

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[28] French, Chief Justice Robert, "Seeing Visions and Dreaming Dreams", Keynote Address given at the Judicial Conference of Australia Colloquium, 7 October 2016

significant part in providing that information.[29] He observed that in the main the leaders of the judiciary no longer accepted that courts should look to others to speak for them. For example, Chief Justice Sir Anthony Mason had in the same year expressed the view that judges could reinforce public confidence in the administration of justice by explaining publicly their work and the issues they faced.[30]

It is useful to set out Chief Justice French's summary of Mr Williams' views on the function of the Attorney-General:[31]

> Mr Williams observed that a declining number of judges expected the Attorney-General to defend them publicly against attack or criticism. In any event, it had never been clearly articulated or accepted that Attorneys-General in Australia had such a duty. …. There were good practical reasons why neither judges nor the public should look to the Attorney-General to take up the cudgels for judges in media debate. Not least was the low priority likely to be given to Attorneys-General monitoring the media on behalf of the judiciary. An informed response would require the Attorney to be briefed from judicial sources. That would not yield a timely response. There was also a real risk of a conflict between the interests of the judiciary in a substantive reply on an issue and the political interests of the Attorney-General, the government or the party in government in relation to the issue. The judiciary should accept the position that it could no longer expect the Attorney-General to defend its reputation.

In a later address, given at the JCA's Colloquium in 2001, Daryl Williams outlined his previously expressed views:

> Following my appointment, I made this view known to the Chief Justices of the federal courts and I had at that time previously published a paper expressing that view. In the past, the Attorney-General was often called upon to speak for the judiciary. The primary reason for this was the desire to avoid having the judiciary involved in public debate. Many thought that any public comment by the judges would severely compromise the judiciary's independence.
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> While I am completely sympathetic to the view that the judiciary should not become embroiled in political debate, relying on a politician to defend judges has its own serious problems. If the Attorney-General allows him or her self to become the de facto representative of the courts, the distinction between the executive and the judiciary - which is so vital to judicial independence - would be eroded.
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> There are further practical reasons why neither judges nor the public should look to the Attorney-General to defend the courts.[32]

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29 Most of what is set out in this and the following paragraphs is drawn from Chief Justice French's address, ibid.

30 Mason, Sir Anthony, "The State of the Judicature" (1994) 20 *Monash University Law Review* 1, 11.

31 French, R (2016), at p 4.

The establishment of the Judicial Conference of Australia

The 1993 Supreme and Federal Court Judges' Conference

At the January 1993 SFCJC the report from the Steering Committee chaired by Justice Sheppard was discussed in detail.[33]

There was concern to avoid the perception that the proposed body was a judges' trade union, advancing the financial interests of judicial officers; rather the fundamental idea underlying its establishment was the defence of judicial independence.

It was intended that it speak broadly on behalf of judicial officers, but have regard to the views of the relevant heads of jurisdiction. It was anticipated that there would be an educational role, directed towards the wider community and the legislative and executive branches. The provision of educational material for use in schools was also contemplated.[34]

There was no apparent opposition to the proposal although some concerns were expressed about an organisation which combined judicial officers at all levels, in particular that superior court judges were unlikely to attend events where magistrates played a prominent role; and many magistrates already belonged to an organisation which aimed to improve their remuneration and conditions of service.

At the conference a resolution was passed supporting in principle the establishment of a body to be known as the Australian Judicial Conference and empowering the Steering Committee to establish the Conference and to pay establishment costs from the funds of the SFCJC.

Initial steps to incorporation

During 1993 the Steering Committee did further work, engaged solicitors to draft a constitution and sought membership.[35] The Australian Judicial Conference was incorporated on 16 December 1993 under the *Associations Incorporation Act* 1991 (ACT).

At an early stage it was decided to emulate the model adopted by the AIJA. That model involved a fostering arrangement with a university, a model

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32 Williams D, Opening remarks at the Judicial Conference of Australia Colloquium 2001, on 7 April 2001. At the JCA's website, www.jca.asn.au at Colloquiums, Past Colloquiums.

33 *Report of Steering Committee on Feasibility of Proposals for an Australian Courts' Committee and an Australian Judicial Conference*, December 1992.

34 Email from Justice Dowsett to the Secretary of the JCA on 12 August 2016.

35 Member no. 1 was the Hon David Angel.

which was also adopted by the National Judicial College of Australia. The initial members of the Governing Council contacted the university law schools and eventually entered into an arrangement with Professor Stephen Parker, then of Griffith University.[36]

First Governing Council meeting: 23 January 1994

The first Governing Council meeting took place in Melbourne on 23 January 1994 during the SFCJC. The meeting was chaired by Justice Ian Sheppard and those present were one representative from all of the Supreme Courts in Australia.[37]

At this meeting Justice Sheppard was elected as Chairman of, what was described as, the First Governing Council, although Justice Sheppard indicated he was prepared to act only on a *pro tem* basis.[38] It was resolved to open a bank account, and to ask Justice Nicholson whether he would be prepared to advise and assist the JCA. There was no other business.

Second Governing Council meeting: 27 January 1994

The second meeting of the Governing Council was held only three days later, on 27 January 1994, and lasted 14 minutes.[39] The only business was a report from Justice Kennedy that Justice Nicholson had agreed to act as the judicial coordinator for the Conference.

Third Governing Council meeting: 26 March 1994

At the third meeting, two months later, the only matter of general business was eligibility. The meeting discussed the admission of magistrates to membership. Some members of the Governing Council raised the question whether magistrates were judicial officers and whether they were truly independent from the Executive. It was agreed that members who had these

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36 ibid.

37 Justice D Angel of the Supreme Court of the Northern Territory, Justice D Bollen of the Supreme Court of South Australia, Justice K Carruthers of the Supreme Court of New South Wales, Justice W Cox of the Supreme Court of Tasmania, Justice Dowsett of the Supreme Court of Queensland, Justice Gallop of the Supreme Court of the Australian Capital Territory, Justice Kennedy of the Supreme Court of Western Australia and Justice Tadgell of the Supreme Court of Victoria.

38 A list of Chairmen and Presidents of the JCA is in Annex A to this history.

39 Attended by Justices Sheppard, Angel, Bollen, Carruthers, Cox, Gallop, Kennedy and Tadgell

reservations were to ascertain more information and report back. In the meantime, the issue of admission of magistrates as members was left in abeyance.

The Chairman had been informed that there would be no representative from the High Court of Australia on the Governing Council.

Fourth Governing Council meeting: 17 September 1994

At the fourth meeting the Chairman reported that he had received formal nominations of representatives on the Governing Council from all Chief Justices, thus making the Governing Council formally constituted for the first time pursuant to the JCA's Rules.

The establishment of an Executive Committee was discussed; the decision being deferred until the Governing Council was more representative. At that point the Governing Council had no representatives from the District or County Courts, the Industrial Commission, the Land & Environment Court of New South Wales or the Compensation Court. It was resolved that members of all the Magistrates Courts, the Land & Environment Court of New South Wales and the Compensation Court were persons who might join as members.

At this stage, membership of the JCA was 134 judicial officers, which included five High Court judges and five Chief Justices.

Interestingly, in view of the decision made in 2015 that the JCA become a member of the International Association of Judges (IAJ), correspondence was received from the Hon Gordon Samuels, QC suggesting the JCA take over his role as convenor of the Australian section of the IAJ.[40] No decision was made to do so.

First Annual General Meeting: 27 January 1995

The first Annual General Meeting was held on 27 January 1995 in Adelaide. In view of the decision by the Governing Council to extend the range of courts from which members might be drawn, it was resolved to delete the numerical limit upon the size of the Governing Council in the Rules in order to accommodate this proposed extended membership.

Interestingly, in light of the initial preference that magistrates not be eligible for JCA membership, at this first annual meeting a matter of concern to

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40 The Hon Gordon Samuels was a former judge of the Court of Appeal of the Supreme Court of New South Wales, and subsequently a Governor of the State of New South Wales.

magistrates was raised. The Chief Magistrate of Tasmania, Mr Shott, addressed the meeting about the salaries of Tasmanian magistrates which were tied to salary levels fixed for senior public servants; the magistrates having no standing to seek any variation of the award. Although the Chairman ruled that it was incompetent for the meeting to consider a motion on the matter in the absence of notice to members of the intention so to move, extended debate occurred in which members indicated general support for the magistrates. Some members expressed concern that the JCA not, at such an early stage, appear to be preoccupied with issues of judicial remuneration. It was resolved that the Governing Council take up the issue as a matter of urgency.

The Chairman reported that both the Law Council of Australia and the Law Foundation of New South Wales had offered some financial assistance, but the Governing Council was reluctant to accept it because of the need to maintain actual and apparent independence from the profession.

Second Annual General Meeting: 26 January 1996

The second Annual General Meeting was held in Darwin on 26 January 1996. The Chairman reported the Governing Council had established a sub-committee to examine the question of abolition of courts, failure to appoint members to another court and failure to provide members with adequate compensation if they were not reappointed. The Chairman noted the first major task of the sub-committee was to formulate a statement that the Conference would supply as guidance to parliaments, governments and judges.

By this time the membership stood at 250 out of about 750 eligible members.

Early activities

The Attorney-General, Daryl Williams, QC, assisted the JCA by making a grant of $60,000 to enable the Secretariat at Griffith University to employ administrative assistance and generally help the JCA secure an administrative base.

A further grant of $40,000 was also made to enable the JCA to conduct its first research project, “Judicial Independence in Australia Today”.

Both these grants are interesting in light of the earlier expressed view that the JCA should not receive money from the government.

In November 1995 the JCA held its first seminar in Brisbane on the theme of the impact on judicial independence of the abolition and re-organisation of courts and tribunals.

In the early years the JCA conducted several educational sessions for parliamentarians, explaining the value of judicial independence. Other early activities included at least one response to a public statement by a judge, which statement was thought to be likely to undermine judicial independence, as well as responses to the more frequent examples of such conduct by politicians and the media.[41]

Colloquiums

The JCA adopted the practice of having one "colloquium" each year, in conjunction with the annual general meeting. The first colloquium was held in November 1996 in Canberra. Approximately 50 attended and included, as well as judicial officers, those from other branches of government and academia. Its theme was "judicial independence and the rule of law at the turn of the century".

Later colloquiums were held in 1997 in Sydney, 1998 in Surfers Paradise, 1999 in Melbourne and then, in 2001 at Uluru in the Northern Territory.[42] Whilst there, those present learned something of the problems faced by remote indigenous communities, particularly petrol-sniffing by young people. For some years the JCA tried to assist the Uluru community in dealing with that, and other problems.[43]

Superannuation surcharge challenge

From 1997, the JCA was actively involved in the successful challenge to the superannuation surcharge legislation as it affected State judges, although it was not a party to the litigation.[44]

41 ibid.
42 The Colloquium was not held in the year 2000.
43 ibid.
44 *Austin v The Commonwealth* 92003) 215 CLR 185.

Bibliography

Angel, D (1997) "The Early Days of the Judicial Conference", *Judicial Conference News*, no. 1, May 1997.

Dowsett, J (2012) "The Conference – 40 Years On", paper presented at the Supreme and Federal Courts Judges' Conference, Melbourne, 21-25 January 2012.

French, R (2016) "Seeing Visions and Dreaming Dreams", Keynote Address given at the Judicial Conference of Australia Colloquium, 7 October 2016.

McGarvie, RE (1991) "The Foundations of Judicial Independence in a Modern Democracy", *Journal of Judicial Administration* (1991), 1, pp 3 – 45.

McGarvie, RE (1992) "The Ways Available to the Judicial Arm of Government to Preserve Judicial Independence", *Journal of Judicial Administration* (1992), 1, pp 236 - 280.

Nicholson, RD (1992) "A Comment on Mr Justice McGarvie's Paper", *Journal of Judicial Administration* (1992), 1, pp 281 – 292.

Nicholson, RD (1993) "Judicial Independence and Judicial Organisation: a Judicial Conference for Australia?", *Journal of Judicial Administration* (1993), 2, pp 281 – 292.

Supreme and Federal Court Judges' Conference (1992)

Report of Steering Committee on Feasibility of Proposals for an Australian Courts' Committee and an Australian Judicial Conference

Annex A Chairmen and Presidents of the JCA

1994 - 1996	Justice Ian Sheppard, AO
1996 - 1998	Justice John Lockhart, AO
1998 – 2000	Justice Bruce McPherson, CBE
2000 – 2004	Justice Simon Sheller, AO
2004 – 2006	Justice Ronald Sackville, AO
2006 – 2008	Justice Bruce Debelle, AO
2008 – 2010	Justice Ruth McColl, AO
2010 – 2012	Justice David Harper, AM
2012 – 2014	Justice Philip McMurdo
2014 – 2016	Justice Steven Rares
2016 – date	Justice Robert Beech-Jones

Annex B Judicial Independence: as discussed in the 1993 report of the Steering Committee established to consider the feasibility of establishing an Australian Judicial Conference

Note: the following extract begins at page 3 of the report of the Steering Committee on Feasibility of Proposal for an Australian Courts' Committee and an Australian Judicial Conference. Some paragraph breaks have been added for ease of reading.

McGarvie J. said (p.237)[45] that the only independence which he would seek to justify within the principle of judicial independence was that which, if absent, would put at risk impartiality in deciding court cases. He added, "Apart from that, judges, as public officials, are not, and should not be, independent." This latter statement may be regarded by some as controversial. It requires discussion. But one could see both sides of an argument on the question whether salaries and conditions of service relate to judicial independence.

On the one hand, it can be seen that these stand apart from the question. Salaries, large or small, will have nothing to say as to the way in which judges discharge their function. On the other hand, it has always been important to those responsible for the establishment of an independent system of justice to endeavour to see to it that those who are to administer it will be independent, particularly of the executive, so that they are not beholden to it or in any way perceived to be within its power or influence.

This is a matter which was the subject of much discussion in the constitutional debates of the last century. The principle is enshrined in the Federal Constitution in s.72(ii) and (iii). The former paragraph provides that judges shall not be removed except by the Governor-General in Council on an address from both Houses of Parliament in the same session, praying for such removal on the grounds of proved misbehaviour or incapacity. The latter guarantees that judges will not have their salaries reduced during their terms of office.

Although salaries and conditions of service may be seen by many to be an essential aspect of judicial independence, it would be unfortunate if any new body established to foster the preservation of judicial independence were perceived to be nothing more than a trade union of judges. If that perception emerged, the new body would have little credibility nor would it deserve it.

The Committee thinks that this is a matter which McGarvie J. had in mind when he said what he did. Subject to what has just been said and to what appears below, the Committee agrees with the definition of judicial independence propounded by McGarvie J.

It is as well to think on the question of what sort of matters may properly concern a body whose principal object is to see to it that judicial independence is preserved.

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45 See McGarvie, RE (1992).

A number of examples come to mind, all taken from recent public controversies some of which are ongoing.

[The report then considered the *Staples* affair and argued that a tribunal, just as a court, must, to have credibility, be independent and be perceived to be independent.]

Most courts (perhaps all) are the creatures of statute. It is not unknown in the Commonwealth area for existing courts to be abolished nor for jurisdiction which they formerly exercised to be vested in a newly constituted court or a tribunal. Judges of the former court are not always appointed to the new. The old court is left in existence so that the judges not appointed to the new are not removed from office; but they exercise no jurisdiction because their former jurisdiction is vested in the new court. It may be said that this practice, although it exists, has not so far, except in the case of the *Staples* affair, been the cause of public concern; but this does not mean that further instances of the practice will in the future be so non-controversial.

Some will say that each of the considerations so far mentioned amounts to an interference with judicial independence; others will say that they do not because the power of parliaments (not executives) to organise courts and tribunals within their respective jurisdictions must be unfettered. This is how many would view the reorganisation of the Supreme Court of Queensland which occurred in 1991 and the reorganisation of the Supreme Court of the Australian Capital Territory which occurred earlier this year. … Similar considerations apply in relation to the establishment of courts of appeal as happened in New South Wales in 1966. Some would say that that example plainly did not interfere with judicial independence, whereas the *Staples* affair did.

[The report then discusses the recent abolition of the Victorian Accident Compensation Tribunal.]

Where does one draw the line? Minds will not give the same answer to these questions. Herein lies the possibility of substantial disagreement which might arise on the council of a body such as …. a Judicial Conference.

[The report then alludes to a recent New South Wales inquiry into the level of judges' pensions, and recent amendments to legislation providing for pensions for federal judges.] The nature of the amendments may be thought by some not to work a significant change in the existing position, but circumstances may be postulated which are not fanciful and which, if they occurred, may have a most adverse effect on the entitlement of a widow or widower to receive a pension on the death of a retired judge. Is this the sort of topic which a … Conference should consider as prejudicially affecting judicial independence in the community or will such a reaction be seen by the media and others as an attempt by the judiciary to preserve the financial position of the judges? Again, minds will differ on the answer to these questions?

Finally, what of the establishment of bodies such as the Judicial Commission of New South Wales and the Independent Commission Against Corruption (ICAC) which have the power to inquire into judges' conduct? … Do those questions raise matters which may affect the independence of the judiciary?

We need to develop some common views about our approach to and understanding of this problem. It is difficult to be simplistic about it. But, if one goes back to the statement in McGarvie J.'s paper earlier referred to that the only independence was that which, if absent, would put at risk impartiality in deciding court cases, one can perhaps evolve a proper approach. When judges take office, they swear or affirm that they will do right to all manner of persons without fear or favour affection or ill will. They are thus in fact, and are perceived by the community to be, independent of parties coming before them and independent of the executive government. This perception exists because the judges may only be dismissed from office on the grounds of proved misbehaviour or incapacity on an address by both Houses of Parliament (in Queensland and New Zealand – Parliament). That is the constitutional guarantee which has existed for almost three centuries. The recent abolition of the Accident Compensation Tribunal in Victoria has raised starkly the question of the existence in the community of this constitutional guarantee. That is so whether the Tribunal was a court or an administrative tribunal.

In any State or Territory without a written constitution, it would be possible for Parliament to pass similar legislation, not about a Tribunal, which may or may not be a court, but about District or County Courts and indeed about the Supreme Court. If that perception becomes manifest in the community, what confidence can it have in any of the judges being in fact independent of the executive? No judge will be seen to sit without the shadow of possible abolition of his or her court and the revocation of his or her appointment and commission.

Judicial independence needs to be understood not as a special privilege conferred on members of the judiciary but as one of the bulwarks of a democratic constitution. Unless there is an independent judiciary able to stand up to an executive and insist on the rule of law, the community is no longer safe from tyranny. Judges must be able to sit day in and day out dealing with all manner of cases including those involving the Crown without the shadow, actual or perceived, of improper influence, however indirect or remove, on the due performance of their duties. This is a matter which we firstly have to understand ourselves and secondly need to impart to the community in order to demonstrate that we do not say these things because of self interest but in order to make it clear to the community that judicial independence is essential for the functioning of democratic government.

What then of Parliament's right to reorganise the court system? Subject to the relevant constitution, it must have this right. Otherwise reform would not be able to take place. What of the judges of the abolished court? Governments acting in good faith should not be obliged to appoint people to judicial positions for which they bona fide see them as unsuitable. However, the matter is not straightforward. Reorganisations of courts may be carried out in the interests of the improvement of the judicial system. But there is always lurking in the background the possibility that the real reason for a particular reorganisation is to rid government of a court which itself is regarded, or some of whose members are regarded, as "inconvenient". This is a very troublesome and difficult matter for which it is impossible to offer any solution other than appropriate guarantees in a written constitution.

Those difficulties aside, what, in any event, needs to be guaranteed are the judges' rights and entitlements. It is only in this way that, during the period in which they do sit (i.e. while their court continues to exist) they may discharge their function confident in the knowledge that they are financially secure against the consequences of abolition of their court and their removal from office.

Importantly, judges are not to be likened to unfortunate people in the community who are retrenched. That is not because judges as individuals are entitled to any special consideration, but because the need to preserve judicial independence and the appearance of it transcends their own personal position. The fact that they may be more secure than other members of the community and thus protected from adversity in ways which most members of the community are not, is a consequent which the community must be prepared to tolerate in the interests of its having an independent judiciary. To the extent that these principles are not to be found in written constitutions, they should be recognised by parliaments and executive governments as a constitutional convention which must never be infringed.

[The report then discusses tribunals, and their independence.]