The New Court of Appeal for South Australia

The Australian Academy of Law

Supreme Court of South Australia

Mary Kitson Room

1 Gouger Street, Adelaide

Wednesday, 28 April 2021

The Hon Justice Mark Livesey

Court of Appeal of South Australia

CONTENTS

The New Court of Appeal for South Australia

Introduction

1. On 10 December 2020, the Attorney-General, the Honourable Vickie Chapman MP, announced that the *Supreme Court (Court of Appeal) Amendment Act 2019* (***Court of Appeal Act***) would come into operation on 1 January 2021.

2. On the same day, the Attorney-General also announced that Justices Trish Kelly, David Lovell and Sam Doyle had been appointed to the Court of Appeal. They joined Justices Mark Livesey and Chris Bleby, who had been appointed in January and May 2020 respectively.

3. Justice Kelly is the inaugural President of the Court of Appeal of South Australia.

4. Shortly before, and after, the Court of Appeal commenced operation, meetings were held with representatives of the South Australian legal profession to outline proposed changes to the management, listing and hearing of appeals. Key to these changes has been the resumption of "callovers" at which appeals in civil and criminal appeals are listed for hearing in the presence of counsel for the parties.

5. However, the role of the callover has been expanded. It is the principal vehicle for the judicial management of appellate litigation in South Australia.

6. At weekly callovers of generally less than an hour (civil and criminal callovers are held in alternating weeks) a single Judge will list appeals, make interlocutory orders and allocate hearing times for arguments.

7. Occasionally these appeals or arguments are heard before two Judges who, at the direction of the Chief Justice or the President, comprise the Court of Appeal and have the authority to finally determine appeals and applications for leave or permission to appeal.

8. On the Courts Administration Authority website appears a diary of Court of Appeal hearings and a listing of matters to be called over.

The *Supreme Court (Court of Appeal) Amendment Act* 2019

9. The *Court of Appeal Act*, assented to on 19 December 2019, was said to be broadly modelled on the legislation which established Western Australia's Court of Appeal.

10. The Government's purpose in creating the Court of Appeal was to ensure a "more effective and efficient means of disposing [of] the appellate work of the Supreme Court".[1] According to the Attorney-General:

> Pursuing this reform simply recognises that the appellate work involves functions and skills different from those performed in trial work and is therefore better performed in a separate court of permanent members than in a court of changing membership. By appointing judges to a court of appeal on a permanent and ongoing basis, the development of specialist appellate expertise will be fostered, leading to greater efficiency in our justice system and higher quality judgements.

11. As the Attorney-General then explained, South Australia was the largest Australian jurisdiction yet to establish a dedicated court of appeal.

12. When considering whether a specialist court of appeal should be established in South Australia, the Government said that it looked to the advantages borne out of the "successful establishment" of courts of appeal in New South Wales, Victoria, Queensland and Western Australia.

13. The debate over the proposed legislation ultimately came down[2] to the views of the members of the minor parties who held the 'balance of power' in the Legislative Council.[3] The issues raised in the course of the debate included concerns about improved efficiency and quality of appellate decision-making. This prompted a forthright response from Chief Justice Kourakis in a letter to the President of the Legislative Council on 20 February 2020, which said in part:

> The Honourable Connie Bonaros informed the Legislative Council that between 2004 and 2015, of the 30 matters appealed to the High Court, 19 judgments were overturned. I observe at the outset that much of that statistical information is more than a decade old…
> …
> The tables and graphs attached to this letter show the number of judgments delivered in each year from 2016 to 2018, and the number of those judgments subsequently overturned by the High Court. In 2016, the percentage of successful appeals, to total judgments delivered by the Full Court of the Supreme Court of South Australia, was 0.65 per cent. South Australia ranked second behind New South Wales in holding its judgments. The highest percentage of successful appeals in that year was in appeals from the Full Court of the Federal Court of Australia, not because the standard of that Court is less than any other, but because the matters heard by it are primarily in the Federal jurisdiction, in which, therefore, the High Court is likely to take a closer interest.

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1 South Australia, Second Reading, House of Representatives, 16 October 2019 (the Hon Vickie Chapman, Attorney-General).

2 According to the Hon. I.K. Hunter (Labor): "Labor opposes this bill. We oppose the bill and we now know that the judges also oppose this bill", Hansard, Legislative Council, 5 December 2019, p 5622.

3 The Greens (the Hon Mark Parnell and the Hon Tammy Franks); Advance SA (the Hon John Darley) and SA Best (the Hon Connie Bonaros and the Hon Frank Pangallo).

> For the 2017 year the percentage of successful appeals against the total judgments delivered by the Full Court was 0.58 per cent. In that year, judgments of the Supreme Court of South Australia were less likely to be overturned than any other court in Australia.
>
> For the 2018 year there was no successful application for special leave to appeal against a judgment delivered by the Full Court and accordingly judgments of the Supreme Court of South Australia were, once again, the least likely to be overturned.

14. The Chief Justice also addressed the perception of delay, again by reference to statistics, emphasising that there had been under-resourcing for a considerable period.

15. The statistics cited in the course of the debate and the Chief Justice's response tend to support the view that the so-called hierarchy of appeals in Australia is less a pyramid than a pancake.[4] In practice, where the High Court delivers around 60 or so decisions annually the decisions of the intermediate courts of appeal of Australia are usually 'final'.

Australian Courts of Appeal

16. The first Australian Court of Appeal was established in New South Wales in 1966. The Queensland Court of Appeal was established in 1991, the Victorian Court of Appeal in 1994 and the Western Australian Court of Appeal was established in 2005.

17. These arrangements generally replaced the hearing of appeals by a "Full Court" made up of puisne judges "rotated" or allocated by the Chief Justice for particular sittings or hearings.

18. The New South Wales Court of Appeal operates in a manner different to all other Courts of Appeal. The judges appointed to that Court sit routinely on civil matters. Criminal matters are heard by the New South Wales Court of Criminal Appeal which still operates on a "Full Court" basis, with judges allocated from the Court of Appeal, the Chief Judges of Common Law and Equity, and from the Common Law Division (where criminal trials are heard). Common Law Division judges are not allocated to appeals from other Common Law Division judges.

19. Otherwise, Courts of Appeal around Australia routinely hear both criminal and civil matters. Criminal matters in those courts account for well over half the caseload.

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[4] Opeskin and Appleby, "Responsible Jurimetrics; A Reply to Silbert's Critique of the Victorian Court of Appeal" (2020) 94 ALJ 923.

20. In New South Wales, the Court of Appeal comprises the Chief Justice, the President and 11 judges, plus acting judges. In Victoria, apart from the Chief Justice and the President, there are 11 judges.

21. At six judges (including the Chief Justice and President) the South Australian Court of Appeal is slightly smaller Western Australian Court of Appeal, which has eight judges including the Chief Justice and President, and the Queensland Court of Appeal which has seven judges including the Chief Justice and President.

The debate regarding Courts of Appeal – the English model

22. The desirability of a dedicated court of appeal had been debated in Australia for some decades before New South Wales finally introduced its Court of Appeal in 1966.

23. The model for Australian Courts of Appeal has generally been the Court of Appeal for England and Wales, first established in 1873. Though modelled on the Chancery Court of Appeal of 1851, there was no precedent for a rehearing and determination on the merits, only the procedure of Error in the Exchequer Chamber. In what was part of a radical suite of reforms undertaken by Lord Selborne LC during Gladstone's first ministry, one Supreme Court was created:[5]

> PART I.
> *Constitution and Judges of Supreme Court.*
>
> 3. From and after the time appointed for the commencement of this Act, the several Courts herein after mentioned, (that is to say,) The High Court of Chancery of England, the Court of Queen's Bench, the Court of Common Pleas at Westminster, the Court of Exchequer, the High Court of Admiralty, the Court of Probate, the Court for Divorce and Matrimonial Causes, and the London Court of Bankruptcy, shall be united and consolidated together, and shall constitute, under and subject to the provisions of this Act, one Supreme Court of Judicature in England.
>
> 4. The said Supreme Court shall consist of two permanent Divisions, one of which, under the name of " Her Majesty's High Court of Justice," shall have and exercise original jurisdiction, with such appellate jurisdiction from inferior Courts as is herein-after mentioned, and the other of which, under the name of "Her Majesty's Court of Appeal," shall have and exercise appellate jurisdiction, with such original jurisdiction as herein-after mentioned as may be incident to the determination of any appeal.

24. Section 3 consolidated all of the disparate courts into the "one Supreme Court of Judicature in England" and, by section 4, the Court of Appeal was one of two permanent Divisions, intended as the final court of appeal.

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5 *The Judicature Act*, 1873 (36 & 37 Vict), ss 3 and 4.

25. These reforms envisaged the abandonment of the House of Lords and Privy Council. The High Court Judges would be "Justices" and the Court of Appeal was to have "Judges of Appeal". In 1876 the House of Lords and the Privy Council were reprieved by Lord Cairns LC during Disraeli's second ministry. The High Court Justices became Judges and the Judges of Appeal became "Lords Justices".

26. However the dilemma of "two tier appeals" remained. This was alleviated only in part by the requirement in 1934 that county court appeals be made directly to the Court of Appeal, and any appeal thereafter to the House of Lords required leave which could be given by the Court of Appeal or the House of Lords.

27. An article by the editor of the Australian Law Journal, Mr B.J. Sugerman KC,[6] described the suggestion that there should be a permanent court of appeal as "an admirable one". He referred to the 1934 recommendation by the English "Business of the Courts Committee" that the Court of Appeal be abolished in favour of the pre-Judicature Act system of rotating "Full Courts". He explained that the English profession successfully opposed the change with arguments that were "weighty". He suggested that "the serene atmosphere of a permanent appellate court" was preferable to a "court constituted anew each term (or as often happens, for each case) from amongst judges most of whose time is taken up in coping with the work at first instance".[7]

28. The then Master of the Rolls, Lord Evershed, addressed the University of Melbourne in 1951 regarding the arguments in favour of the establishment of specialist appellate courts.[8] During that address his Lordship identified what are now well-known considerations supporting the establishment of dedicated courts of appeal. Some of these are:

    (1) Appellate work generally involves functions and skills different to those required of trial judges.

    (2) A permanent court of appeal is likely to attract the appointment of Judges of the highest quality.

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6 Published in "Current Topics", 11 *Australian Law Journal* 39, 15 June 1937.

7 Sugerman KC was eventually appointed to the NSW Supreme Court in 1947 and sat as head of the Land and Valuation Court until 1961, and in equity and the Full Court and the Court of Appeal. He is said to have been passed over for appointment as first president of the new Court of Appeal in 1966, but was the second president between 22 January 1970 and 29 September 1972, when he retired on account of ill health. See M. Z. Forbes, "Sugerman, Sir Bernard (1904–1976)", *Australian Dictionary of Biography*, National Centre of Biography, Australian National University.

8 Lord Evershed MR, "The History of the Court of Appeal" (1951) 25(6) *Australian Law Journal* 386.

(3) A permanent court of appeal is an acknowledgment of the fact that, in practice, it will be the final resort in all but the most exceptional of matters.

(4) By establishing a permanent court of appeal at the highest tier, the primacy of that court is assured.

(5) The necessary attention to the development of the law in an appellate court would be better served by a comparatively small court of Judges operating in repeated interaction with one another.

(6) An acknowledgement of the need to avoid the appearance of Judges tempering their judgments on appeal in light of the fact that their colleagues may sit in an appeal against their own first instance judgments at a later date.

29. This last point has been described as "most controversial".

30. Lord Evershed related what he regarded as sagacious advice received from Lord Uthwatt about how appellate judges should conduct themselves:

> You must try to attend to the case as if the result depended on you alone, otherwise you will not be giving of your best and you will derive no satisfaction from the work, but you must also realise that two other Judges are at the same time trying the same case and you must try to understand how their minds are working and gain inspiration from their approach.

31. It was this advice that led Evershed MR to reflect on his experiences as an appellate judge in the following way:

> The point of a question put by the Bench is therefore in an appellate Court somewhat different from the point of a question put at a trial. It is not merely to demolish an argument, to vex counsel or to indicate superiority of intellect. It is put as often as not to indicate to your colleagues that your own apprehension of the case may not be quite in accord with what you understand to be theirs. It is by such means that the combined judicial operation is achieved.

32. By 1951 the Court of Appeal was the final court of appeal for 95% of civil cases.[9] It was then a Court of nine, including the Master of the Rolls, hearing around 600 appeals annually. Decisions were delivered *ex tempore*, or orally, immediately following argument in 90% of the cases heard. By 1962 there were twelve Lords Justices hearing about the same number of appeals. The average hearing occupied one and a quarter days and there were no written outlines, in contrast to the practice in American appeal courts.[10]

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[9] Lord Evershed MR, "The History of the Court of Appeal" (1951) 25(6) *Australian Law Journal* 386, 387.

[10] Lord Evershed MR, "Work of Appellate Courts" (1962) 36 *Australian Law Journal* 42, 43, 28 June 1962.

33. Lord Evershed's 1951 address was influential. The New Zealand Court of Appeal was established on 1 January 1958 and Lord Evershed's address was extensively cited. His address was also extensively cited by proponents of a dedicated court of appeal in the New South Wales Parliamentary Debates of the 1960s, before the establishment of the New South Wales Court of Appeal.

34. In 1999, the Western Australian Government commissioned a report into the desirability and feasibility of establishing a court of appeal in Western Australia. The Final Report of the "Court of Appeal Committee" authored by the Hon David Malcolm AC, Chief Justice, dated 30 April 2001 concluded that the longstanding courts of appeal in New South Wales, Victoria and Queensland were successful, effective and efficient, and were superior to a "Full Court" model.

35. There are, of course, differing perspectives on the desirability of a dedicated court of appeal.

36. Opponents would no doubt point to the undesirability of creating any division amongst what is otherwise an egalitarian, collegiate bench of judicial officers. This encouragement to hierarchy, otherwise endemic in the law, might best be avoided. The Hon Michael Kirby AC has referred to the well-known disputation that accompanied the creation of the New South Wales Court of Appeal in the 1960s in a 2008 article in the *Sydney Law Review*.[11]

37. Similar problems accompanied the introduction of the Queensland Court of Appeal under the Hon Tony Fitzgerald AC QC, which was not entirely welcomed by the then Chief Justice, Justice John Macrossan AC QC. Only one member of the Supreme Court, the Hon Bruce McPherson CBE, QC was appointed, along with the Hon Cecil Pincus QC, from the Federal Court, and the Hon Geoffrey Davies AO, QC who was Solicitor-General.[12]

38. According to Chief Justice Malcolm, there were far fewer problems associated with the introduction of the Victorian Court of Appeal in 1994.[13]

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[11] Justice Michael Kirby AC, "Judicial Supersession: The Controversial Establishment of the New South Wales Court of Appeal" (2008) 30 *Sydney Law Review* 177.

[12] The Hon Justice Margaret McMurdo AC, President of the Queensland Court of Appeal, "The Queensland Court of Appeal: the First 25 Years" the Australian Academy of Law 2016 Queensland Lecture, 5-6.

[13] Hon David Malcolm AC, "The Final Report of the Court of Appeal Committee", dated 30 April 2001, 11 [30].

39. Some of these problems were undoubtedly the product of a perception that the work of many fine Judges on Full Courts over many years had been undervalued. As Professors Brian Opeskin and Gabrielle Appelby have persuasively argued, there is a real danger in using "casual empiricism" when evaluating, for example, the record of an intermediate appellate court in connection with applications for special leave to appeal to the High Court.[14]

40. In addition, it might be said that it is undesirable for judges to only be concerned with appellate work, rather than the dynamics and pressures associated with trial work. Indeed, the experience of conducting trials as counsel does not necessarily translate into a firm appreciation of the demands of conducting trials as a judge. Routine experience in trial work is sometimes said to be of considerable importance in the effective disposition of appellate work.

41. As well, it could be said that appellate judges may become too specialised and insufficiently exposed to the full range of judicial work, whether this be trial work or other first instance decision-making.

42. Whilst there are undoubtedly a range of valid observations to be made in support of the traditional "Full Court" method of managing appeals, over the last 50 years the tendency in Australia, as elsewhere in the common law world, has firmly been in favour of the development of dedicated appeal courts.

43. Some of the criticisms associated with courts of appeal have, however, been recognised and acted upon in some Australian jurisdictions.

44. For example, as mentioned, the New South Wales Court of Criminal Appeal operates on a "Full Court" basis. The Queensland Court of Appeal routinely rosters two of its Trial Division judges to each monthly sitting. This is in part a response to the volume of work and in part the product of a desire to benefit from the experience of those Judges, particularly Judges with criminal trial experience. Other courts of appeal occasionally engage the services of specialist judges for appeals featuring that specialty.

45. Despite the Australian trend in favour of permanent courts of appeal, the Federal Court has generally operated on a "Full Court" model and the Commonwealth Attorney-General recently announced that the Federal Circuit Court and the Family Court will be brought together as the Federal Circuit and Family Court. This Court will comprise two divisions, with Division 1 a continuation of the Family Court, and Division 2 a continuation of the Federal Circuit Court.

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[14] Opeskin and Appleby, "Responsible Jurimetrics; A Reply to Silbert's Critique of the Victorian Court of Appeal" (2020) 94 ALJ 923.

46. While Division 1 will retain jurisdiction to hear family law appeals, the former appeal division will be disbanded.[15] Instead, all Division 1 judges will hear appeals either as a single Judge or as part of a Full Court. All appeals from decisions of Division 2 will be heard by a single judge, unless the Chief Justice of Division 1 considers it appropriate that it be heard by a Full Court. The intention is to expedite appeals and allow the Court to hear more first instance matters each year.

47. In South Australia, no decision has yet been made as to whether General Division judges will be routinely rostered to sit on the Court of Appeal, or whether this will occur on an *ad hoc* basis. To date members of the General Division have sat on only a handful of appeals.

Jurisdiction of the Court of Appeal of South Australia

48. The Court of Appeal is not the first South Australian court of appeal. When first established in 1837,[16] the Supreme Court of South Australia included "the Court of Appeals of the Province of South Australia".[17]

49. At a time when, apart from the Kuarna people living on the Adelaide plains, there were only around 550 colonists, any preference for a separation of powers yielded to necessity: the Court of Appeals comprised the Governor and the Council of the Province (apart from the Advocate-General and the Crown Solicitor), which included the only judge, Jeffcott. Jurisdiction to hear appeals from the Supreme Court was limited to cases where the sum at issue exceeded £100, or upon the verdict of a jury where there was error apparent on the record.

50. Courts such as these had been common in the American colonies and the West Indies, but often criticised.

51. In South Australia the appeals were sporadic but there were invariably concerns about the composition of the Court. Dissatisfaction with these arrangements – "the absurdity of the present constitution of that Court" - led to Advocate-General

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[15] Commonwealth, Second Reading, House of Representatives, 5 December 2019 (the Hon Christian Porter, Attorney-General) regarding the *Federal Circuit and Family Court of Australia Act* 2021 (C'th).

[16] The province of South Australia was created by order in council dated 23 February 1836, and its first judge, Sir John Jeffcott was appointed (together with a number of other officials), by another order in council dated 13 July 1836. The Court was formally established by ordinance on 2 January 1837. See Combe "*Responsible Government in South Australia – From the Foundations to Playford*" (Vol 1) 1957, revised edition 2009, p 8 and Hague's "*History of the Law in South Australia 1837-1867*" (Vol 1) 2005, p 68.

[17] The *Supreme Court Act 1837* (7 Wm IV No 5), s XVI. See Hague's "*History of the Law in South Australia 1837-1867*" (Vol 2) 2005, p 605ff.

Hanson reporting on a Court of Appeal for all Australian colonies. Although revived from time to time, difficulties with traveling and gathering together Judges from the different colonies ensured that this idea was never taken up before Federation.[18]

52. Although the Court of Appeals was held to have been abrogated by various legislation in *Payne v Dench* in 1860, Act No 5 of 1861 restored it, but this was "brushed aside" by a majority of the three judges, Gwynne and Boothby JJ, with Chief Justice Cooper in dissent.

53. Thereafter the issue became clouded and subsumed by the furore over the conduct and eventual removal of Boothby. The last sitting of the Court of Appeals was in 1882. Gradually the Full Court took over. However, by s 74 of the Commonwealth *Constitution Act*, provision was made for the High Court to hear appeals from the Court of Appeals.

54. The Court of Appeals was finally abolished by the *Supreme Court Act 1935* (SA).[19]

55. By the *Court of Appeal Act*, the *Supreme Court Act 1935* (SA) has been amended so that the Court is now constituted of the General Division and the Court of Appeal. As is now common around Australia, the General Division and the Court of Appeal are both divisions of the Supreme Court.

56. By clause 89(a), Schedule 1, Part 2 of that Act, any reference to the Full Court of the Supreme Court will now be construed as a reference to the Court of Appeal.

57. By s 7(1a), the Court of Appeal consists of the Chief Justice, the President and the puisne judges of the court that are appointed to the Court of Appeal, the masters and the judicial registrars.

58. By s 9B, the President "is responsible, subject to the Chief Justice's directions, for the administration of the Court of Appeal". By s 45(3a), the Court of Appeal will sit at such times and places as the President may direct.

59. By s 19B, the Court of Appeal has jurisdiction to hear and determine all appeals from a single judge and, subject to the *Supreme Court Act 1935* or any other Act, and to the rules of court, all appeals from a single judge sitting in chambers.

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[18] Hague's "*History of the Law in South Australia 1837-1867*" (Vol 2) 2005, p 614-621.

[19] Hague's "*History of the Law in South Australia 1837-1867*" (Vol 2) 2005, p 668, but contrast s 3(a) which stipulated that the repeal "shall not affect … any established jurisdiction".

60. As may be expected, the Court of Appeal also has jurisdiction to hear and determine all questions of law referred to or reserved for the consideration of the Court of Appeal.

61. By s 19C, the Court of Appeal is constituted of not less than 3 judges when hearing and determining any matter. In accordance with any Act or rules of court, the Court of Appeal may be constituted by 2 judges.

62. In those circumstances, a decision of the Court is to be in accordance with the opinion of those judges, or, if they are divided, the proceedings must be reheard and determined by the Court of Appeal constituted by 3 judges (including, if practicable, the 2 judges who first heard the proceedings).

63. By s 19D, in hearing and determining matters within the jurisdiction conferred by s 19B, the Court of Appeal has, and may exercise, any jurisdiction and powers that the court has in its General Division, or that were exercisable by the Full Court immediately before the commencement of s 4(2) of the *Court of Appeal Act*.

64. By s 47, there is facility for the Chief Justice and the President to agree that a General Division judge may act as an acting judge in the Court of Appeal for a "suitable period", and *vice versa*. It is necessary for the particular judge to agree to undertake acting duties. The Chief Justice may then, by instrument in writing, authorise the judge to undertake acting duties for a specified period.

65. Whilst matters previously heard by the Full Court will generally now be heard by the Court of Appeal, by r 11.1(6) of the new *Uniform Civil Rules 2020* (SA), the jurisdiction of the Supreme Court to finally hear and determine admissions and disciplinary proceedings is addressed in the following way:

> The jurisdiction of the Supreme Court to finally hear and determine—
>
> (a) an application to admit a person as a solicitor and barrister of the Court under section 15 of the Legal Practitioners Act; or
>
> (b) a disciplinary proceeding under section 89 of the Legal Practitioners Act or in the inherent jurisdiction of the Court,
>
> is to be exercised by 3 Judges of the Court sitting in banco.

66. The terms "en banc" and "in banco" are of Latin or French origin meaning, literally, "the bench" or "on a bench". Conventionally, terms such as these refer to the judges of a court sitting as a group or a full bench, principally as an appeal court of a particular court. For the history of these terms, see the helpful discussion by Bell J in *Engebretson v Bartlett*.[20]

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[20] *Engebretson v Bartlett* (2007) 16 VR 417, [41]-[44], [46].

67. It was recently held in *Legal Profession Conduct Commissioner v Davey* that:[21]

> Accordingly, it seems clear enough that by the *Uniform Civil Rules 2020*, rather than the *Supreme Court Act 1935* or the *Legal Practitioners Act 1981*, the striking off or disqualification jurisdiction is to be exercised by the Supreme Court sitting "in banco" – that is, by the Full Court rather than the Court of Appeal, unless an appeal is taken from a final decision of the Legal Practitioners Disciplinary Tribunal, in which case the appeal is heard by the Court of Appeal.
>
> That does not, of course, rule out members of the Court of Appeal from sitting as part of the Court "in banco", and it indicates that, at least for the purposes of admissions and disciplinary proceedings, there is to be no sharp division between the Judges of the Court of Appeal and those of the General Division of the Supreme Court of South Australia.

68. No appeal lies from the Supreme Court sitting "in banco".

69. Any right of appeal is a creature of statute and the scope of that right depends on the terms of the statute.[22]

70. Section 50 of the *Supreme Court Act 1935* only confers a right of appeal from "a judgment of the court constituted of a single judge", not from the Court sitting as a Full Court "in banco".[23]

Sittings of the Court of Appeal of South Australia

71. Sittings of the Court of Appeal commenced in February 2021.

72. The Court of Appeal will sit in two terms between February and June and then between August and December each year. The Court of Appeal will not sit in January or July each year.

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[21] *Legal Profession Conduct Commissioner v Davey* [2021] SASCA 2, [20]-[21] (Kelly P, Livesey and Bleby JJA).

[22] *Fox v Percy* (2003) 214 CLR 118, [20] (Gleeson CJ, Gummow and Kirby JJ), citing *Attorney-General v Sillem* (1864) 10 HLC 704, 720-721; *South Australian Land Mortgage and Agency Co Ltd v The King* (1922) 30 CLR 523, 552-553; *CDJ v VAJ* (1998) 197 CLR 172,[91]-[95], [184]; *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (in liq)* (1999) 73 ALJR 306, [72]; *DJL v Central Authority* (2000) 201 CLR 226, [40]; *Allesch v Maunz* (2000) 203 CLR 172, [20]- [22], [44].

[23] Indeed, it may be doubted whether there is any avenue for the judicial review of the decision of the Supreme Court – whether from a single Judge or from the Full Court – because it is a superior court of record, exercising supervisory jurisdiction, see *Craig v South Australia* (1995) 184 CLR 163, [7] (Brennan, Deane, Toohey, Gaudron and McHugh JJ), although "the exercise of that supervisory jurisdiction is ultimately subject to the superintendence" of the High Court as the "Federal Supreme Court", see *Kirk v Industrial Relations Commission* (2010) 239 CLR 531, [114]-[115] (Heydon J).

73. Each month of sittings will be divided, very broadly, into a first week of civil appeals, a second week of criminal sentence appeals and a third week of criminal convictions appeals. This timetabling is not fixed. It must of course reflect the pressures of any particular sittings.

74. Those members of the Court of Appeal not occupied with sittings consider applications for leave to appeal, whether these be civil or criminal appeals.

75. Annually, the Full Court usually delivered judgments in around 200 to 250 cases, although fewer are reported online. Whilst the listings of criminal matters account for well over 60% of the appeal listings, the complexity of a number of civil and commercial cases has ensured that they occupy close to 50% of the time spent working on cases.

76. In the first few months of 2021 the Court has sat on between 15 and 20 three judge appeals each month, as well as a handful of single judge or 2 judge hearings. A number of decisions on leave to appeal have been determined "on the papers".

Civil Appeals

Leave to Appeal

77. Most civil appeals may be pursued in the Court of Appeal as of right pursuant to s 50 of the *Supreme Court Act 1935*.

78. Some appeals, however, can only be pursued with leave. Examples of these are certain appeals from the South Australian Employment Tribunal, from the South Australian Civil and Administrative Tribunal, and from interlocutory decisions of a single judge of the Supreme Court or District Court.

79. The requirements for seeking leave to appeal are governed by rules 213.2 and 213.6 of the *Uniform Civil Rules 2020*.

80. Presently, under the *Uniform Civil Rules 2020* a single judge may grant leave to appeal or refer that question to the Full Court: see rule 212.5(2)(e). However, a single judge may not refuse leave to appeal or an extension of time to appeal: rule 212.5(3). Leave to appeal may only be refused by the Court of Appeal.[24]

81. Consideration is being given to the utility of adopting the practice of allocating applications for permission to 2 judges of the Court of Appeal, who may determine the question of permission under s 19C of the *Supreme Court Act* with the benefit of a 30-minute hearing.

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[24] *Return to Work (SA) v Opie* [2020] SASC 201, [7]-[8].

82. An amendment will be made to Rule 212.4(c) of the *Uniform Civil Rules 2020* to facilitate hearings before 2 judges where the President or Chief Justice so determine.

83. That amendment came into operation on 1 March 2021.

Listing of Appeals

84. The Court of Appeal has reverted to the practice of conducting callovers in order to facilitate the listing of appeals before the Court of Appeal. These are conducted fortnightly and commenced on Friday, 22 January 2021.

85. The Court expects counsel appearing at the callover to know the likely length of the hearing, the availability of counsel and be ready to address any issues ancillary to the listing of the appeal. Counsel appearing should attend understanding that the Court assumes that most appeals require either half a day or a full day. If more time is required, counsel must be in a position to explain why more time is required.

86. Listings will not necessarily be determined by the availability of counsel and if an appeal is listed for hearing at a callover, the date will not be administratively vacated, regardless whether the parties attended the callover at which the appeal was listed.

87. Whilst the principal purpose of the hearing is to determine when matters are listed before the Court of Appeal, these hearings will also provide an opportunity for the Court and the parties to raise issues ancillary to the hearing of appeals. These may include issues about the timing of outlines of argument or about the content of appeal books.

88. The Court expects the parties to have conferred with a view to constructively resolving issues such as these without undue delay or expense, well ahead of any callover.

Appeal Hearings

89. Any matter is capable of being treated as ready for hearing 8 weeks (56 days) after the "preparation commencement date", which is the date for the filing of any Notice of Appeal under rule 214.1 of the *Uniform Civil Rules 2020*.[25]

90. The requirements for written submissions, lists of authorities and chronologies are addressed by rule 217.6, and following, of the *Uniform Civil Rules 2020*. There

[25] The "preparation commencement date" is defined by rule 211.1 to be the date of institution of the appeal or the date when leave to appeal is granted or referred for hearing.

remains the option for a three-page skeleton to be delivered on the morning of the hearing.

91. The requirements for the filing and service of the "Core Appeal Book" are set out in rule 218.3, and following. The content of written submissions and the content of the "Exhibit Appeal Book" are addressed by rule 218.5, and following.

92. In the event of a request to defer the time for the filing of written outlines past the time stipulated by rule 218.3(2) (that being 28 days after the "preparation commencement date"), the Court expects the parties to have conferred with a view to reaching agreement before seeking dispensation from the Court at any callover.

Criminal Appeals

Grounds of Appeal – Criminal Conviction Appeals

93. In the course of consultation with the profession it has been made clear that the 21 days required for the filing of Notices of Appeal is problematic for a number of appeals, generally, but not exclusively, conviction appeals.

94. The reasons for this include the availability of counsel, the speed at which funding can be approved by the Legal Services Commission and, on occasion, difficulties compiling the trial materials required to be reviewed by counsel drawing and settling the grounds of appeal. This has led to the familiar appeal ground, "…and such other grounds as counsel may in due course advise" appearing in many Notices of Appeal.

95. The consequence is that matters are adjourned, sometimes on numerous occasions, until the advice of counsel has been received, funding approved and the grounds of appeal finally settled, and it is the settled grounds to which the DPP must respond.

96. Rather than alter the requirement that a Notice of Appeal be filed within 21 days, it has been proposed to generally allow a further period of 21 days within which it is expected that settled grounds of appeal can be supplied by the applicant. To be clear, that will require an initial Notice of Appeal to be filed within time, followed by a supplementary Notice with settled grounds of appeal. The initial Notice must use terminology which makes it clear that a further, settled set of grounds will be supplied within 21 days.

97. If further time is required for filing settled grounds of appeal beyond 42 days from the institution of the appeal, that will need to be sought at one of the fortnightly callovers and proper reasons provided.

98. As with civil appeals, adjournments will no longer be granted administratively.

Permission to Appeal

99. In criminal matters, s 157(1) of the *Criminal Procedure Act 1921* permits a convicted person to appeal against conviction as of right on any ground involving a question of law alone, or with permission on any other ground. In addition, with permission, a convicted person or the Director of Public Prosecutions may appeal against sentence on any ground.

100. Once a convicted person's grounds of appeal are finalised, the practice has been to require written outlines of submissions from the applicant and then from the DPP. During the COVID-19 pandemic these were full written arguments.

101. Pursuant to s 157(1) and rules 119 and 120 of the *Supreme Court Criminal Rules 2014*, applications for permission are presently heard by a single Judge who, usually, decides whether to grant or refuse permission according to whether a particular ground is reasonably arguable. Alternatively, no decision is made and the question of permission is referred for determination by the Court of Appeal.

102. One disadvantage with the present practice is that considerable time is required of practitioners in preparing and providing written and oral submissions, and the Court is required to prepare in some detail and give reasons (even if only brief *ex tempore* reasons) in the course of a busy callover list, usually conducted on Fridays.

103. Whilst the Court of Appeal obtains the benefit of the views of the single judge, that judge does not sit on the Court of Appeal if any ground has been refused. More importantly, a dissatisfied applicant can simply file a Form 51 which has the effect of requiring the Court of Appeal to review and determine afresh any ground of appeal for which permission to appeal has been refused by a single judge.

104. It may be doubted whether the intended "filter" of requiring an applicant to seek permission to appeal is operating as effectively as it might.

105. In order to streamline the process for seeking permission to appeal in criminal matters, the current practice has been altered in the following way:

(1) By s 104G(1) of the *Supreme Court Criminal Rules 2014* (SA), an applicant presently has 21 days within which to lodge a Notice of Appeal against conviction or sentence.

(2) Within 14 days of receipt of the Notice of Appeal, a "DPP Notice" will be filed and served by the DPP, indicating whether and to what extent the DPP concedes that the grounds of appeal are reasonably arguable.

(3) The matter will then be placed into the next available callover list. These are held each fortnight, alternating with the civil callover. The first callover was held on Friday, 29 January 2021, but they are now held on Mondays.

(4) If the DPP concedes that one or more grounds is reasonably arguable, the matter will likely be listed for hearing before the Court of Appeal in the next available sitting. Any other ground requiring permission will be referred to the Court of Appeal for argument as on appeal.

(5) If the DPP contends that none of the grounds is reasonably arguable and the applicant presses the application for permission, written outlines of no more than five pages will be exchanged.

(6) The Court of Appeal will then review these outlines and determine whether it is satisfied on the basis of that material that there is sufficient merit to warrant a listing of the matter before 3 judges of the Court of Appeal.

(7) Alternatively, the application for permission will be listed before 2 judges of the Court of Appeal. As presently advised, around 30 minutes will be allocated to that hearing during which the applicant seeking permission will have the opportunity to convince the Court that the matter is appropriate for the grant of permission and a hearing before 3 judges of the Court of Appeal.

(8) There will no further scope for using the Form 51 where the application for permission has been determined by 2 or more judges of the Court of Appeal.

106. An amendment was made to Rules 106A and 119 of the *Supreme Court Criminal Rules 2014* to facilitate hearings before 2 judges where the Chief Justice or President so determine. That amendment came into operation on 1 March 2021.

Appeal Hearings – Criminal Appeals Generally

107. Criminal appeal listings are presently being managed at the fortnightly callover rather than administratively by the Registry.

108. Appeal books are presently compiled by the Registry, though there is facility for the parties to write to the Registry, requesting particular inclusions or exclusions. This too is under review. Whilst in practice there has been little difficulty with the "Core Appeal Book", from time to time there are issues about what is or is not

available in hard copy, although exhibits and transcripts are usually available to members of the Court electronically.

109. There is no requirement that any further book be filed. Whether a further book, perhaps a "Hearing Book", would be beneficial is under consideration. That book would contain only the essential pages of transcript or extracts from exhibits from which counsel will read at the hearing.

110. Written outlines for the hearing of the appeal are presently limited to 20 pages, with the appellant's outline due six days and the respondent's outline due four days before the hearing. There remains the option for a three-page skeleton to be delivered on the morning of the hearing.

Appeal Hearings – Sentence Appeals

111. Sentence appeals, particularly where they concern manifest excess or inadequacy, depend very largely upon a clear and concise statement of the factual circumstances.

112. Whether it is necessary to revise the requirements for sentence appeal outlines is being reviewed.

113. Whether a number of sentence appeals should be listed on the same day, or referred to a panel of 2 judges, is also under consideration.

Consultation with the Legal Profession

114. During the course of the transition from the Full Court and Court of Criminal Appeal to the Court of Appeal, discussions have been held with representatives of the legal profession regarding existing arrangements for permission to appeal, appeal listings and appeal hearings. Those discussions are continuing.

115. Generally, the profession appears to have welcomed the changes which have been made.

116. The civil and criminal appeal rules are being reviewed with the benefit of these discussions and so as to incorporate changes in practice such as the introduction of the fortnightly callover.

117. Further matters for consideration include: whether opportunities should routinely be given for appearances by audio-visual link, as well as whether it is invariably necessary for a representative of each party to appear in person on the delivery of judgment.

118. The Court of Appeal welcomes the views of the profession on these matters.