NEW RULES ON WRITTEN SUBMISSIONS IN THE FULL COURT AND COURT OF CRIMINAL APPEAL

THE HON. JUSTICE MARTIN HINTON, SUPREME COURT OF SA

In my early days of practice, counsel would produce a skeleton argument to assist in the conduct of an appeal or application. Generally, a skeleton tended to be a statement of the propositions intended to be advanced and which, if accepted, would support the relief sought. Oral submissions would follow the structure of the skeleton and apply flesh to the bones.

In time skeletons gave way to outlines of argument. An outline performed the same function as a skeleton but was a more a substantial document. Whilst the outline was not in the nature of a written submission, it tended to include a summary of the facts or important facts, a recitation of the relevant legal principles, and the argument advanced in proposition form. Brevity remained the ideal.

The outline is now an entrenched component of the practice of the advocate. They are routinely deployed in all jurisdictions in all types of matter. Their use is encouraged and welcomed by judicial officers.

The wide use of outlines has been driven in no small part by the demands upon the judiciary and by the demands and complexity of modern practice. From the judiciary's point of view, scarce judicial resources demand greater efficiency in the conduct, hearing, and disposition of matters. In this regard the outline has proven a valuable tool; it permits a focused preparation by judicial officers, ensures that the advocate travels more speedily to the core of the argument, lays bare the critical issues in the dispute allowing for targeted debate and testing, ensures the parties truly join issue, and serves as a reminder to judicial officers of the debate and the parties' arguments long after the hearing has ended. Outlines are now indispensable to the work of appellate courts in particular.

In more recent times outlines have come to resemble able-bodied persons of considerable girth by comparison to their predecessor the skeleton. They have also come to perform a function that ill-fits their description in the rules as outlines. Generally, they have become more akin to written submissions.

Before my appointment, my own written submissions prepared for the Full Court and Court of Criminal Appeal could not be described as outlines. They were written submissions and intended as such. I found a written submission allowed me to close with the argument quickly and to spend my time on my feet in active discussion with the bench on the content of legal principles and their application. The fulsome written outline meant that I need not address every point orally as I could rely upon what had been written. I could also focus upon what was critical, safe in the knowledge that everything that needed to be put, was, in the combination of oral and written submissions, put. My perception was that the prepared judge appreciated the approach. Bearing in mind the value that the Socratic method is intended to bring to the appeal proceeding, I found an appeal conducted before a bench that has had the opportunity to digest a comprehensive written submission efficient and effective.

As of 1 December, 2017, the rules of the Supreme Court governing appeals in the Court of Criminal Appeal and Full Court were amended. The outline of argument is no more. In its place the Full Court and the Court of Criminal Appeal now require written submissions. This change signals a sea change in the Court's expectations of those appearing in the Full Court and Court of Criminal Appeal.

The purpose of this article is twofold; first, to provide notice of the rule changes and their content, and, second, to provide some indication as to the expectations of the Full Court and the Court of Criminal Appeal.

Necessarily this article reflects my opinion. The reader should bear this in mind. The views expressed are my own. Nonetheless, they may be of assistance to the appellate advocate and those who would be appellate advocates.

WRITTEN SUBMISSIONS ARE NOW REQUIRED IN THE FULL COURT AND COURT OF CRIMINAL APPEAL

Rule 297 of the *Supreme Court Civil Rules 2006* ("SCCivR"), which applies to all appellate proceedings in the Supreme Court, save those to which the *Supreme Court Criminal Rules 2014* (SCCrimR) apply, provides:

297 – Summary of Argument or Written Submissions for Hearing of the Appeal

1. Each party to an appellate proceeding must deliver to the Court a summary of the party's argument in the case of appeals to a single judge or a written submission in the case of appeals to the Full Court.
2. The summary of argument or written submission (as the case may be) must be delivered to the Court within the relevant time limit prescribed by the Supplementary Rules.
3. Subject to any direction by a Judge or Master, a summary of argument or written submission (as the case may be) must conform with the Supplementary Rules.

As mentioned, rule 297 came into operation on 1 December, 2017.

The distinction drawn by SCCivR 297(1) between a summary of argument and a written submission is obvious and intended. It indicates that a written submission is a different creature to a summary of argument. The latter, as its name makes plain, is a summary. By contrast the former *is* the party's submission in support of the grounds of appeal. Not being a summary, the written submission is intended to be comprehensive.

Rule 125A SCCrimR, which also came into operation on 1 December, 2017, similarly requires each party to a criminal appeal[1] in the Full Court to deliver a written submission to the Court within the relevant time limit prescribed by the Supplementary Rules and conforming to the requirements of those rules.

The form and content of a written submission provided to the Full Court in purported compliance with SCCivR 297 is the subject of rule 243 of the *Supreme Court Civil Supplementary Rules 2014* (SCCivSuppR). Rule 243 SCCivSuppR provides:

Subject to any direction by a Judge or Master, a summary of argument or written submission (as the case may be) must conform with the Supplementary Rules.

243 – Form and content of written submissions

1. A written submission is not to exceed 20 pages without the prior permission of the Court.
2. A written submission is to-
   a. contain a concise statement of the issues raised by the appeal and of facts on which the party relies;
   b. provide the Court with an outline of the steps in the argument to be presented on each issue;
   c. comprise a written submission in the appeal with each contention to be advanced by the party followed by a reference to authorities (giving paragraph or page numbers), legislation (giving section numbers), relevant passages of the evidence and exhibits and/or the reasons for the judgment under appeal;
   d. if a party intends to challenge the reasoning of the judicial officer at first instance, identify any relevant passage in the reasons for judgment;
   e. if a party intends to challenge a finding of fact:-
      i. identify the relevant finding or failure to make a finding;
      ii. state concisely why the finding or failure to make a finding is said to be erroneous;
      iii. identify the finding that the party contends should have been made; and
      iv. give reference to the evidence to be relied upon in support of the argument and
   f. if a party intends to challenge a finding of law, or the appellate proceeding is in the nature of the reservation or reference of a question of law, identify the relevant decided cases and the relevant legislation.
   g. identify any ground of appeal that is not to be pursued.
3. Except when necessary to identify the error at first instance, a written submission should not set out passages from reasons for a judgment under appeal, from the evidence, or from the authorities relied upon, but is instead to be a guide to those materials.

Rule 70(1), (3) and (4) of the *Supreme Court Criminal Supplementary Rules 2014* ("SCCrimSuppR") require the same for appeals against conviction heard by the Full Court sitting as the Court of Criminal Appeal.

The form and content of written submissions in appeals against sentence are differently treated. Rule 70(2) SCCrimSuppR provides:

(2) A written submission on an appeal against sentence is –
   a. not to exceed 10 pages without the prior permission of the Court;
   b. for the appellant, is to be in form 56A;
   c. for the respondent, is to be in form 56B;
   d. for the applicant in a Crown appeal, is to be in form 56C.

Forms 56A, 56B and 56C control the content of a written submission filed in support of an appeal against sentence to be heard by the Full Court by requiring that the parties address the given headings and

sub-headings contained in each form. For an appellant, form 56A requires that the following be addressed in the order stated:

Part 1: Concise Statement of Issues Presented by the Application/ Appeal
Part 2: The Sentence Appealed Against
A. Offence(s) for which the Applicant/ Appellant was sentenced and related maximum penalties
B. The sentence imposed
C. The factual basis for the offending
D. The harm, loss or injury sustained by the victim
E. The personal circumstances of the applicant/appellant
Part 3: Legislative Provisions
Part 4: Argument
Part 5: Orders Sought

For the respondent, form 56B requires that the submission address the following in the order as stated:

Part 1: Facts of Findings Disputed
Part 2: Legislative Provisions
Part 3: Argument in Response

Bearing in mind the particular principles applicable to an application by the Crown for permission to appeal against sentence, form 56C requires that the Crown address the following in its written submission filed in support of an application for permission to appeal against sentence in the order as stated:

Part 1: Concise Statement of Issues Presented by the Application/ Appeal
Part 2: The Sentence Appealed Against
A. Offence(s) for which the Respondent was sentenced and related maximum penalties
B. The sentence imposed
C. The factual basis for the offending
D. The harm, loss or injury sustained by the victim
E. The personal circumstances of the respondent
Part 3: Legislative Provisions
Part 4: Reasons Why Permission to Appeal Should be Granted
Part 5: Reasons Why an Appeal Should be Allowed
Part 6: Orders Sought

To state the obvious, written submissions are not intended as a complete substitute for the oral hearing. The written and the oral are intended to share a symbiotic relationship. There can be no doubt that the Full Court expects that the introduction of written submissions will promote the speedy and efficient hearing of appeals. The written submission allows counsel to marshal and present detailed evidentiary and case law references without needing to go to those materials in the course of oral submissions. Freed from having to descend to the evidence and authorities unless necessary, and relying upon the judges having read the submissions in advance of the hearing of the appeal, counsel can more speedily engage with the issues in dispute.

Despite the function of written submissions, the importance of oral submissions should not be underestimated. In this regard Kiefel CJ has observed:

> *"It can hardly be doubted that the opportunity for dialogue is of benefit to judges. It allows for fuller examination of the facts, referenced to the evidence; it permits discussion of the approach taken in the argument; it may elicit a more direct answer to different approaches to an issue; it allows for the resolution of uncertainties about what was said in written submissions; it allows arguments to be tested. The problem of the oral argument being too long, usually because it is not properly prepared, discursive and repetitive, should in theory occur less in the dual regime of written and oral argument, at least where the written submissions identify the arguments which are sought to be advanced."* [2]

Self-evidently it is not intended that counsel simply take the Court through the written submission. Two points should be made here; first, the oral submission complements the written. It is necessary then that the Court know how the oral submission relates to the written submission. If counsel is asked, "where is this addressed in your written submissions?" a problem in the representation of the argument has occurred. Second, and related to the first, rule 245 SCCivSuppR and rule 74 SCCRimSuppR permit, but do not require, counsel to lodge a skeleton outline of the propositions that the party intends to advance in oral argument. Skeleton arguments are to be lodged with the Court no later than the commencement of the hearing. Beyond the length of the skeleton being limited to three pages, the content is not prescribed save that the propositions to be advanced are to be stated sequentially in the order intended to be addressed.

The skeleton outline of oral submissions has been a part of High Court practice for some years. In my experience they contributed greatly to the appeal hearing. Skilfully used, the skeleton, which I emphasise is not a supplementary written submission or an outline of argument, enables a structured approach to the oral argument that makes plain the relationship of the oral submission to the written submission and allows the court to follow counsel. Hence, SCCivSuppR 245(2)(e) requires a skeleton of oral argument to cross refer to written submissions. The skeleton, written submission and oral argument, complement one another to ensure that counsel presents a coherent, comprehensive and cohesive case. It goes without saying that all must link back to the Notice of Appeal and the grounds it contains.

I would encourage counsel to utilise the three-page skeleton.

Turning from the appeal hearing, it is obvious that written submissions are expected to be of great assistance in judgment writing. In fact, Forms 56A, 56B and 56C provide a structure to written submissions for sentencing appeals that readily translate to a judgment structure. The more significant point is the expectation of counsel as

Beyond the length of the skeleton being limited to three pages, the content is not prescribed save that the propositions to be advanced are to be stated sequentially in the order intended to be addressed.

to content. Written submissions must be comprehensive. To leave something to be dealt with orally, or to leave the development of an argument to oral submissions, or, worse still, raise but never develop an argument leaving it floating, is not an option. The intellectual rigour expected of the Court should be reflected in counsel's written submissions, and the Court should expect nothing less. It follows then that the Court is expecting a high standard of oral and written argument and counsel can expect that the Court will demand that this standard be consistently met.

SOME SUGGESTIONS ON CONTENT

Despite rules 243(2) SCCivSuppR and 70 (3) and (4) SCCrimSuppR, and putting sentence appeals to one side, the structure of a written submission is very much up to the individual. What follows are some pointers that may assist. Many advocates may have read the same or similar before. I do not apologise for this. It is no bad thing for the experienced advocate to be able to reflect from time to time on his or her approach.

A 20 page limit. A written submission is limited to 20 pages in length. It is not required to be 20 pages in length. Brevity remains prized.

Be aware of the rules regarding font, font size, line spacing and margins. Do not think that judges will fail to spot the abuser or will turn a blind eye to abuse of the rules. Bear in mind that written submissions and any abuse of the rules reflect upon the individual's professionalism.

The nature of the appeal. It will be important that counsel understand the nature of the appeal and the consequent limits on the power to interfere. Knowing when and in what circumstances the court can interfere is critical to identifying error and structuring a related and effective argument. The same knowledge should be reflected in the grounds contained in the Notice of Appeal.

A logical structure. In his article, *Writing a Better Brief*, Andrew Baida refers to IRAC - Issue, Rule, Application, Conclusion.[3] As an organizational structure for an outline it has much to commend. An alternative is CRAC – Conclusion,[4] Rule, Analysis and Cases. These are not the only possibilities.[5] The point is, a structure must be adopted that promotes understanding of the issue, the argument and the resolution proposed.

Identify the issue. It is good practice in any submission to commence by identifying the issue that the Court is asked to resolve. In a paper delivered as part of the Continuing Legal Education program of the Victorian Bar, Hayne J, as he then was, gave the example of a capital case where the accused had been denied an adjournment of his trial. He formulated the issue as follows:

> *"John Smith will likely be convicted of murder and sentenced to death at next week's trial unless he can lead evidence of his mental retardation. Smith's expert on mental retardation must undergo emergency surgery to remove a cancer that his doctors have just discovered. Did the trial court abuse its discretion in refusing to grant Smith an adjournment?"*[6]

Justice Pagone, quoting from Bryan Garner's, *The Winning Brief*, provides a second example:

> *"Leonard Slocum Jr, a mentally retarded minor whose father has physically abused him, has become the state's ward and begun a rehabilitation program that has helped him demonstrably. His father, Slocum Sr, petitioned to become Leonard Jr's guardian, but the court found him unfit because of the abuse and because he has sired four illegitimate children by a 25 year old mentally retarded woman – formerly his ward. Did the court abuse its discretion?"*[7]

In each case the identification of the issue is succinct, direct and calls for an answer. Most importantly, the issue skillfully crafted suggests at the very outset the answer. It is a powerful approach when done properly. In this regard it should be borne in mind that written submissions commence the task of persuasion long before the appeal commences and carry it on long after counsel has sat down.

Identify the error. Related to identification of the issue is the need to identify the error. Tell the court where precisely to find it in the judgment under appeal.

The argument. I always found it helpful to identify the legal or factual propositions upon which the argument was based, before elaborating in order to make good the proposition. The controlling propositions should feature in the skeleton outline of oral submissions.

Headings and sub-headings. Headings and sub-headings, perhaps framed as rhetorical questions, may assist in signposting issues and tying arguments together. Such techniques allow the reader to understand where a written submission is going and how it ties into oral submissions:

> *… A reader who cannot follow why or how something is written, may not take the time to work it out or might follow connections or lines of inquiry that the writer did not intend. The writer may have a significant point to make, but its effect may be lost if the reader cannot see it. In complicated or lengthy texts it may be useful to have an introduction explaining the structure of a document and to set out the text with headings, numbered and sub-numbered paragraphs, and other signposts which tell the reader what is being read and why it appears where it does. It is useful to have connective phases in the text which link one part of the text with another. This technique also provides a useful discipline upon the writer who may otherwise lose focus of the object of writing (namely to carry the reader along particular paths and to particular conclusions) and meander along lines which come to the writer's mind more haphazardly than necessary for the task.*[8]

Address the opposing argument and the shortcomings in your case. Perhaps the most difficult task is to address your opponent's argument and the shortcomings in your own case. In doing so the aim is to persuade the court that your opponent's argument does not lead to the right conclusion and that, despite the shortcomings in your own case, your argument should succeed as it leads to the right conclusion. Do not ignore the shortcomings in your case; to do so has the potential to undermine the force of

the argument you present. Logic dictates that you deal with the shortcomings in your case as they arise during the unfolding of your argument, and that you deal with the rebutting argument once you have put your own argument.

The law. This is difficult. How much do you put in? Judges do know a great deal about the law and in particular the powers and the procedures of the court. But "[J]udges, as anecdotal evidence suggests[9] and empirical research tends to confirm,[10] are human."[11] They cannot be expected to retain or think of everything. Also, on multi-member benches, knowledge and experience is variable. In the end a judgment call must be made. As an advocate, I erred on the side of caution. As a Judge I prefer going back to the basics. I am grateful then for the time saved by at least a footnote with the relevant authority.

Footnotes. Think about the use of footnotes. They are a potential trap in two respects. First, they distract from the flow of the written argument. Second, counsel are sometimes tempted to put in the footnote an idea that has no obvious place within the argument. On the other hand, footnotes can be very useful as the place where citations and references are parked so as not to distract from the flow of a written argument. As counsel I avoided using them as the place for argument. If an issue is important enough, I see no reason why it should not feature in the body of the text. Think carefully then about what you place in your footnotes.

Quotations. Think about the inclusion of quotations. Wherever a document includes a lengthy quote I often skip over it in my haste to work out what it is that is being said. I suspect this is something many advocates and judges do. If you are going to include quotations, and I often did because I could not say it better than as stated in the quotation, it becomes important to be strategic in their use in your argument.[12]

Authorities. Be selective. Six authorities that re-state the same proposition need not be cited. Which is authoritative? Never lose sight of the difference between the *ratio decidendi* and *obiter dicta*. Be mindful of *stare decisis* - what is binding? What is persuasive? It remains the case the counsel should refer the Court to authorized reports unless the particular authority has not been reported in the authorized reports. Personally, I am grateful for all the help I can get. I am not at all adverse to authorities from the far-flung corners of the common law world, if they can genuinely assist. My attitude is the same in relation to academic works.

Transcript references. Include transcript references, exhibit references, references to the judgment under appeal and references to case law. Doing so is particularly helpful to the judges.[13] It also reduces the amount of note taking by the judge during the argument, leaving the judge free to listen to the argument and engage counsel.

Clarity. Clarity of expression is critical to being understood. Write plainly. Avoid hyperbole and epithets. Use Latin advisedly. I defer to Julian Burnside QC:

> *"The English language is richly endowed. It has a bigger available vocabulary than any other language: at least 250,000 individual words not counting duplicates and specialized, technical words. The principles which guide the structure of a piece and the framing of sentences are similar to those which guide the choice of words. These principles have been adopted in one form or another by Strunk and White, George Orwell and H W Fowler and include at least these:*
> *prefer plain words over fancy ones*
> *prefer short words over long ones*
> *prefer familiar words over exotic ones*
> *But each of these principles has to acknowledge the power of effective metaphor and (occasionally) a rare or exotic word which lends colour or emphasis."*[14]

Latin. Use Latin where it describes an established legal concept. Do not use it, however, as an alternative to English, unless it provides a far more economical way of stating a proposition.

Acronyms and definitions. Beware of acronyms and definitions in parentheses. Overuse is distracting and can make for difficult reading.

Give yourself time, including time to edit. I refer to Hayne J:

> *"Again, the preparation of written argument takes time. It takes time to formulate what has to be said and then to edit it properly. When I speak of editing the written argument I do not mean only making sure that there are no errors of fact and no typographical errors, although those are common enough in written arguments. I mean that you must refine the argument. Cut out the epithets and intensifiers and produce an argument that self-evidently stands on its own feet."*[15]

Do not underestimate the effect of proof reading and final production. The persuasive impact of your summary can be undermined by sloppiness in production. Once you have arrived at what you think is the finished product you must force yourself to critically examine what you have written one more time. Check punctuation. Check references. Check quotations. Check spellings. Break up those long and tortured sentences. Stay within the page limit. Use the correct font, and keep it simple.[16]

I conclude quoting the former Chief Justice:

> *"…I cannot overemphasise the importance of the timely filing of the outline. A late outline is unlikely to receive the attention that it would otherwise get if delivered on time, because by the time it arrives the judge would have moved on to the preparation of another matter. I can only conclude that despite what judges keep saying, many counsel fail to understand the strategic advantage of the timely filing of a good quality outline."*[17] B

Endnotes

1 Criminal appeals to which rule 125A applies are identified in rule 105 SCCrimR 2014.

2 The Honourable Justice Susan Kiefel, *Oral Advocacy – The Last Gasp?*, Supreme & Federal Court Judge's Conference, Canberra, 27 January 2010. Se also, The Honourable Justice J D Heydon AC, *Aspects of Rhetoric in Forensic Advocacy Over the Past 50 Years*, in J T Gleeson and R C A Higgins (Eds), *Rediscovering Rhetoric; Law, Language and the Practice of Persuasion* (2008, Federation Press) at 241.

3 A. Baida, *Writing a Better Brief: A Useful Guide to Better Written Submissions in Appellate Advocacy* (2002) 22 Aust Bar Rev 149.

4 The Hon Justice G T Pagone, *Written Advocacy: Writing with Effect and Persuasion*, in Gray, Hinton and Caruso (Eds), Essays in Advocacy, (2012, Barr Smith Press) at 127.

5 A third approach. David Jackson QC has written; "There is no special mystery about appeals. As in any litigation the secret of success is to know what you are doing, and why. In appeals that manifests itself in three broad issues. They are:
(a) what aspect of the judgment below is being attacked?
(b) why is it said to be wrong?
(c) what is the consequence if it is wrong?
D F Jackson QC, *Appellate Advocacy* (1991) Aust Bar Rev 245 at 247.

6 The Hon Justice K Hayne AC, *Written Advocacy*, Paper delivered as part of the CLE Program of the Victoria Bar (5 and 26 March 2007).

7 The Hon Justice G T Pagone, *Written Advocacy: Writing with Effect and Persuasion*, in Gray, Hinton and Caruso (Eds), Essays in Advocacy, (2012, Barr Smith Press) at 120. See also A. Baida, *Writing a Better Brief: A Useful Guide to Better Written Submissions in Appellate Advocacy* (2002) 22 Aust Bar Rev 149.

8 The Hon G T Pagone, *Written Advocacy: Writing with Effect and Persuasion*, in Gray, Hinton and Caruso (Eds), *Essays in Advocacy*, (2012, Barr Smith Press) at 122.

9 See eg Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (W S Hein, 1960) 30-1; Cass R Sunstein, *Why Societies Need Dissent*, (Harvard University Press, 2005) 166-82.

10 See eg Cass R Sunstein, David Schkade and Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation* (2004) 90 Virginia Law Review 301; Cass R Sunstein et al, *Are Judges Political? An Empirical Analysis of the Federal Judiciary* (Brookings Institution Press, 2006) 63-78; Lee Epstein, William M Lands and Richard A Posner, *The Behaviour of Federal Judges: A Theoretical and Empirical Study of Rational Choice* (Harvard University Press, 2013) especially ch 5; Chris Guthries, Jeffrey J Rachlinski and Andrew J Wistrich, *Blinking on the Bench: How Judges Decide Cases* (2007) 93 Cornell Law Review 1.

11 The Hon Justice S Gageler AC, *Why Write Judgments?* (2014) 36 Syd LR 189 at 198.

12 The Hon Justice K Hayne AC, *Written Advocacy*, Paper delivered as part of the CLE Program of the Victoria Bar (5 and 26 March 2007).

13 The Hon J Doyle AC, *Appeals before the Full Court and the Court of Criminal Appeal,* in Gray, Hinton and Caruso (Eds), *Essay's in Advocacy* (2012, Barr Smith Press) at 543.

14 J Burnside QC, *The Advocate and Language*, in Gray, Hinton and Caruso (Eds), *Essays in Advocacy*, (2012, Barr Smith Press) at 137-8.

15 K Hayne, Advocacy in the High Court of Australia, An Address to the Western Australian Bar Association, 25 October 2004. See also The Hon Justice K Hayne AC, *Written Advocacy*, Paper delivered as part of the CLE Program of the Victoria Bar (5 and 26 March 2007).

16 See also A. Baida, *Writing a Better Brief: A Useful Guide to Better Written Submissions in Appellate Advocacy* (2002) 22 Aust Bar Rev 149.

17 The Hon J Doyle AC, *Appeals before the Full Court and the Court of Criminal Appeal*, in Gray, Hinton and Caruso (Eds), Essay's in Advocacy (2012, Barr Smith Press) at 454).