NEW SOUTH WALES COURT OF CRIMINAL APPEAL

MEMORANDUM ON PROPOSED STATUTORY AMENDMENTS

RE: CRIMINAL APPEALS IN THE SUPREME COURT OF NEW SOUTH WALES

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SUMMARY

This note examines the need for reform of the arrangements for criminal appeals in the Supreme Court of New South Wales. It sets out the relevant provisions of the Criminal Appeal Act, 1912. It then explains the practice of the Chief Justice in constructing that Court. Despite the statute, the practice of his predecessors and his own practice during the period of 1979 to 1984, the Chief Justice excludes from the Court of Criminal Appeal the Judges of the Court of Appeal. The paper argues that this is not only contrary to the desirable position, it also overlooks the broad nature of the jurisdiction of the Court of Appeal and the desirability of developing criminal law in harmony with the rest of the law. It is divisive. It deprives the Court of Criminal Appeal of the participation in its important work of the senior Judges of the Supreme Court who have experience in appellate judging. Above all it is inefficient.

Various overseas models are examined briefly. The paper then concludes with options for reform and a preferred option to provide that the Court of Criminal Appeal will always include at least one Judge of Appeal, as Gibbs CJ envisaged in a comment which is reproduced. The paper closes with a number of other possible reforms which could improve the efficiency of the appellate arrangements of the Court of Appeal and which need to be considered.

THE ISSUE

1.1 The appellate jurisdiction of the Supreme Court of New South Wales is divided, for the most part, between the Court of Appeal established in 1965 and constituted under the Supreme Court Act 1970 s 42 and the Court of Criminal Appeal, established in 1912 and constituted under the Criminal Appeal Act 1912, s 3. Single Judges of the Supreme Court also exercise some appellate functions. Under the Australian Constitution, s 73, appeals lie to the High Court of Australia from, relevantly, judgments, decrees, orders and sentences "of the Supreme Court of any State". Accordingly, to preserve the hierarchy of courts envisaged by the Constitution, and the ultimate unity of the court system of Australia under the High Court of Australia, it is not possible for the State Parliament to establish a unified appellate court separate from the Supreme Court. It is for these constitutional reasons that the Court of Appeal and the Court of Criminal Appeal are part of, or manifestations of, the Supreme Court. But they are different:

* The Court of Appeal comprises the Chief Justice, the President, the Judges of Appeal, Additional Judges of Appeal and Judges of the Supreme Court who are appropriately certified under s 36(2) of the Supreme Court Act 1970 to sit in a particular proceeding. The day to day constitution of the Court of Appeal is determined by the President subject to the concurrence of the Chief Justice (s 39(1));

* The Court of Criminal Appeal is the Supreme Court for the purposes of the Criminal Appeal Act 1912. It is constituted by the Chief Justice. It is made up of "two or more Judges of the Supreme Court as the Chief Justice may direct" (s 3). In day to day operation in recent years, the Court has been constituted by the Chief Justice (Presiding) and two Judges of the Common Law Division. Participation by the Judges of Appeal has, in the same period, become extremely rare, although they must, by the Supreme Court Act be "Judges of the Supreme Court" (s 31(1)) and so members of the class from which the Court of Criminal Appeal is to be constituted.

1.2 The issue in this paper is the reform of the arrangements for criminal appeals in this New South Wales. The guiding principles accepted include:

* The necessity to conform with the Australian Constitution;
* The desirability of securing the participation of the judges best able to contribute to the exposition, application and development of the criminal law;
* The undesirability of bifurcating unnecessarily appellate arrangements of the Court or of separating criminal law and practice from the general body of law and practice in the State;
* The imperative need to improve the efficiency of the discharge by the Supreme Court of its functions and to promote appropriate flexibility in the deployment of

available judges of the Supreme Court, in order to reduce delays in the hearing of cases.

PRESENT LAW

2.1 The present statutory provisions for the constitution of the Court of Criminal Appeal are found in s 3 of the Criminal Appeal Act 1912. That section provides:

> "3. The Supreme Court shall for the purposes of this Act be the Court of Criminal Appeal and the court shall be constituted by such three or more Judges of the Supreme Court as the Chief Justice may direct."

As stated, the Court of Criminal Appeal is for constitutional reasons the Supreme Court, so that appeals may lie under s 73 of the Constitution to the High Court of Australia. However, the Court of Criminal Appeal is not for all purposes the Supreme Court, being the statutory court created by the Criminal Appeal Act 1912. Its creation preceded by fifty years the establishment of the Court of Appeal. The latter is by s 38 of the Supreme Court Act 1970 a separate Court but "part of" the Supreme Court. It is not a Division of the Supreme Court. But being "part of", the Supreme Court and because of their own commissions as judges, the Judges of Appeal have the powers, including the inherent powers, that attach to the Supreme Court and its Judges.

PRESENT PRACTICE

3.1 The practice of succeeding Chief Justices in the constitution of the Court of Criminal Appeal is not in doubt. It is disclosed by the State Reports and Weekly Notes as well as by the records of the Supreme Court. Until the establishment

of the Court of Appeal in 1965, following legislation introduced immediately after the election of the Askin Government, the Court of Criminal Appeal was constituted in the same way as the former Full Court of the Supreme Court. Following the appointment of Judges of Appeal to the Court of Appeal - some of whom had not been Judges of the Common Law Division - the question arose as to whether the Judges of Appeal, as senior Judges of the Supreme Court, would participate in the Court of Criminal Appeal. Between 1965 and the appointment of Street CJ in 1974, all of the Judges of Appeal, including the President, regularly participated in the Court of Criminal Appeal. They frequently presided in the absence of the Chief Justice.

3.2 In 1974, with the appointment of the present Chief Justice, the practice of the constitution of the Court of Criminal Appeal suddenly changed. In the result:

* The Chief Justice normally presided in the Court of Criminal Appeal and usually gave the judgment of the Court extempore;
* Invitations to the Judges of Appeal to participate were virtually terminated;
* The Court of Criminal Appeal became constituted not by "Judges of the Supreme Court", as such, but by Judges of the Common Law Division as directed by the Chief Justice; and
* The Chief Justice's participation in the Court of Appeal declined markedly.

3.3 The Judges of Appeal never accepted their exclusion from the Court of Criminal Appeal. Moffitt P continued to press for his inclusion and that of the other Judges of Appeal in that Court. In 1979 the Chief Justice changed his practice. Thereafter he substantially reverted to the practice which had preceded his appointment. The President and Judges of Appeal increasingly participated in the work of the Court of Criminal Appeal. Frequently the President presided.

3.4 Following the appointment of Kirby P as President in September 1984 (and the appointments of Priestley JA and McHugh JA in 1983 and 1984) the practice of the Chief Justice changed once again. He reverted substantially to the practice which he had followed between 1974 and 1979. The result is that the participation of the Judges of Appeal in the Court of Criminal Appeal declined to virtually nothing. Effectively, the only exceptions were:

* An occasional invitation to the President to participate, but not to preside;
* A very occasional invitation to a particular judge to participate because the Chief Justice did not participate (eg Hope JA in Farquhar v The Queen; and
* The constitution of a common bench in cases appealed to the Court of Criminal Appeal where a stated case was concurrently made to the Court of Appeal by the trial judge under the Judiciary Act 1903 (Cth). See Murphy v The Queen (1985) 4 NSWLR 41; 63 ALR 53. A similar course occurred recently in Saffron v The Queen.

SCHEDULE

ASSIGNMENT OF JUDGES OF APPEAL TO THE COURT OF CRIMINAL APPEAL

	No. of cases each Judge sat						No. of days each Judge sat							
	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987
Street CJ	86	168	174	156	186	135	75	67	73	51	80	67	20	63
Moffit P						26	75	7	6	3	3	R	R	R
Kirby P											1			5
Hope JA							12	8	3					
Reynolds JA		4				26	12	11	4			R	R	R
Hutley JA											4	R	R	R
Glass JA						2	12	9	14	10	10	8		R
Samuels JA		2					10	6	9	5	2	8		
Mahoney JA							1		5	1	7	9		
Priestley JA										2	14			
McHugh JA												7		
Clarke JA												2		

SCHEDULE 17 - NOTES

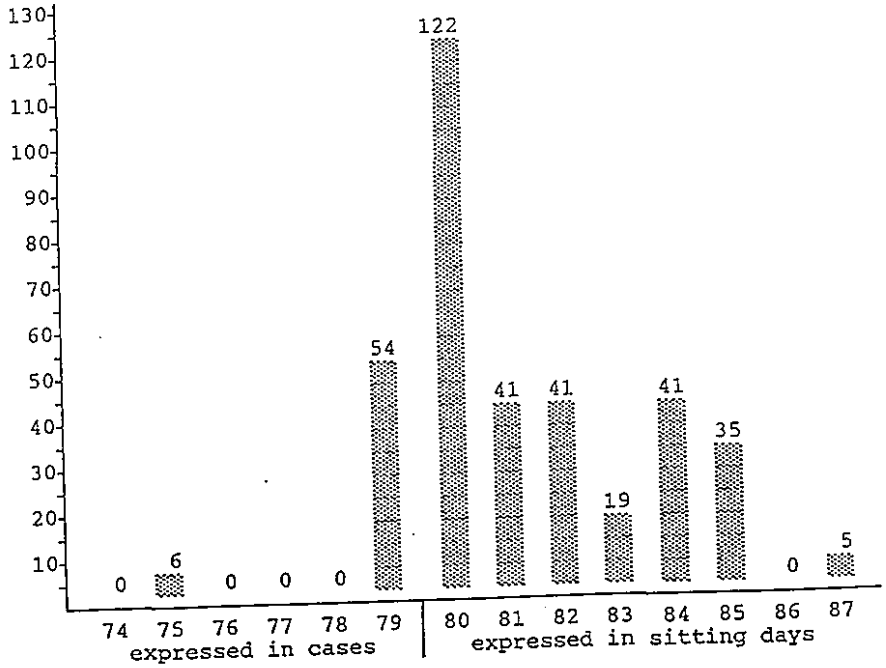
1. This schedule and the following chart do not show participation of Judges of Appeal in the Court of Criminal Appeal between 1966 and 1974.

2. This schedule and the following chart show participation of the JJA in the CCA in terms of cases heard prior to 1980 and in terms of sitting days in 1980 and following years. This is due to the changed manner of presentation of CCA statistics at the end of 1979.

3. Where the letter R appears it indicates the retirement of that Judge.

CHART

ASSIGNMENT OF JUDGES OF APPEAL (OTHER THAN THE CHIEF JUSTICE) IN THE COURT OF CRIMINAL APPEAL



3.5 In a series of memoranda between June 1986 and February 1988, the Chief Justice formulated varying "policies" concerning his constitution of the Court of Criminal Appeal.

* On 13 June 1986 he indicated that the Court would normally be constituted by two trial judges and himself presiding with the occasional participation of the President or a Judge of Appeal, as invited. The Judges of Appeal by a letter dated 23 June 1986 signed by all of them argued against this "policy". They subsequently maintained their representations for a return to the former practice and compliance with the Act.

* On 4 November 1986 the Chief Justice revised his "policy". Henceforth, he indicated that he would constitute the Court of Criminal Appeal with the Chief Justice normally presiding and the other [two] judges having "current trial experience". Judges of Appeal who had "current trial experience" would also be invited to sit. This "experience" they could secure by spending "a few weeks each year" sitting in criminal trials. The President was exempt from this requirement by reason of his office. He would be invited to sit from time to time. This restated policy effectively continued the exclusion of the Judges of Appeal (because they could not accept the precondition stated and because the nature of their office and functions did not allow them to achieve the "current trial experience" stipulated).

* On 4 September 1987 the Chief Justice indicated that he was contemplating yet another "policy". By this, a Judge of Appeal would be invited to participate in the Court of Criminal Appeal on a regular slot on Thursdays. At that time, and until recently, the Court sat normally on Thursdays and Fridays. This attempt at compromise was not accepted as it was pointed out that it could lead to attempted manipulation of the list in order to predict judicial participation in the Court. In the end the Chief Justice withdrew it and it was never implemented.

* Finally, on 2 February 1988, the Chief Justice revoked all earlier statements of "policy". His new policy excluded the Judges of Appeal entirely from the Court of Criminal Appeal. For the first time the President was also expressly excluded from participation.

3.6 Apart from cases where there was a concurrent reference to the Court of Appeal under the Judiciary Act (Saffron) and when the Court had to be re-constituted by the President, as Acting Chief Justice, in July 1988, the Judges of Appeal, although "Judges of the Supreme Court" and so entitled to sit have, by the present policy of the Chief Justice been excluded from doing so.

DEFECTS OF PRESENT POLICY

4.1 The Statute:

The fundamental defect of the present policy is that it excludes from participation in the Court of Criminal Appeal

judges who, by the law enacted by Parliament, are to be included in the group from whom the Court is to be constituted. It was this fundamental objection which the Judges of Appeal repeatedly asserted. It is a misuse of a statutory discretion to adopt guidelines or follow "policy" which distorts the achievement of the statutory object or artificially limits that achievement by imposing restrictions on the unfettered exercise of the discretion in each case. See Water Conservation and Irrigation Commission (NSW) v Browning (1947) 74 CLR 491, 496, 498; Mallet v Mallet (1983-4) 156 CLR 605, 621; Norbis v Norbis (1986) 161 CLR 513; Attorney General v Maksimovich & Anor (1985) 4 NSWLR 300, 316. See also Pambula District Hospital v Herriman, unreported, CA, 5 August 1988.

4.2 Historical:

The creation of the Court of Appeal in 1965 and its enactment as part of the Supreme Court in 1970 are events which have overtaken the establishment of the Court of Criminal Appeal by the Act of 1912. For constitutional and practical reasons, Parliament intended that the Judges of Appeal should be Judges of the Supreme Court. They are the senior judges of the court. It is therefore inappropriate that they should be excluded from participation in an appellate court drawn from the Judges of the Supreme Court.

4.3 CA Criminal Jurisdiction:

Nor is it appropriate to describe the Court of Appeal as a purely "civil" court. Frequently, by prerogative writs, the Court of Appeal has to consider and apply the criminal law. There is no strict bifurcation between the criminal

jurisdiction of the Court of Criminal Appeal and civil jurisdiction of the Court of Appeal. The entire exclusion of the Judges of Appeal from the Court of Criminal Appeal on the ground of lack of expertise is artificial and wrong.

4.4 Criminal Law:

The criminal law is not a separate entity, although it has some particular features as do other areas of the law commonly dealt with in the Court of Appeal. Criminal law is part of the law of the land. It should be integrated into the general developments of the law. Otherwise there is a risk that it will develop into "lore". Important developments of the law occur by the interaction of legal categories and by the integration of legal concepts. Only in this way is a consistent development of the law achievable. For convenience, lawyers divide the law into categories. But activity in society is continuous. The law simply applies to such activity. The artificial, and strictly separate development of criminal law is a form of legal apartheid and is undesirable in principle. Ultimately, criminal law issues come for resolution in the High Court of Australia whose appellate judges have no "current trial experience".

4.5 Departure from Past Practice:

The present "policy" is a serious departure from the past practice of the Supreme Court until 1974 and also from the practice which was revived from 1979 until 1984. No convincing reason has been given why the Judges of Appeal, appropriate to sit in the Court of Criminal Appeal between 1965 and 1974 and between 1979 and 1984, should now be excluded. The real reason

referred to by the Chief Justice for his "policy" was the "fervour" with which the Judges of the Common Law Division considered the "Court of Criminal Appeal as theirs exclusively" (Memorandum 6 March 1987). It is not for Judges, without the authority of Parliament, to make such exclusive demands. Especially may they not do so in the face of a statutory provision to the contrary.

4.6 Recent Trial Experience:

The imposition of an obligation to securing of "recent trial experience" upon the Judges of Appeal, in order to qualify to sit in the Court of Criminal Appeal, was the introduction of an impermissible additional qualification for which Parliament had not provided. In the nature of their busy work in the Court of Appeal Judges of Appeal do not have the time for such duties. In any case, their commissions as Judges of Appeal do not require it. Their contributions to the Court of Criminal Appeal would be different. The would include experience in the appellate function of the Court. They are the senior judges of the Court and it is demeaning to impose upon them such a prerequisite condition which applies nowhere else as a prerequisite to the discharge of their duties. In any case, the requirement breaks down for other reasons. The Chief Justice himself did not have such "trial experience" when he was first obliged to sit in the Court, nor has he sat in trials since. He, like the Judges of Appeal, relies upon his office. It is frequently the fact that new appointees to the Supreme Court have little or no recent trial experience in criminal trials when they first sit in the Court of Criminal Appeal. In

any case, Clarke JA, when he was appointed to the Court of Appeal had "recent trial experience" in criminal trials. Yet he was excluded from the Court of Criminal Appeal with the rest. Many of the Judges of Appeal, who have long sat in the Court of Criminal Appeal, had substantial trial experience in criminal trials and some as judges.

4.7 Acting Chief Justice:

The unacceptability of the prerequisite was at first acknowledged in the case of the President. In the earlier memoranda the Chief Justice excluded the President from the requirement of "recent trial experience". No more than in the case of the Chief Justice could it be expected that the President would interrupt his duties to sit in criminal trials. Yet subsequently the President too was excluded. The unacceptability of this exclusion was demonstrated in July 1988. The President was obliged to sit in the Court of Criminal Appeal when vacancies in the list fixed by the Chief Justice before his departure came to be filled. The necessity for the President, as the office holder envisaged by Parliament to be the Acting Chief Justice during the absences of the Chief Justice (see s 35 Supreme Court Act 1970) is one reason why he was originally excluded from the general "policy" removing the Judges of Appeal from sitting in the Court of Criminal Appeal. However, that exclusion was subsequently confirmed in his case too. It is unacceptable that the alternate Chief Justice of the State should be excluded from an important aspect of the work of the Supreme Court which he may be called upon to perform in the event of illness or absence of the Chief Justice. Yet once

the President participates, the exclusion of the other Judges of Appeal becomes manifestly unwarranted.

4.8 Role of Chief Justice:

An associated matter for consideration is the role of the Chief Justice. The Chief Justice should participate in all aspects of the judicial work of the Supreme Court, at least at the appellate level. He should not be confined effectively to judicial duties in the Court of Criminal Appeal, and administrative tasks. It is important that his intellectual leadership should be stamped upon the work of the Court of Appeal as well. This has always been the desire of successive Presidents and the Judges of Appeal. Unfortunately, in recent years, the participation of the Chief Justice in the Court of Appeal has been minimal. This has been so despite attempts to increase his participation. It may be hoped that the incoming Chief Justice will take a much more active part in the Court of Appeal sharing his judicial sitting time between that court and the Court of Criminal Appeal. If this occurs, it will be even more appropriate for other senior judges of the Court of Appeal to take a more active part in the work of the Court of Criminal Appeal. This is a further reason why the Judges of Appeal should resume their proper and previous participation in that Court, by reason of their office and not on a precondition which has no basis in law.

4.9 Appearances of the Court:

An additional reason to reinforce this argument is the appearance to the community and to the legal profession of the exclusion of the senior judges from the Court of Criminal

Appeal where, by their commissions and by past practice, it might be expected that they would participate. Only two inferences can be derived from their non-participation. The first is that they had no interest in or are unprepared to participate in the vitally important work of the Court of Criminal Appeal. The second is that they are, for an unidentified reason, considered unsuitable to sit. The Judges of Appeal are not at liberty to publicly correct the first impression. They object to the second, for it is contrary to the statute and to fact.

4.10 Harmony in the Court:

A further reason for the participation of the Judges of Appeal in the Court of Criminal Appeal is that it will promote greater harmony within the Supreme Court. The participation, as judicial colleagues, of members of the Supreme Court in common endeavours of judging is the best possible way to diminish tensions which can arise from preconceptions. It is believed that this was a useful contribution of the period in July 1988 when the President as Acting Chief Justice sat with a number of Judges of the Common Law Division in the Court of Criminal Appeal. In virtually all cases the President gave the leading judgment. It was rare for there to be any disagreement. This experience helps to dispel the causes of disharmony and division in the Supreme Court.

4.11 Appellate Experience:

The work of appellate judges is different in kind from that of trial judges in important respects. Experience in the daily business of appellate work refines skills which have an important place in the exposition and development of legal

principle, including of the criminal law. To exclude the appellate judges, with this important quality to bring to the Court of Criminal Appeal, is erroneous, intellectually unworthy and inefficient. It deprives the Court of Criminal Appeal of the participation of the judges of the Supreme Court with the greatest experience in appellate judging.

4.12 Individual Responsibility:

In the Court of Appeal there is an even distribution of the responsibility to provide the primary ex tempore judgment and to prepare the first draft of reserved judgments. This distribution, assigned by the President, is accepted by all of the Judges of Appeal. In recent years in the Court of Criminal Appeal the Chief Justice has accepted the very substantial obligation of providing the primary judgment in virtually every case. The more even distribution of this obligation would promote the more active participation of all of the sitting judges in the work of the Court of Criminal Appeal. Furthermore it would reduce the burden on the Chief Justice, so that he can accept other obligations of a more general character, including sitting more frequently in the Court of Appeal. The Judges of Appeal are well experienced, by reason of their own arrangements, in accepting this function of providing the primary judgment in appeals. It might be expected, if they participate, that they would adopt the procedure of the Court of Appeal and share evenly the burden of judgment preparation. In a real sense this would promote the higher integration of the Supreme Court.

4.13 Opinion of the High Court:

Although the composition of the Court of Criminal Appeal is to be determined by reference to legal principle and by the internal necessities of the Supreme Court, there is little doubt that the standards of that Court would be lifted by the participation of the Judges of Appeal. It is widely known that that participation was welcomed by the Justice of the High Court of Australia, and, it is believed, by Judges of the District Court and Magistrates. Referring to the period of revival of the participation of the Judges of Appeal (1979-1984) Sir Harry Gibbs, then Chief Justice of Australia, said in 1985:

> "Some time ago the Supreme Court of New South Wales began the practice of sitting a member of the Court of Appeal with two Common Law judges to constitute the Court of Criminal Appeal; the expedient of thus combining wide appellate experience with practical knowledge of the working of the criminal courts proved most beneficial."
>
> (See (1985) 59 ALJ 522, 523.)

Unfortunately this benefit was terminated when the exclusion of the Judges of Appeal was resumed.

4.14 Opinion of Associations:

In the course of formulating his "policy" the Chief Justice sought the opinions of various professional organisations. None expressed themselves opposed to the participation of the Judges of Appeal in the Court of Criminal Appeal. It is believed that the legal profession would welcome the return of the Judges of Appeal to participate in the Court of Criminal Appeal as heretofore.

4.15 Appellate Independence:

One of the reasons frequently given for the establishment of a separate Court of Appeal (and referred to by Mr McCaw in supporting the establishment of the Court of Appeal of this State) is the desirability that appellate judges should be, and be seen to be, completely independent from those whose decisions they are reviewing. This reason, strong in all areas of the law, has particular relevance in criminal jurisdiction where personal liberty and reputation are at stake. The injection of thinking by appellate judges may be specially useful in this regard. But so is the desirability, for the Crown, the prisoner and the community, that the appellate judges should, as far as possible, be appropriately removed from the pressures, even subconscious, which may affect trial judges who participate. It is true that experience is useful. This can be assured by the appointment of experienced judges to the Court of Appeal. But it is equally true that complete independence, and the appearance of independence, are integral to the successful functioning of appellate review such as to command the respect of the litigants and the acceptance of the community.

4.16 Efficiency:

The most important reason for not excluding from the Court of Criminal Appeal the Judges of Appeal, apart from the provisions of the statute, is the inefficiency of so doing. To constitute the Court of Appeal it is necessary (s 46 matters apart) for the Court to sit in Divisions of three (see s 43(1)). Accordingly, there are from time to time, whether one

or two Divisions are sitting, individual Judges of Appeal who would be available to sit in the Court of Criminal Appeal. Although the Court of Appeal is extremely busy and its workload is increasing, the best deployment of the Judges of the Supreme Court (including the Judges of Appeal) in criminal appeals requires flexibility. The present arrangements are inefficient:

* Although a Judge of Appeal may be available to preside (as Gibbs CJ contemplated in his comment (1985) 59 ALJ 522, 523), because not sitting in the Court of Appeal, he is not used.
* Instead, a Judge of the Common Law Division is taken from trial work and assigned to sit.
* Frequently, this has seriously inefficient consequences for the Common Law list. Typically, Judges of the Common Law Division will require a day off sitting to read the substantial papers in the Court of Criminal Appeal. This effectively takes them out of the list for two days. As well, quite frequently Judges of the Common Law Division will not accept earlier in the week a lengthy case, lest it interfere with their ability to sit in the Court of Criminal Appeal later in the week.

The result is an inefficient utilisation of available judicial officers. It is undesirable that an element of inflexibility should be introduced by excluding from the available resources the senior judges of the Court and those with daily experience in appellate judicial work.

OVERSEAS PRACTICE

5.1 United Kingdom:

The position in the United Kingdom is regulated by the Supreme Court Act 1981 (Engl) which constitutes two divisions of the Court of Appeal, namely the Criminal Division and the Civil Division (s 2(2)). The Criminal Division of the Court of Appeal exercises jurisdiction akin to that of our Court of Criminal Appeal. See s 53 of the Supreme Court Act 1981. The composition of the Court of Appeal in the Civil Division is provided for in s 54. According to an enquiry made of the Lord Chief Justice in 1987 (and as is in any case shown by the reports), the Criminal Division of the Court of Appeal in England is usually comprised of at least one Court of Appeal Lord Justice together with two Queen's Bench Judges. There is no requirement of "current trial experience". It is not invariably the case that judges experienced in criminal trials only sit, as the recent visit of Dame Elizabeth Butler-Schloss LJ indicated. Her background was in family law. She quite frequently sits in the Court of Appeal, Criminal Division with Queen's Bench Judges or with another Lord Justice and a Queen's Bench Judge. The overall position appears to be similar to that contemplated by Gibbs CJ in his comment (above).

5.2 Canada:

In Canada, there is no distinction between the Courts of Criminal Appeal and the Courts of Appeal. All Provinces have a single Court of Appeal. The Court of Appeal of a Province performs all appellate work of the Province. This includes

criminal appeals. There is no bifurcation of the criminal and civil law or of appellate duties in relation to either.

5.3 New Zealand:

In New Zealand, criminal appeals lie to the Court of Appeal in Wellington. That court is constituted from time to time to include a High Court Judge who sits as an Acting Judge of the Court of Appeal. The composition of the Court of Appeal and the structure of the courts in New Zealand is presently under consideration by the Law Commission of New Zealand. See Law Commission (NZ) The Structure of the Courts (Preliminary Paper No 4), Wellington, 1987, 66.

OPTIONS

6.1 Unchanged:

The first option is to leave the present legislative arrangements unchanged in the expectation that the incoming Chief Justice will revert to the practice of his predecessors and constitute the Court of Criminal Appeal as the Criminal Appeal Act envisages, without excluding the Judges of Appeal. This has the advantage of requiring no legislation. It has the disadvantage of confronting the incoming Chief Justice with an old controversy and with the "fervour" of some Judges of the Supreme Court which has occasioned the differences of view set out above. It also involves the delay of the opportunity to reform the source of the problem and appropriately to integrate the appellate judicial arrangements of the State. It would be desirable that any such reforms should be discussed with the incoming Chief Justice.

6.2 Incorporation:

The second possibility is to follow the lead of the English legislation (See Annexure). This provides for the integration of the civil and criminal appellate work in the Court of Appeal. It constitutes a Criminal and Civil Division of the Court of Appeal. The Lord Chief Justice is the President of the Criminal Division. The Master of the Rolls is the President of the Civil Division. By analogy, the Chief Justice would be the President of the Criminal Division and the President of the Court of Appeal would be the president of the Civil Division of the Court of Appeal of the Supreme Court of New South Wales.

6.3 Modification:

The third option would be to amend the Criminal Appeal Act 1912 to provide for the deletion of the Court of Criminal Appeal and for appeals to lie to the Court of Appeal but with a particular provision requiring that the Court of Appeal should, for criminal appeals, be constituted by the Chief Justice and should include him, the President or another Judge of Appeal in every case except in particular circumstances certified by the Chief Justice. This would be a sufficient indication from Parliament of the intention that the Judges of Appeal should participate fully in the work of the Court of Criminal Appeal.

6.4 Minor Change:

The most minor change, designed to indicate more specifically the intention of Parliament that the Judges of Appeal should participate (as Sir Harry Gibbs contemplated and as was the previous practice) in the Court of Criminal Appeal,

would be to amend s 3 of the Criminal Appeal Act 1912 to provide simply that the Chief Justice, in constituting the court, shall do so from the Judges of Appeal and the other Judges of the Supreme Court.

PREFERRED OPTION

7.1 The need is for an immediate reform which will authoritatively remove this problem from those facing the incoming Chief Justice and, at the same time, indicate clearly the parliamentary intention that the Judges of Appeal should participate in the Court of Criminal Appeal and not be excluded from it.

7.2 It may be adequate simply to amend s 3 of the Criminal Appeal Act 1912 to provide that the Court of Criminal Appeal should be constituted by three or more judges chosen from among

(a) (i) the Chief Justice,

(ii) the President,

(iii) the Judges of Appeal, and

(b) the remaining Judges of the Supreme Court,

but shall in every case, unless the Chief Justice certifies that it is impracticable to do so, include one or more of the persons in (a).

ECONOMIC IMPLICATIONS

8.1 There would be no immediate economic implications of the above change (para 7.2). It would simply involve the better redeployment of the Judges of Appeal and the Judges of the Supreme Court. Indeed, that deployment could have beneficial economic consequences by providing for the more efficient

management of the list of the Common Law Division and avoiding the inefficiencies referred to above.

8.2 It may be that, in time, the shift of criminal appellate duties to Judges of Appeal could involve, together with the growth of the work of the Court of Appeal generally, the necessity to appoint further Judges of Appeal. The position would need to be monitored. Trends, together with statistical information are provided in the Annual Review of the Court of Appeal. The provision of that Review is a further reason for contemplating, at this time, the immediate or eventual integration of the Court of Appeal and the Court of Criminal Appeal into a Civil and Criminal Division of the Court of Appeal, as in England. The English Court of Appeal provides an annual report. So does the Court of Appeal of New South Wales; but only as to what is substantially civil work. It would be desirable to monitor the efficient deployment of all appellate judicial duties. This can be done through ad hoc reports and in the Annual Review of the Court of Appeal.

OTHER REFORMS

9.1 Annual Report:

Consideration should be given to the requirement, as in the case of the Supreme Court of Victoria, for the provision of an annual report to Parliament by the Supreme Court and/or an annual report on the judicature (covering all courts) by the Chief Justice. Cf Supreme Court Act 1958 (Vic), s 28. Such requirements are a commonplace in the United States and are often provided by statutes or State constitutions. It might be

desirable to consider specifying the matters to be dealt with in the report as the Victorian report provides relatively little information or detail. The High Court of Australia is required by the High Court of Australia Act 1979 (Cth) to provide an annual report to the Federal Parliament. (See s 17.)

9.2 Divisions of Two:

The Court of Appeal is presently required to sit in a Division of three judges for the purpose of disposing of appeals, judicial review and applications for leave to appeal. (See Supreme Court Act 1970, s 43(1).) In England, provision has now been made for the Court of Appeal to be constituted by two judges for purposes specified in s 54(4) of the Supreme Court Act 1981 (attached). There could be merit in providing for an amendment of s 43(1) of the Supreme Court Act 1970 to permit the Court of Appeal to sit in a bench of two in certain specified cases. Such cases could, as in England, include:

(a) Hearing and determination of any appeal against an interlocutory order or interlocutory judgment;

(b) Hearing and determination of any appeal where all of the parties have filed a consent to the appeal being heard and determined by two judges;

(c) Hearing and determining of applications for leave to appeal; and

(d) Hearing and determining of an appeal of such description, or in such circumstances not covered by the above, as may be prescribed.

In England, special provision is made to deal with the case where there is an equal division of the appellate judges. See

s 54(5). Obviously, if appeals can be disposed of, in appropriate cases by two judges, a greater and faster throughput of the work of the Court of Appeal can be more efficiently achieved without additional cost to the State and, indeed, with some savings in costs. In minor cases particularly this would not involve any relevant diminution in applicable standards. It is appropriate to preserve an appellate bench of at least three Judges of Appeal in appeals from Judges of the Supreme Court or courts or tribunals of equivalent status. But in respect of other courts and tribunals and, in particular, where relatively small amounts are involved, and the issues are simple or routine, it would be desirable that consideration should be given to the foregoing reforms introduced in England.

9.3 Sentencing Appeals:

The foregoing would also apply to sentencing appeals. At least in respect of appeals imposed originally by Magistrates or by Judges of the District Court there would seem to be little reason for requiring that three Supreme Court Judges, including the Chief Justice, President or Judge of Appeal should be obliged to sit. It would appear desirable to provide for such matters to be dealt with by a bench of two judges, reserving the bench of three judges to cases of importance, cases of disagreement and to cases where a conviction is challenged. In the event of abandonment of an appeal against conviction, the Court could then be reconstituted, allowing the deployment of the released judge to other judicial duties. Adjustments of this kind are necessary having regard to the rise in appellate work in the Supreme

Court of New South Wales, demonstrated in the Court of Appeal's Annual Review.

9.4 Long Run Reforms:

If the above modest reforms which follow the provisions of the Supreme Court Act 1981 (Eng) are introduced, a more significant reform, including the abolition of the Court of Criminal Appeal and the redirection of criminal appeals to the Court of Appeal could be contemplated later. This would require a provision similar to s 2(3) of the Supreme Court Act 1981 (Engl) by which two divisions of the Court of Appeal are created. Work should be set in train to consider such a reform. It should be accompanied by consideration, in consultation with the Judges, of other ways in which more efficiency and cost effectiveness could be secured in the discharge of the appellate jurisdiction of the Supreme Court. One further way could be to provide specifically for the Court of Appeal to limit oral argument and to require the filing of a full written case. The need to tackle the procedures of appellate argument are now widely recognised. See report Institute of Judicial Administration (NY) English Civil Appeals Process, noted (1988) 1 Judl Officers Bulletin 8. It has been shown overseas that greater efficiency can be achieved without any diminution of standards. The same thing should occur in New South Wales.

SCHEDULE

Composition of Court of Criminal Appeal as recorded in reported decisions from 1.1.66 until 22.5.72 in Vols 83 - 92 Weekly Notes and (1971) 1 and 2 and (1972) 1 NSWLR

(a) The Chief Justice is not counted as a Judge of Appeal.

(b) When the President sat as Acting Chief Justice this is noted.

(c) When an acting judge of appeal sat this is also noted.

83 WN (1966)	No CCA decisions reported which were heard after 1.1.66
84 WN (1966-67)	6 CCA decisions heard after 1.1.66 4 with no J.A. 2 with 1 J.A.
(Pt 1) 42	No J.A.
(Pt 1) 55	No J.A.
(Pt 1) 121	1 J.A.
(Pt 1) 248	No J.A.
(Pt 1) 361	No J.A.
(Pt 1) 588	1 J.A. (Sugerman J.A. presiding)
85 WN (1966-67)	3 CCA decisions reported, 2 including at least 1 J.A.
(Pt 1) 7	3 JJ.A. (including Moffitt A.J.A. and with Wallace P. presiding).
(Pt 1) 36	1 J.A. (Sugerman J.A. presiding)
(Pt 1) 725	No J.A.
86 WN (1966-67)	6 CCA decisions reported, 1 with no J.A., 1 with 1 J.A., 1 with 2 JJ.A., and 2 with 3 JJ.A.
(Pt 1) 149	2 JJ.A.
(Pt 1) 272	2 JJ.A.
(Pt 1) 310	3 JJ.A. (with Wallace P. presiding)
(Pt 1) 372	No J.A.
(Pt 2) 354	3 JJ.A. (Wallace P. presiding)
(Pt 2) 445	1 J.A.
87 WN (1967-68)	7 CCA decisions reported, no J.A.
(Pt 1) 290	No J.A.
(Pt 1) 314	No J.A.
(Pt 1) 323	No J.A.
(Pt 1) 387	No J.A.
(Pt 1) 438	No J.A.
(Pt 1) 449	No J.A.
(Pt 1) 500	No J.A.

88 WN (1968)	No CCA decisions reported.
89 WN (1968-69)	
(Pt 1) 141	3 CCA decisions reported.
(Pt 1) 444	2 JJ.A., including Wallace as A.C.J. 1 J.A.
(Pt 1) 91	2 JJ.A., including Wallace as A.C.J.
90 WN (1969-70)	
(Pt 1) 91	9 CCA decisions reported. 1 with no J.A., 7 with 1 J.A., and 1 with 3 JJ.A.
(Pt 1) 111	No J.A.
(Pt 1) 150	1 J.A.
(Pt 1) 488	1 J.A.
(Pt 1) 548	1 J.A.
(Pt 1) 552	1 J.A.
(Pt 1) 620	3 JJ.A. (Wallace P. presiding)
(Pt 1) 682	1 J.A.
(Pt 1) 731	1 J.A.
	1 J.A.
91 WN (1969-70)	
1	10 CCA decisions reported, 1 with no J.A., 6 with 1 J.A., and 3 with 2 JJ.A.
61	1 J.A.
145	1 J.A.
327	2 JJ.A. (Sugerman P. presiding)
609	1 J.A. (Jacobs J.A. presiding)
720	1 J.A.
793	No J.A.
829	1 J.A.
845	2 JJ.A. (Walsh J.A. presiding)
849	2 JJ.A. (Sugerman J.A. presiding)
	1 J.A.
92 WN (1970)	
182	8 CCA decisions reported, 0 with 0 J.A., 4 with 1 J.A., 3 with 2 JJ.A., and 1 with 3 JJ.A.
223	2 JJ.A. (including Wallace presiding as A.C.J.)
757	2 JJ.A.
763	1 J.A.
767	1 J.A. (Manning J.A. presiding)
768	1 J.A. (Manning J.A. presiding)
816	2 JJ.A. (Mason J.A. presiding)
888	1 J.A.
	3 JJ.A. (Jacobs J.A. presiding, and including Taylor A.J.A.)

(1971) 1 NSWLR	8 CCA decisions reported, 3 with 0 J.A., and 5 with 1 J.A.
247	1 J.A.
506	1 J.A. (Manning J.A. presiding)
511	1 J.A. (Manning J.A. presiding)
544	1 J.A.
589	No J.A.
613	1 J.A. (Manning J.A. presiding)
703	No J.A.
781	No J.A.
(1971) 2 NSWLR	7 CCA decisions reported, 4 with 0 J.A., 2 with 1 J.A., and 1 with 2 JJ.A.
136	No J.A.
181	No J.A.
191	1 J.A.
213	2 J.A. (Manning J.A. presiding and Taylor A.J.A. sitting)
235	1 J.A. (Manning J.A. presiding)
262	No J.A.
423	No J.A.
(1972) 1 NSWLR (until 22.5.72)	2 decisions of CCA in respect of this period reported, 1 with 0 J.A. and 1 with 1 J.A.
373	1 J.A. (Taylor A.J.A.)
504	No J.A.

NOTES FOR REPLY TO CHIEF JUSTICE'S LETTER

OF 26 MARCH 1986

1. The CCA is a statutory court with a wholly appellate jurisdiction. The power to assign judges to sit on it is given by s 3 of the Criminal Appeal Act 1912 solely to the Chief Justice. No provisions of any statute or statutory instrument limit or confine the exercise of this power by the Chief Justice and it is respectfully suggested that clearly the power should be exercised so that the requirements of the administration of criminal justice and in particular of the provisions of the Criminal Appeal Act should best be met. The views of judges of the Supreme Court, including judges of appeal, as to how those requirements might best be met may no doubt be considered by the Chief Justice in arriving at his decision as to how he should exercise his power, but they are quite peripheral to the principal basis of its exercise.

2. A court which exercises appellate power - other than appeals which involve a hearing de novo, as do appeals to the District Court from local courts - requires skills and capacities which have significant differences from those exercised by courts of first instance. It is not suggested that they are in any way superior; they are simply different. A good judge at first instance may be a bad appellate judge; a good appellate judge may be a bad judge at first instance; the same judge may be good or bad in both respects. Appellate judges can exercise their powers with complete efficiency whether or not they have ever sat in the court from which the appeal is brought. No more need be said on this subject than

to refer to the variety of courts from which appeals or other forms of review are taken to or end up in the High Court, the members of which would commonly never have sat in the court of first instance. In relation to criminal appeals it is not suggested that judges who currently preside over criminal appeals may not have an important contribution to bring to the appellate process but we suggest that it must be apparent that judges of appeal have a special contribution to make because of their appellate experience. Appellate work involves an independence and detachment which will enable the issues raised to be looked at away from the often quite difficult atmosphere and tension of courts of first instance and of the lore which often develops in those courts as to the way trials or particular issues should be conducted or dealt with.

3. Some of the views against the assignment of judges of appeal to the CCA seems to be based on an assumption that common law judges have an exclusive right to be so assigned. The right certainly does not come from any statutory provision. The Chief Justice may assign any judge of the Supreme Court to sit on it.Furthermore it does not come from any invariable practice before the establishment of the Court of Appeal. Thus to give some illustrations - and these have been picked merely as examples - Roper C.J. in Eq. was frequently assigned to sit on the CCA: see Reg. v. Towle 72 W.N. 338; Reg v. Kadar 72 W.N. 445; Reg v. Stones 72 W.N. 465; Reg v. Wood 74 W.N. 421; In the appeal of Baldock 75 W.N. 21; Reg. v. Windle 75 W.N. 63; Reg. v. Wakefield 75

W.N. 66; Reg. v. Hutchins 75 W.N. 75; Reg. v. Steen 75 W.N. 119; Reg. v. El Mir 75 W.N. 191; Reg. v. Carmody 75 W.N. 194; Reg. v. Makrides 75 W.N. 221. Roper J. had been a judge of the Land and Valuation Court and an equity judge, but had never been a common law judge and had never presided at a criminal trial. Sugerman J. was regularly assigned to the CCA before the establishment of the Court of Appeal: see, for example, Reg. v. Castiglione 80 W.N. 537; Reg. v. Parker 80 W.N. 632; Reg. v. Foley 80 W.N. 726; Reg v. Yates 80 W.N. 744; Reg. v. Jorgic 80 W.N. 761; Reg. v. Smart 80 W.N. 1125. Sugerman J. had been a judge of the Commonwealth Industrial Arbitration Commission, a judge of the Land and Valuation Court and an equity judge. He was never a common law judge and he never presided at a criminal trial. McLelland J. was appointed to the Supreme Court as a judge in equity on 28 April 1952, and never presided at a criminal trial. He also sat at times on the CCA: see, for example, Reg. v. Cooke 72 W.N. 132; Reg. v. Mraz 72 W.N. 422. Roper C.J. in Eq. and Sugerman J. sat frequently in the Full Court. They had considerable appellate experience and it may be that they were selected to sit in the CCA because they had the necessary qualifications and experience to make a valuable contribution to its work.

4. The Court of Appeal was established on 1 January 1966 pursuant to the provisions of the Supreme Court and Circuit Courts (Amendment) Act 1965. Although its principal work was civil, it was nonetheless left with a significant criminal jurisdiction which it has regularly exercised. None of the

relevant legislation suggests any policy that the Court of Appeal should do no criminal work. Section 21A of the Supreme Court and Circuit Courts (Amendment) Act 1965 provided that nothing in the Division establishing the Court of Appeal should affect the operation of the Criminal Appeal Act 1912 or the jurisdiction of the Supreme Court with respect to matters within the operation of the Criminal Appeal Act. The Supreme Court Act 1970, s 17, provides that the Act and Rules do not apply to any of the proceedings in the Supreme Court specified in the Third Schedule to the Act. The proceedings listed in the Third Schedule include proceedings in the Supreme Court for the prosecution of offenders on indictment (including the sentencing or otherwise dealing with persons convicted) and proceedings under the Criminal Appeal Act 1912. The section expressly reserves to the Court of Appeal its jurisdiction under the Supreme Court (Summary Jurisdiction) Act 1967. These excluding provisions leave the jurisdiction of the Court of Appeal in respect of criminal matters otherwise unaffected. A considerable supervisory power is thus vested in the Court of Appeal in respect of criminal matters, derived, inter alia, from the power to issue prerogative writs and to make analogous orders, statutory appeals in various forms and the declaratory power.

5. The question whether judges of appeal should sit on the CCA first arose on 1 January 1966 when the Court of Appeal was constituted. The Chief Justice at the time was Herron C.J., who had been Chief Justice since 25 October 1962 and continued to hold that office until 22 May 1972. His term of office

thus encompassed the enactment of the Supreme Court and Circuit Courts (Amendment) Act 1965, providing for the establishment of the Court of Appeal, and the enactment of the Supreme Court Act 1970. Of all people he should have been the one to know the circumstances which led to the establishment of the Court of Appeal, the occasion for the retention of the Court of Criminal Appeal, and the existence of any policy in relation to the assignment of judges of appeal to sit on the Court of Criminal Appeal.

6. The recollection of persons who were judges of appeal in the period 1966 to 1972, or were judges of the Supreme Court or members of the Bar then, is that members of the Court of Appeal regularly sat on the CCA throughout the whole period of the chief justiceship of Herron C.J., and indeed that the CCA included at least one judge of appeal more often than not. This recollection would no doubt be borne out by an inspection of the notebooks of the judges of appeal at the time, but in any event is amply confirmed by reports of decisions of the CCA during the chief justiceship of Herron C.J. which are to be found in volumes 83 to 92 inclusive of the Weekly Notes and in volumes (1971) 1 and 2 and (1972) 1 of the N.S.W. Law Reports. A description of the membership of the CCA as recorded in these reports is to be found in the annexed schedule. These reported decisions deal of course with few only of the decisions of the CCA, and it is not suggested that they are necessarily representative of the membership of the Court throughout this period. However they certainly confirm the continued assignment of judges of

appeal to sit on the CCA during this period. Recollection is that this practice applied both in relation to appeals on sentence as well as appeals on conviction, although of course most reported decisions deal with conviction. Memory and the reported decisions show that sometimes more than one judge of appeal sat on the CCA, that frequently a judge of appeal presided, and that judges who had had no experience in proceedings of criminal trials sat as well as judges who had had that experience.

7. Kerr C.J. held office from 23 May 1972 to 27 June 1974. The recollection of persons who were judges of appeal during this period or were otherwise members of the profession is that, whilst there may have been some diminution in the assignment of judges of appeal to the CCA, it continued regularly throughout this period. Sometimes more than one judge of appeal sat, and this was often the case when Jacobs P. presided. However judges of appeal also sat with Kerr C.J. presiding and these included judges who had not presided at criminal trials. This recollection is confirmed by records in judges' notebooks.

8. This practice of eight and a half years changed some time after the middle of 1974. Recollection, judges notebooks and the record of the membership of the CCA in reported decisions show that from this time the assignment of judges of appeal to sit on the CCA sharply declined and stopped.

9. Some time in the late 1970s judges of appeal began again to be assigned to sit on the CCA. The earliest such case to be found in the reports seems to be Reg. v. Lynch (1979)

2 N.S.W.L.R. 775, heard in June 1979, when Reynolds J.A. sat with Street C.J. presiding. However the practice had certainly been resumed for some time before this. Moffitt P. was the first judge of appeal assigned to sit. Thereafter he was joined by Reynolds J.A., and gradually the other judges of appeal were assigned. Sometimes they sat with Street C.J. presiding. Moffitt P. and other judges of appeal presided from time to time. Recollection and judges' notebooks reveal the regularity of the assignment of judges of appeal to the court, and indeed, in the monthly duty rosters for judges of appeal issued by Moffitt P., there were four columns, the Banco Court, the President's Court, Court No. 12 and the CCA.

10. We are unable to comment on the relevance of any shortage of common law judges to the reinstatement of the earlier established practice, but it is suggested that the pressure on common law judges could not have been stronger then than it is now. Whatever was the position in this regard, Moffitt P. made strong representations to the Chief Justice on the assignment of judges of appeal to the CCA and wrote a letter to the Chief Justice in which, among other things, he brought to the Chief Justice's attention the assignment of judges of appeal to sit on the CCA as recorded in reported decisions of that court during the Chief Justiceships of Herron C.J. and Kerr C.J.

11. The reinstated practice continued until Moffitt P. retired. Judges of appeal have not sat on the CCA since then except when special circumstances, as in the case of Reg. v. Farquhar, apparently suggested the appropriateness of such a

course. We suggest that there is no reason to be found for the exclusion of judges of appeal from the CCA other than the views of some common law judges who are said to feel that they have "a rightful entitlement exclusively to constitute, with the Chief Justice, the Court of Criminal Appeal". As has been shown, this alleged right has no basis either in law or in practice, nor has it any basis in what must be the principal consideration, the most effective administration of the criminal appellate system. A further matter should be added. A cursory examination of the reports of the decisions of the CCA since 1 January 1966 shows that from time to time the President of the Court of Appeal has acted as Chief Justice, and in that capacity has presided over the CCA. The efficient administration of the criminal appellate system would seem to call for experience by the President in sitting on or presiding over the CCA before he has to take full responsibility for it.

12. Strong support for the views we have expressed is to be found in the address given by Gibbs C.J. at the 23rd Australian Legal Convention on 5 August 1985 (reported in 59 ALJ 522). Having suggested that it might be an improvement if appeals from the Family Court were brought to the Full Court of the Federal Court, or that a judge of the Federal Court should be a member of the bench hearing these appeals, Gibbs C.J. said (at p. 523):-

> "If precedent is needed for the course which I suggest, I would mention that some time ago the Supreme Court of New South Wales began the practice of sitting a member of the Court of Appeal with two common law judges to constitute the Court of Criminal Appeal; the expedient of thus combining wider appellate experience with practical knowledge of the working of the criminal courts has proved most beneficial."