THE POSITION OF CRIMINAL APPEALS AND OF COURTS AND TRIBUNALS BELOW THE SUPREME COURTS

The eminent framers of the suggested structures for an integrated court system have given only passing attention to the questions addressed by this paper. Before discussing the nature of the problems requiring attention and propounding some suggestions, it is appropriate to mention briefly the extent to which consideration has already been given to the matter.

Propounding his suggestion for an integrated national court system, at the Supreme Court Judges' Conference in January 1982, Burt C.J. suggested (56ALJ 509 @ 512), that each Supreme Court "would retain an appellate jurisdiction from decisions from courts beneath them in the structure, with a <u>further appeal</u> in such matters, but with leave only, to the Australian Court of Appeal" (my emphasis). Note 3 to the diagrammatic representation of the proposed structure (supra page 514) makes the same point. Nonetheless it is not clear beyond argument what His Honour contemplated. To take an example, from the inferior courts mentioned in the diagram and using New South Wales as an illustration, an appeal from Petty Sessions may go, either to the District Court, by way of rehearing, or, by way of stated case, to a single judge of the Supreme Court. There may thenbe a further appeal to the Court of Appeal. Appeals from the District Court go to the Court of Appeal. Burt C.J may have contemplated retention of appeals to single judges only, or the retention of the entirety of the system, with the proposed Australian Court of Appeal super added to the structure.

At the same conference Street C.J. put forward an alternative plan which in a somewhat more elaborate form is reproduced at 56 A.L.J. 515. The Appeal Division of the Court suggested by him was to hear appeals from first instance decisions of judges of the Court (p516). His proposal expressly refrained, for the time being, from making any suggestions for accommodating inferior courts and appeals from them (p517).

The question of an integrated court system was then considered by the Sub-Committee on Jurisdiction of Courts to Standing Committee D of the Australian Constitutional Convention which reported on 1st July 1982. As the Report stated (par 4) it focused its attention on the proposal by Burt C.J. as expounded at the Conference. In paragraph 30, the sub-committee recommended a three tier system based on the proposal, but in par. 30(3)(b)(ii) left for future investigation the so called "technical consideration of matters incidental to the establishment of an integrated system of Courts including .....the inter-relation between State inferior courts and the integrated system of courts".

In August 1982 Standing Committee "D" passed a resolution that an integrated court system be established including "an Australian Court of Appeal to hear all appeals from the <u>original</u> jurisdiction of State and Territory Supreme Courts (my emphasis).

Further the Standing Committee requested the Sub-Committee to reconsider certain of its earlier recommendations and deferred consideration of par. 30(3) of the Report altogether. It is ironic that consideration of the

problems presently addressed, which are so central to the structure of an appellate system, and to the establishment of the proposed court, should have been deferred. When it is appreciated how much of the criticism of the proposal for an integrated court system stemmed from a lack of precision on these so called "technical considerations" it is seen how early attention to them might have proved rewarding.

The Sub-Committee undertook the task assigned to it, but in the course of it, noted the emergence of the more detailed Street proposal. In its further report of 10 February 1983 it recommended in favour of the structure for trial work embodied in the Street proposal and called Supreme Court of Australia ("S.C.A.") but adhered to the concept of a separate Australian Court of Appeal ("A.C.A."). In addition to judges to be appointed to the A.C.A., all judges of the S.C.A. were to hold dormant commissions and were available to be selected to sit in the A.C.A. (par 30(2)(e) and (f). Provision was to be made for a judge, normally resident in a particular State or Territory, to sit on the A.C.A. on appeals from that State or Territory (par 30(2)(g). Once again, there was expression of wide spread concern from members of the judiciary and the profession centering in a large measure on problems of appeals in criminal cases and from inferior courts.

In a memorandum dated 20th April 1983 Sir Laurence Street, reiterating adherence to the structure previously advocated by him, pointed to some of the difficulties which adoption of the proposal of Burt C.J. and the Sub-Committee for the A.C.A. would import into the administration of justice in Australia. Relevantly to the present questions he said:

"The bringing into existence of a new Court of Appeal simply adds one additional court to the existing system. But, what is more important, it is not a Court which is proposed to, or could from the practical point of view exercise full appellate authority over all matters deriving from the States. The present proposal is, that the Australian Court of Appeal would only hear appeals from the first instance divisions of the Supreme Court of Australia. It would still remain necessary for the various Divisions of the Supreme Court of Australia to maintain an appellate structure to deal with appeals from inferior courts within the States and Territories. In New South Wales, for example, the Court of Appeal comprises, in addition to the Chief Justice ex officio, a President and six judges. As a very rough generality, it could be said that about half of its work is appeals from single Supreme Court judges. The other half is a mixed collection from other courts and tribunals (Land and Environment Court, District Court, Workers Compensation, Professional Disciplinary Tribunals, together with other work inhering in the position of the Supreme Court as the superior court of the State). Under the present proposal, it would still be necessary for the New South Wales division of the Supreme Court of Australia to have 3 or 4 judges ordinarily engaged in exercising all of the present jurisdiction of the Court of Appeal other than decisions of Supreme Court Judges at first instance. Instead of the single appellate mechanism which functions with such efficiency in this State, we would have two appellate mechanisms dividing the work between them. It is

difficult, moreover, to see why an appeal from the New South Wales District Court against an award of, say, $80,000 damages for an industrial accident, should go to the New South Wales division of the Australian Supreme Court, but an appeal from an identical verdict of a single Judge of the New South Wales division of the Australian Supreme Court should go to the Australian Court of Appeal." (my emphasis)

In this criticism, the Chief Justice of NSW was stressing some of the points made at the 1982 conference of Supreme Court Judges by Moffitt P. which are now reproduced at 57 ALJ 167. Although the criticism in the paper by Neasey J., (57 ALJ 335, which enjoys the support of the whole of the Supreme Court of Tasmania) goes much further, some of the points are based on similar considerations. However the Chief Justice makes two assumptions which are by no means self evident. The first is that the current proposal is that appeals to the A.C.A. be restricted to appeals from the original jurisdiction of the S.C.A. Now that certainly was not the original Burt proposal. He also assumes that the question which has been set aside for further consideration namely appeals from inferior courts and from tribunals will be resolved in favour of their being retained within some existing Supreme Court structure. That view does not sit easily with the fact that there has been an adoption of the Street proposal for the S.C.A. though shorn of its Appellate Divison.

It seems to me that there are two basic questions calling for consideration. Firstly, assuming that appeals are handled as suggested by the Burt proposal, or in some similar vein, by the judges of the S.C.A., should there be

a further appeal, even if only by leave, to the A.C.A.? Secondly, what is the appropriate body to deal with all or some of the appeals from inferior courts and tribunals? In other words, is there some way of overcoming the problems adverted to by the critics of the A.C.A?

In my respectful view, the objections to that aspect of the proposal advanced by Burt C.J. that there be a further rung in the appellate ladder are overwhelming. Under no circumstances should it be contemplated that appeals should go from another court or a tribunal to a number of judges of the Supreme Court or the S.C.A. and thence to the proposed appellate court or division whether by leave or at all. As A.P. Herbert put it jocularly, but with considerable truth; "The institution of one court of appeal may be considered a reasonable precaution; but two suggest panic". By that yardstick, at any rate, we are in a state of considerable disarray. There is a very practical objection to this aspect of the Burt proposal. It appears to be a well accepted principle that an appeal bench should consist of more judges than sat on the court appealed from. There are very sound reasons for this approach. On that basis an appeal say from a District Court judge would have to go to 3 judges of the S.C.A., then 5 judges of the A.C.A. whilst the High Court would invariably have to sit 7 judges to avoid an even split. Quite apart from anything else the economics of of such an operation would be tremendous.

All recent suggestions, addressed to the question of rights of appeal, have been in the direction of restricting rather than enlarging the number of appellate steps that

may be available. As long ago as 1869, a Judicature Commission in England, recommended that there should be only one appeal, either to the Court of Appeal, the decision of which should be final, or, if appropriate, a direct appeal to the House of Lords. Implementation of the recommendation by the Judicature Act 1873 was narrowly thwarted 3 years later by the Appellate Jurisdiction Act which restored the House of Lords to its present position (Stevens, The Final Appeal, Reform of the House of Lords and Privy Council 80 L.Q.R. 343). The philosophical tendency has been to permit one appeal by way of a full review of the facts and law, and thereafter a further review on questions of law only and often times only by leave. It would be a completely retrograde step to provide a further possible intermediate appeal. The thinking underlying the present approach is firstly, that parties should not be put to the expense of multiple appeals. Secondly, there is the undesirable additional delay in the final disposition of the dispute. Thirdly, it is detrimental to the concept of the proper administration of justice, that there should be a multiplicity of appeals, in the course of which, possibly a majority of judges, considering a dispute, may be in favour of one party, whilst the ultimate court by a narrow majority may decide in favour of the other party. Restricting the number of appeals, at least reduces the number of judges who may be garnered in favour of a particular view which ultimately proves unsuccessful.

Advocating restricting even the present 2 appeals available in England Lord Gardiner L.C. put it this way (H.L Deb. Vol 299 Col 41):

"Whilst it is usually thought in the interest of the litigant to have an appeal, it is very doubtful whether having regard to the desire for certainty, the desire to arrive at a decision within a given time, more than one appeal is really in the litigant's interest".

A single appeal also satisfies the function of an appellate tribunal as perceived by other commentators on the judicial structure. Blom Cooper Q.C. and Drewry, put it thus wise: "The composition of the court a quo is a vital determinant of the structure of the appellate system .... When the court of first instance is the judge of fact, and of law, a calm review based on the cold formalities of a printed record, unencumbered by emotional reaction at the more personal level of the trial is called for. A measure of isolation from the dust raised by forensic combat is the hallmark of the appellate court" (32 M.L.R. 262 @ 273).

The present is not the time to debate whether there should be a further constriction of the number of available appeals. It is sufficient to say that there should certainly be no increase.

I do not believe that there is any support for, or any need, to effect changes in the present system of appeals from inferior courts to single judges of the Supreme Courts. Those would continue to be heard by single judges of the S.C.A.. Equally there is no argument but that appeals from single judges of the S.C.A. should go to the newly to be created appellate structure in all except criminal cases. Thus the matters in controversy are; 1. criminal appeals, 2. appeals from Courts and Tribunals

which have heretofore been heard by Full Courts of the Supreme Courts (or Court of Appeal in the case of NSW).
3. Matters heard in the original jurisdiction of the Full Courts Court of Appeal e.g. disciplinary matters, contempt applications etc.

The structure of the intermediate court of appeal whatever it is to be called, is crucial because it can be expected to be the final court for all but a select few matters. It can be confidently expected that in the near future all appeals to the High Court will be by leave only. The remarks of Frankfurter J. are equally aposite to the High Court:-

> "Without adequate discussions there can not be that fruitful interchange of mind which is indispensable to thoughtful unhurried decision and its formulation in learned and impressive decisions. It is therefore imperative that the docket be kept down so that its volume does not preclude wide adjudication. This can be avoided only if the Court rigourously excludes any case from coming here that does not rise to the significance of inescapability in meeting the responsibilities vested in this Court (Dick v New York Live Insurance Co. 359 U.S. 437, 458)."

The alternatives which appear to be available for the purpose of accommodating the proposal for a national court of appeal appear to me to be the following:-

1. All appeals and matters presently heard by a bench of 3 Judges of a Supreme Court, whether styled.

Court of Appeal, Full Court or Court of Criminal Appeal, to be heard by the A.C.A.

2. With the exception of criminal appeals and such further matters, (if any) as may be designated, all appeals and matters presently heard by a bench of 3 Supreme Court judges however designated to be heard by the proposed A.C.A. - Criminal Appeals and such other matters (if any) as may be specifically designated to be heard by a bench of 3 Judges of the S.C.A.

3. All matters to be heard by a bench of 3 Judges of the S.C.A. who will for that purpose constitute the appeals division however called.

It will be perceived that an adequate discussion of these alternatives, must involve reference to the perennial topic of the comparative advantages of a permanently constituted Court of Appeal as against an Appeal Court staffed by Judges sitting ad hoc in an appellate capacity.

The strongest opposition to all appeals from single judges of the S.C.A., going to a permanently constituted Court of Appeal arise in criminal cases. It is the strongly held belief of Judges, who customarily preside over criminal trials, that members of a permanent Court of Appeal are an inappropriate body for determination of criminal appeals. A number reasons are advanced for this view. It must be acknowledged that generally speaking, members of a permanently constituted Court of Appeal will have had limited, if any, experience in criminal work. Further, even if they have had such experience whether at

the Bar or on the Bench, it is claimed that translation to a Court of Appeal and a substantial loss of day to day contact with the problems of conducting a criminal trial and level of sentencing should disqualify Appeal Judges from being the entirety of the pool from which members of a Court of Appeal for criminal cases should be chosen. No doubt it may be said that problems of this nature are accentuated in situations where the members of the Appellate Tribunal may, wholly, or in a large measure, be from outside the territorial district where the original trial was held and are unacquainted with local conditions, local procedures and local levels of sentencing. The paper prepared by Neasey J. (supra) strongly echoes such concepts. It is no doubt in recognition of some of these arguments that, almost universally, even in countries, where there is a permanently constituted Court of Appeal, the Bench hearing criminals appeals is constituted largely, if not entirely, by members of the trial division of a Superior Court. Thus in England, customarily the Court of Appeal (Criminal Divison) is constituted by the Lord Chief Justice or a member of the Court of Appeal, and two members of the Queen's Bench Division. In New South Wales, the Court of Criminal Appeal receives occasional assistance from the Court of Appeal, but more often than not, is constituted by the Chief Justice sitting with two members of the Court. It is only in Queensland, that, if the measures suggested by the Queensland Law Reform Commission on the reform of the Supreme Court Acts is implemented, criminal appeals will be heard by the to be created Court of Appeal. Even that recommendation recognised the difficulty. It is useful to cite from page 29 of the Report:-

"But the danger that a Court of Appeal might be composed of members with limited experience in criminal trials cannot be dismissed as unreal. Persistence in New South Wales of a Court of Criminal Appeal alongside the Court of Appeal, and the constitution in England of a civil division and a criminal division of the Court of Appeal, attest to the need to ensure that an appellate court includes members with extensive experience in the criminal jurisdiction. This need may however, be met by providing a discretion to the Chief Justice to appoint a Judge as an additional Judge of Appeal. It is anticipated that this discretion would be exercised mainly in constituting a court for criminal appeals, in cases were he considered that the members of a particular Court of Appeal could be assisted by the addition of a Judge highly experienced in the criminal jurisdiction."

The argument that has been used in support of the suggestion that criminal appeals need not be heard by an appellate tribunal composed of experienced trial Judges, utilizes reference to the High Court. However, that is, with all due respect, an inaposite argument. Firstly, generally speaking the High Court is not concerned with questions of sentencing. Secondly, the work of the High Court is concerned with principle rather than, with what is after all staple fare of courts of criminal appeal, the conduct of criminal trials. The need for experienced trial judges to contribute to the work of the appellate body, is recognised by the Queensland Law Reform Commission conceding the need for the appointment of an ad hoc Judge of Appeal at least from time to time. Once that concession is

made, it seems to me that the principle which it recognises should work across the board and that the current system which prevails should continue and criminal appeals heard by a bench composed largely, if not solely, by members of the trial division.

This conclusion conveniently leads into a major question. As can be seen from the illustrations given it is customary to retain a collegiate court for the hearing of criminal appeals whilst having civil appeals heard by a permanent Court of Appeal. None the less, by reason of the nature of the objections tendered against the creation of the A.C.A., it is desirable to consider whether in the light of the particular problems of Australia a permanently constituted A.C.A. is appropriate at all or whether a collegiate court would more readily absorb the objections against an integrated court system. If the answer to the last mentioned question is in the affirmative, then it would seem to me that in substance, the question which is the topic of this paper, would no longer present a problem.

It is convenient therefore to turn first to a general consideration of what is the desirable structure for an appellate bench and then evaluate that conclusion in the light of the particular problems posed by an integrated national court system. Generally speaking should an appellate bench be constituted by trial Judges sitting as ad hoc members of the appellate body rather than by Judges of Appeal? Overall, the tendency throughout common law countries, has been to create permanent Courts of Appeal. Powerful and reasoned arguments had been advanced at the

time of creation of the Court of Appeal in New Zealand, the Court of Appeal in New South Wales and more recently in the report of the Queensland Law Reform Commission, arguing for the creation of a Queensland Court of Appeal, why a permanent Court of Appeal is the preferred structure. It is argued that the work of an appellate Judge is substantially different from trial work. The two types of duty require persons of different disposition and temperament to handle them. It is said that, it is an uneconomical use of judicial time to divert Judges, from time to time, from trial work into appellate work. It is impossible to forecast how long commitments may extend either in relation to trials or appeals. Great difficulties in listing and allocation of judicial manpower must arise from time to time. For example, a trial Judge may not wish to start a case of somewhat indeterminate length when he knows that he is required for duties on the appellate bench on the following week. Again, in turn it has not been unknown for counsel to be rushed in argument in the Full Court where members of the Court are required for duties as trial Judges in the ensuing week. More importantly, it has been found difficult for trial Judges to snatch sufficient time from the hurly-burly of conducting trials to write reasoned judgments in appellate matters that they have heard. In the result, there occurred cases of quite lengthy delay, which were emphatically adverted to by those discussing the creation of a New Zealand Court of Appeal at the time the debate in that country was going forward. Moffitt P. made a strong feature of the fact that members of the Court of Appeal in New South Wales have found it possible to work together as a team and preserve a consistency of decisions by reason of their number. Otherwise it is said conceivably a Full Court in say Western Australia might on the

same day of week and, unaware of the situation in New South Wales, give a diametrically opposed decision on the same point of law.

There is a deal of literature on the subject. However reference may most usefully be made to a speech by Lord Evershed on the English Court of Appeal (25 ALJ 386) in which he expounded the main arguments in favour of a permanently constituted Court of Appeal:-

> "It is said that Judges sitting temporarily on appeal over their brethren may think over much of what may happen later when their own cases come up for review. I do not myself attach too much importance to this. But the problem is very different when there are but ten or a dozen Judges all together, and when there are three or four times that number. It must be remembered that, as I have said, our Court of Appeal is in fact the final Court for 95% of the civil cases, and it is therefore surely important that the Court should have the status, the experience and also the uniformity of outlook appropriate to that fact. Moreover - and this I believe myself to be the most serious point - the judicial function is not quite the same in an appellate Court as it is in a Court of first instance. In a Court of first instance, the duty of the Judge is to sift the evidence and to reach a conclusion as best he can, and as quickly as he can; for there is no doubt whatever, that costs vary directly with the length of the hearing. Dispatch is of course important no less in the Court of Appeal, but it must be subject to due deliberation if an appellate Court is justifiable at all. In our

ourt three Judges constitute the Court, and so far as I know, all comparable Courts of Appeal consist of more than one Judge. If therefore, the real purpose of an appellate court is to be achieved, it is essential so to do by getting what I may call a combined judicial operation. Two heads it is said are better than one, but only if they work truly together. Otherwise individual opinion of each of the three appellate judges may have no obvious primacy over the view of the trial judge. If, therefore, the members of the appellate court are constantly having to change (and I leave aside the mechanical difficulties which would clearly arise if constant change of personal were necessary), then those Judges constituting the Court would not sit often enough together, acquire the faculty of working not individually but in cooperation with their brethren and again - with us, where we have much specialization in our Courts, separate and distinct divisions of the High Court - each Judge would find a high percentage of the appellate work he was called upon to do, work of which he had had little or no experience, which was almost entirely strange to him. This essential quality of a combined judicial operation is indeed not easy to obtain".

As an abstract proposition, I think the balance must come down in favour of a permanent appellate bench. However, it is necessary then to test the applicability of this generalized conclusion against the situation which will obtain in Australia if an integrated court system is put in place.

The advantage to be derived from Court of Appeal with a small number of members customarily working together, would be difficult of attainment whatever model is chosen. On the original Burt proposal, the A.C.A would have to travel around the country, to some extent at any rate, to dispose of appeals in Tasmania, South Australia and Western Australia. There simply would not be sufficient appellate work to justify the appointment of 3 permanent Judges of Appeal in each of those States. If one or more Judges of Appeal are appointed from the less popular States they presumably would have to travel inter-State when, as would frequently be the case, there was no appellate work in their home State. Thus the practice of working together lauded by Lord Evershed would be lost. It would be retained if each Territorial Divison of the SCA contributed a collegiate Bench. Between times members would engage in the ordinary work of trial judges. In the more populous States the constitution of the Bench would be a matter of choice for the Chief Justice of the Division. He could, if he wished, call on only a limited number of the judges of the Division to hear appeals. If he wished he could have a de facto Court of Appeal. Even so, sitting at first instance, from time to time would ensure that they kept in touch with the daily problems of trial work. The consistency of approach between appellate benches sitting in Perth and Brisbane, would be neither greater nor lesser in a collegiate territorial appeal bench then if the A.C.A. came into existence.

There are in fact, considerable advantages in constituting the appellate branch on a collegiate basis from members of the territorial trial division which do not

arise in countries which do not face the problem presently before us. These problems have been re-capitulated in papers by Moffitt P. and Neasey J.. The notions that the Government of a State would not care to have its legal problems resolved by an intermediate Court of Appeal such as the A.C.A, whose membership would largely, if not entirely, be out of State personnel would be largely met. There would be a strong infusion of local experience, and knowledge if that were appropriate, in the judgments of members of the intermediate appellate body. Again, the problems of accommodating local disciplinary questions could more readily be resolved.

It might then be asked, why not simply retain the present system? The answer I believe to be simple. A nationally constituted court, with a federal division, if that be desired, would both avoid the present jurisdictional difficulties and exercise jurisdiction throughout Australia. Because it would be the one court, albeit generally sitting in terrritorial divisions, it could meet within realistic bounds the demands of consistency. It would also permit matters of high interest to the Commonwealth to be channelled to the federal division and matters of importance to local State government to be determined by territorial divisional judges both at trial and intermediate appellate levels.

Failing acceptance of a collegiate appellate bench, all matters presently heard by a bench of three Supreme Court judges, with the exception of criminal appeals, should go to the A.C.A.. This approach would at least ensure that there is no doubt as to where an appeal lies. I believe

it would be much more difficult to obtain political consensus on this approach. However, splitting appeals between a Supreme Court appellate bench and an A.C.A. would merely create a fresh field for discord and confusion.