Dear Ms Attorney

Supreme Court (Court of Appeal) Amendment Bill 2019

1. I refer to your letter of 9 September 2019 in relation to the Supreme Court (Court of Appeal) Amendment Bill 2019 ("the Bill").

2. The Bill seeks to establish a Court of Appeal in South Australia. It is proposed that the Court of Appeal will be established as a division of the Supreme Court of South Australia, with a separate General Division for the matters that are not to be heard by the Court of Appeal.

3. Under the proposed model the Chief Justice will remain the principal judicial officer of the Supreme Court, including the Court of Appeal. The Court of Appeal will be comprised of the Chief Justice, President of the Court of Appeal and the judges of the Supreme Court who have been appointed to the Court of Appeal.

4. It is proposed that the jurisdiction of the Court of Appeal will be the existing jurisdiction of the Full Court of the Supreme Court and the Court of Criminal Appeal. The jurisdiction of the General Division will be the current jurisdiction of the singles judges of the Supreme Court and will include the current jurisdiction of the Land and Valuation Division of the Supreme Court.

5. The Society has consulted its Members and relevant Special Interest Committees with respect to the proposed Court of Appeal. Provided below for your consideration are the comments received from Members in relation to the proposal, including such matters as the need for a specialist appellate court in South Australia and the requirements as to the constitution of the Court of Appeal.

Is a specialist appellate court required in South Australia?

6. The Society understands that South Australia remains one of the only jurisdictions yet to establish a Court of Appeal. While most Members took no issue with the proposal in principle, there were questions raised as to whether a specialist appellate court is necessary in this jurisdiction and whether resources could be better directed elsewhere. A number of these questions were raised at our meeting of 30 September, including:

6.1 Whether there is a sufficient volume of work in south Australia to justify a specialist appellate court?
6.2 What are the financial implications of the proposal? In particular, how many new judicial appointments will be required?

6.3 How will the proposal impact a court system that is already under financial strain?

7. It was indicated by you during our meeting on 30 September 2019 that approximately 50% of the current workload of the Supreme Court is appellate work. You were unable during our meeting to advise the number of judicial appointments that would be made as a result of the establishment of the Court of Appeal and advised that you would continue to consult with the Chief Justice about the appointments, including the number of appointments and where the Justices of the Court of Appeal would be accommodated.

8. The Society has advocated on an ongoing basis against the continued reductions in funding to court services. These reductions have resulted in the closure or downsizing of suburban and regional courts and registries, a reduction in circuit courts, a reduction in court staff, and chronic delays across the State’s courts and tribunals.

9. Measures which seek to improve access to justice and the efficacy of the courts are welcomed by the Society. However, there were mixed views expressed by Members as to the need for a specialist appellate court and whether it would deliver increased efficiency in the court system. Some considered that appellate work and principles are not a discrete area of law in which specialisation will produce faster or better results, as opposed to specialisation in specific areas of law (i.e. construction, tax, family, criminal, personal injury etc.), where specialist judges and judge managed case lists would be likely to improve efficiency.

10. At this time the financial implications (i.e. the additional resources required) of the proposal are unknown, therefore, the Society is limited in making comment other than stating the need to ensure that any additional cost to the Court is matched with increased funding.

11. An additional concern raised was whether the proposal might actually limit the flexibility offered with respect to the movement of judges (i.e. to suit the demands of the Supreme Court) under the current model and whether it may serve to decrease efficiency in this regard. This issue is discussed further below with respect to the general requirements as to the constitution of the Court of Appeal.

12. During our meeting the Society questioned the timing of the proposed Court of Appeal, in particular whether the Court will be established before or after the roll out of the Electronic Court Management System (ECMS). It was suggested that if the Bill is passed by the Parliament this year, the Court of Appeal is expected to be operational by late 2020. The Society noted concerns raised by Members in this regard as to the concurrent rolling out of ECMS and the establishment of the Court of Appeal.

General requirements as to constitution of Court of Appeal

13. The Society notes the Bill provides the following under section 19C:

   (1) subject to this or any other Act, and to the rules of court, the Court of Appeal will be constituted of not less than 2 judges when hearing and determining any matter.

   (2) the decision of the Court of Appeal when constituted by 2 judges is to be in accordance with the opinion of those judges or, if the judges are divided in opinion, the proceedings are to be
14. The Society is concerned that the approach set out in section 19C(2) may potentially lead to the duplication of cost for the parties (and the courts) should a matter be heard by two judges. The Society considers the Bill should be revised so that the Court of Appeal would be constituted by three judges of appeal and if the judges do not agree, the majority view prevails.

15. The Society is aware that in most other jurisdictions a Court of Appeal bench is generally made up of three judges and can vary depending on the type of matter being heard. It was noted by you at our meeting of 30 September that the proposed Bill has been modelled on the Western Australian Court of Appeal.

16. While the WA Supreme Court Act 1935 stipulates that the Court of Appeal shall be constituted by “2 or more judges of appeal”, the Society understands that usually matters in the Western Australian Court of Appeal are determined by a panel of three judges, although some matters will be heard by two judges or by a single judge. For example, it is stipulated that there must be three judges of appeal with respect to certain matters under the Criminal Appeals Act 2004 (WA).

17. Furthermore, the Society notes section 47 provides that if the Chief Justice and President agree that an acting judge from the General Division is able to sit in the Court of Appeal (and vice versa) for a period not exceeding 6 months. While the Society is unaware of the total number of judicial appointments anticipated to the Court of Appeal, this provision would hopefully ensure despite the number of appointments, that two judge panels would be the exception as opposed to the norm.

18. If the Court of Appeal is established, it is important that the model is reflective and responsive to the needs of this jurisdiction, with sufficient flexibility to ensure matters are being heard efficiently. In this regard, the Society suggests that it may be appropriate to include a provision in the Bill which codifies the existing practice, whereby a single judge of appeal is able to hear applications for permission to appeal and other interlocutory/procedural matters (with similar rights of review).

19. In addition, it has been suggested that it may also be appropriate to include a provision to codify the existing practice where a major legal issue is involved, or the Court of Appeal is being asked to overrule an existing Court of Appeal precedent, that a five judge Court of Appeal can be convened.

Land and Valuation Division

20. The Society notes that as part of the proposed Court of Appeal, the Land and Valuation Division of the Supreme Court will be abolished and subsumed within the General Division. It was suggested by Members that the user friendly rules of Court which currently apply in this Division should be retained.

I trust these comments are of assistance. The Society would be grateful to be further consulted as additional details pertaining to the proposal are finalised.

Yours sincerely

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PRESIDENT

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