ACT Government

WRONGFUL CONVICTION: REFORMS TO THE RIGHT TO APPEAL AND RIGHT TO COMPENSATION

A Discussion Paper

Justice and Community Safety Directorate

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INTRODUCTION

The ACT Government is considering two matters in relation to appeals against conviction and is seeking the views of the ACT community.

The first matter is how the ACT should deal with convictions where new evidence has come to light. Three Australian jurisdictions have already legislated in relation to this issue, and the ACT Government committed to considering reforms in the Parliamentary and Governing Agreement for the 10th Legislative Assembly.

The second matter is how a person should be compensated for wrongful imprisonment.

This paper sets out proposals in relation to both matters and questions for consideration. It also provides background and context for the proposals.

PROPOSALS

Proposal 1: Introduce a second or subsequent right to appeal against conviction on the grounds of fresh and compelling evidence

The proposal under consideration by the ACT Government would result in amendments to the *Supreme Court Act 1933* to provide opportunities for a person to appeal their conviction on the grounds of fresh and compelling evidence. The proposed amendment would not replace current rights to appeal but would provide additional opportunities for a person to appeal against their conviction when all other appeal rights are exhausted.

Questions

The ACT Government is seeking the community's views on this law reform proposal. All interested persons are welcome to make a submission in response to the proposal in general, or in relation to the questions below.

1. Do you support the ACT introducing a second or subsequent right to appeal against conviction?
2. Do you support an approach based on the current legislation in other Australian jurisdictions?
3. Do you have any concerns with the proposal?
4. Should the right to appeal against conviction on the grounds of fresh and compelling evidence apply to all criminal convictions for both summary offences and indictable offences?
5. Should the right to appeal against conviction on the grounds of fresh and compelling evidence be limited to certain categories of offences? Examples of categories are indictable offences, serious offences, or offences specified in legislation.
6. If there were limitations on the offences to which the right of appeal applied, should it be possible to also appeal convictions for related summary offences?
7. Should there be any additional specified criteria for granting an appeal, such as a requirement that the fresh evidence would have eliminated or substantially weakened the prosecution case if it had been presented at trial?
8. What orders should a court be able to make following a successful appeal?
9. Are there any elements of the South Australian, Tasmanian and Victorian models which should not be adopted in the ACT? If so, why?
10. Are there any elements of the South Australian, Tasmanian and Victorian models which should be adopted in the ACT that have not been proposed? If so, why?

Proposal 2: Reform to the right to compensation for wrongful conviction

The ACT Government is considering how to provide greater certainty regarding the right to compensation for wrongful conviction in the *Human Rights Act 2004* and how this right is to be given effect. Two options are under consideration: the creation of a stand alone statutory regime and establishing an administrative scheme under the *Human Rights Act 2004* (ACT).

Questions

The ACT Government is seeking the community's views on this law reform proposal. All interested persons are welcome to make a submission in response to the proposal in general, or in relation to the questions below.

1. Should the ACT adopt a statutory scheme for compensation for wrongful conviction?
2. Should the *Human Rights Act 2004* (ACT) be amended to provide that the right to compensation for wrongful conviction will be determined in accordance with guidelines developed under the Human Rights Act that must be applied in assessing these claims?
3. Do you have any alternative proposals you think the ACT Government should consider?

PROPOSAL 1: INTRODUCE A SECOND OR SUBSEQUENT RIGHT TO APPEAL AGAINST CONVICTION ON THE GROUNDS OF FRESH AND COMPELLING EVIDENCE

In the ACT, there are a number of appeal mechanisms, including the right to appeal orders of the Magistrates Court and Supreme Court,[1] questions of law arising at or in relation to the proceeding,[2] cases stated or questions reserved by the court,[3] and prosecution appeals of acquittals.[4] The most relevant appeal right for the purposes of this paper is that a person who has been convicted can lodge an appeal against their conviction.[5]

Existing options to appeal against conviction

A person convicted of an offence may appeal their conviction to the Supreme Court (for an appeal from conviction heard in the Magistrates Court)[6] or the Court of Appeal (for an appeal from conviction heard in the Supreme Court).

On an appeal against conviction, the Court of Appeal must allow the appeal if it considers that:

- the jury verdict is unreasonable, or cannot be supported, having regard to the evidence; or
- the judgment should be set aside because of a wrong decision of a question of law; or
- on any other grounds where there was a miscarriage of justice.[7]

However, the Court of Appeal may dismiss the appeal if it considers no substantial miscarriage of justice has occurred, even if the appeal might be decided in favour of the appellant.[8]

If the appeal is allowed, the Court of Appeal can either set aside the verdict and order a verdict of not guilty or order a new trial.[9] When hearing an appeal, the Court of Appeal *must* have regard to the evidence given in the original proceeding and *may* receive further evidence.[10]

A convicted person may only appeal their conviction once on these grounds. Once this right to appeal against conviction has been exhausted, a person may appeal to the High Court, which is the final appeal court level. However, the High Court only grants leave to a small number of criminal cases and is unable to admit fresh evidence on an appeal.[11]

A convicted person may also request the Executive to exercise the prerogative of mercy or seek an inquiry into the conviction, as discussed below.

The limitation with current appeal rights is, if new evidence emerges only after appeal rights have been exhausted, and that evidence, had it been available in previous proceedings, may have resulted in an acquittal, the convicted person would not be able to pursue an appeal.

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[1] *Supreme Court Act 1933* (ACT) s 37E(2)(a).
[2] *Supreme Court Act 1933* (ACT) s 37S(2). Note that the decision on this type of appeal (reference appeal) does not invalidate or affect any verdict or decision given in the proceeding.
[3] *Supreme Court Act 1933* (ACT) s 37E(2)(c).
[4] *Supreme Court Act 1933* (ACT) s 37E(d).
[5] *Supreme Court Act 1933* (ACT) s 37O(2).
[6] *Magistrates Court Act 1930* (ACT) s 208(1)(b).
[7] *Supreme Court Act 1933* (ACT) s 37O(2).
[8] *Supreme Court Act 1933* (ACT) s 37O(3).
[9] *Supreme Court Act 1933* (ACT) s 37O(1)(d)–(e).
[10] *Supreme Court Act 1933* (ACT) s 37N.
[11] Rachel Dioso-Villa et al, 'Investigation to Exoneration: A Systemic Review of Wrongful Conviction in Australia' (2016) 28(2) *Current Issues in Criminal Justice* 157, 164.

Prosecution's right to appeal an acquittal

In 2016, legislative changes were made via the *Supreme Court Amendment Act 2016* which allow the Director of Public Prosecutions, on application, to appeal a person's acquittal if the person's acquittal was tainted, or on the grounds of fresh and compelling evidence, and in the interests of justice.[12] Evidence is 'fresh' if it was not tendered and could not have been tendered in the original proceeding, and is admissible.[13] Evidence is 'compelling' if it is reliable, substantial and highly probative.[14]

This amendment was introduced as a mechanism to abrogate the doctrine of double jeopardy in certain circumstances.[15] This right to appeal is only open to the prosecution and is limited to cases where a person was acquitted of an offence, and the principle of double jeopardy would prevent the person from being retried for the principal offence or for another related offence.[16] This is not an appeal against conviction.

Prerogative of mercy

The exercise of the prerogative of mercy is a power that has long been available to executive government in Australia, [17] generally exercised by the Crown's representative or in the ACT by the Executive.

In the ACT, part 13.2 (Remissions and Pardons) of the *Crimes (Sentence Administration) Act 2005* provides statutory recognition of the prerogative of mercy. The power to exercise the prerogative of mercy is vested in the Executive. The exercise of the prerogative of mercy can take the form of a free pardon, commutation or a conditional pardon, or a remission of a sentence.

Presently, there is no protocol or statutory framework in place in the ACT to assist the Executive in exercising the prerogative of mercy. Ultimately, the Executive has broad discretion to exercise the prerogative of mercy.

The prerogative of mercy is an important aspect of the criminal justice system but has been the subject of criticism for reasons including:

- lack of transparency and accountability;[18]
- immunity from review; and[19]
- it is not equivalent to an acquittal.[20]

Inquiry into conviction

Part 20 of the *Crimes Act 1900* allows the Executive to order an inquiry on its own initiative[21] or the Supreme Court to order an inquiry on application by the convicted person or by someone else on the

[12] *Supreme Court Act 1933* (ACT) part 8AA.
[13] *Supreme Court Act 1933* (ACT) s 68K(1)–(2).
[14] *Supreme Court Act 1933* (ACT) s 68K(3).
[15] *Supreme Court Act 1933* (ACT) s 68H(3).
[16] *Supreme Court Act 1933* (ACT) s 68H(1).
[17] David Caruso and Nicholas Crawford, 'The Executive Institution of Mercy in Australia: The Case and Model for Reform' (2014) 37(1) *University of New South Wales Law Journal* 312, 314.
[18] Sue Milne, 'The Second or Subsequent Criminal Appeal, the Prerogative of Mercy and the Judicial Inquiry: The Continuing Advance of Post-Conviction Review' (2015) 36 *Adelaide Law Review* 211, 212.
[19] Sue Milne, 'The Second or Subsequent Criminal Appeal, the Prerogative of Mercy and the Judicial Inquiry: The Continuing Advance of Post-Conviction Review' (2015) 36 *Adelaide Law Review* 211, 212.
[20] *Eastman v DPP (ACT)* [2003] HCA 28, [98] (Heydon J): At common law, 'the effect of a free pardon is such as, in the words of the pardon itself, to remove from the subject of the pardon, "all pains penalties and punishment whatsoever that from the said conviction may ensue", but not to eliminate the conviction itself', which is not the type of outcome that a person convicted of a crime and claiming to be innocent desires.
[21] *Crimes Act 1900* (ACT) s 423. The Explanatory Statement to the *Crimes Act Amendment Bill 2001*, at page 12, provides that the purpose of section 423 is to allow the Executive to order an inquiry in cases where, by whatever means, it has received material casting doubts on the safety of a conviction.

convicted person's behalf.[22] An inquiry can be ordered in relation to a summary conviction or a conviction on indictment.

If an inquiry is ordered, the Executive must appoint a board of inquiry under the *Inquiries Act 1991* and the board must be constituted by a judge of the Supreme Court or a magistrate.[23] At the end of an inquiry, the board must produce a copy of a written report of the inquiry.[24] The Full Court of the Supreme Court must consider the board's written report and:

- confirm the conviction; or
- confirm the conviction and recommend the Executive grant a pardon or remit the penalty; or
- quash the conviction; or
- quash the conviction and order a new trial.[25]

The inquiry process is intended to supplement, not duplicate, the criminal appeals structure.[26] There is an expectation that the power to inquire into conviction would be used only in exceptional cases and that it is not intended to be used as a means of endlessly challenging a conviction.[27] It is expected to be invoked only in cases where evidence of a miscarriage of justice comes to light after all opportunities for appeal have been exhausted.[28]

The Full Court of the ACT Supreme Court has held that a convicted person may apply for an inquiry under section 424 (Supreme Court order for inquiry) of the *Crimes Act 1900* more than once, as long as the subsequent applications concern a different doubt or question to that raised in the previous application.[29]

The inquiry process is complex and may not be the best approach to address the issue of wrongful conviction because:

- the criteria for an application are not clearly articulated, which makes it difficult for an applicant to initially meet the requirements;
- the process commences as an administrative one in which a judge determines whether an inquiry ought to be ordered. This administrative decision is not subject to appeal, and there are real questions about whether it is amenable to judicial review;
- the process conflates executive and judicial functions. The Executive must appoint a board of inquiry, and the Executive could, if it wished, order an inquiry into a conviction of its own motion, bypassing a hearing for an order of the Court; and
- the inquiry itself is subject to judicial review which can complicate and delay its finalisation.

The ACT has only had one inquiry under part 20 of the *Crimes Act 1900* – the Eastman Inquiry.[30] The Inquiry recommended that Mr David Eastman's conviction be quashed,[31] after a finding that Mr Eastman did not receive a fair trial according to law and that he was denied a fair chance of acquittal, resulting in a substantial miscarriage of justice.[32]

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[22] *Crimes Act 1900* (ACT) s 424.
[23] *Crimes Act 1900* (ACT) s 427.
[24] *Crimes Act 1900* (ACT) s 428(1).
[25] *Crimes Act 1900* (ACT) s 430.
[26] Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 15 June 2001, 1814 (Bill Stefaniak).
[27] Explanatory Statement, Crimes Legislation Amendment Bill 2001 (ACT) 12.
[28] Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 15 June 2001, 1814 (Bill Stefaniak).
[29] *Eastman v Marshall* [2012] ACTSC 134, [16] (North and Katzmann JJ and Sidis AJ).
[30] *Inquiry into the Conviction of David Harold Eastman for the Murder of Colin Stanley Winchester: Report of the Board of Inquiry*. An unsuccessful application was made under section 424 of the *Crimes Act* in 2003: *Application for an inquiry by Parker under s 424 of the Crimes Act 1900* [2003] ACTSC 38 (16 May 2003). A previous inquiry was held on application by Mr David Eastman under repealed section 475 of the *Crimes Act 1900*.
[31] *Inquiry into the Conviction of David Harold Eastman for the Murder of Colin Stanley Winchester: Report of the Board of Inquiry* 447.
[32] *Inquiry into the Conviction of David Harold Eastman for the Murder of Colin Stanley Winchester: Report of the Board of Inquiry* 446.

Right to appeal a conviction in other jurisdictions

Three Australian jurisdictions currently have legislation for a right to appeal a conviction.

South Australia

On 19 March 2013, the South Australian Parliament passed legislation which allows a second or subsequent appeal against conviction. This provision, formerly section 353A of the *Criminal Law Consolidation Act 1935* (SA), is now section 159 of the *Criminal Procedure Act 1921* (SA). An excerpt of the provision is at **Appendix 1**.

The South Australian scheme allows the Court of Appeal to hear a second or subsequent appeal against conviction where the court is satisfied that there is 'fresh and compelling' evidence that should, in the interests of justice, be considered on an appeal if it thinks that there was 'a substantial miscarriage of justice'.[33] The law applies to appeals instituted after the commencement of the legislation, regardless of when the offence was committed, or allegedly committed.[34] Key aspects of this legislation are:

- it applies to any conviction, not only those for serious offences;[35]
- the convicted person must seek permission from the Full Court before they can appeal;[36]
- if an appeal is allowed, the Court may quash the conviction and either enter an acquittal or order a new trial;[37] and
- the legislation provides a purely judicial approach (without involving the Executive) to post-conviction review.[38]

The scheme was introduced to improve the procedure for criminal appeals in South Australia.[39] Prior to the reform, only one right of appeal existed and no further appeal against conviction was allowed after that right was exhausted, even if fresh and compelling evidence came to light.[40] If new evidence emerged after the convicted person's right of appeal had been exhausted, the only option for the person was to petition for mercy to the Governor.[41] The Governor acted on the advice of the Attorney-General, Solicitor-General and Cabinet.[42] This process is open to criticism as lacking transparency, accountability and independence.[43]

Tasmania

On 2 November 2015, the Tasmanian Parliament passed legislation to provide for a second or subsequent appeal against conviction. Section 402A of the *Criminal Code Act 1924* (Tas) is substantially similar to the South Australian scheme. An excerpt of the section is at **Appendix 2**. The key difference between the Tasmanian and South Australian models is that the appeal mechanism in Tasmania only applies to convictions for the most serious crimes.[44] Serious crimes are defined as those listed at Appendix D of the *Criminal Code Act 1924* (Tas) and include:

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[33] *Criminal Procedure Act 1921* (SA) s 159(1) and (3).
[34] *Statutes Amendment (Appeals) Act 2013* (SA) sch 1.
[35] The Hon G.E Gago in the second reading of the Bill stated, 'The Committee suggested that the procedure should be confined to serious crimes carrying a maximum of 15 years imprisonment. It is preferable to have one similar process for any renewed appeal against conviction. Though in practice the applications that are most likely to attract public and press scrutiny are those from convictions for serious offences, there are many circumstances in which a convicted defendant may wish to challenge a conviction imposed in the Magistrates Court' (South Australia, *Parliamentary Debates*, Legislative Council, 19 February 2013, 3166).
[36] *Criminal Procedure Act 1921* (SA) s 159(2).
[37] *Criminal Procedure Act 1921* (SA) s 159(4).
[38] Sue Milne, 'The Second or Subsequent Criminal Appeal, the Prerogative of Mercy and the Judicial Inquiry: The Continuing Advance of Post-Conviction Review' (2015) 36 *Adelaide Law Review* 211, 212.
[39] South Australia, *Parliamentary Debates*, Legislative Council, 19 February 2013, 3165 (Gail Gago).
[40] South Australia, *Parliamentary Debates*, Legislative Council, 19 February 2013, 3165 (Gail Gago).
[41] South Australia, *Parliamentary Debates*, Legislative Council, 19 February 2013, 3165 (Gail Gago).
[42] South Australia, *Parliamentary Debates*, Legislative Council, 19 February 2013, 3165 (Gail Gago).
[43] South Australia, *Parliamentary Debates*, Legislative Council, 19 February 2013, 3165 (Gail Gago).
[44] *Criminal Code Act 1924* (Tas) s 402A(1).

- crimes involving serious violence such as murder, manslaughter, grievous bodily harm, wounding and armed robbery;
- serious sexual crimes such as rape, sexual offences involving children, incest, production and distribution of child exploitation material, and aggravated sexual assault; and
- other serious crimes such as kidnapping, aggravated burglary, crimes relating to trafficable quantities of controlled substances, and arson.

Prior to the reform, Tasmania had one right of appeal against conviction under section 401 of the *Criminal Code Act 1924* (Tas). This allowed for one appeal to the Court of Criminal Appeal and did not provide for a further right of appeal against conviction after that right was exhausted.[45] An appellant aggrieved by an unfavourable decision of the Court of Criminal Appeal could appeal to the High Court.[46]

A convicted person may also petition to seek the exercise of the royal prerogative of mercy.[47] Upon receipt of a petition, the Attorney-General could refer the case to the Court of Criminal Appeal for hearing and determination or seek assistance from the Supreme Court on a point arising in the case.[48] Alternatively, the petition could be determined by the Governor acting on advice from the Premier.[49] This process is open to criticism as lacking transparency, accountability and independence.[50]

Victoria

On 19 November 2019, the Victorian Parliament passed legislation to provide a right to a second or subsequent appeal against conviction of an indictable offence where a person has exhausted other appeal rights. An excerpt of part 6.4 of the *Criminal Procedure Act 2009* (Vic) is at **Appendix 3**.

The Victorian model is similar to the South Australian and Tasmanian models. However, there are key differences:

- the Victorian model only allows second and subsequent appeals against conviction for a person who was convicted of an indictable offence.[51] However, the Victorian model will allow an appeal against conviction for a summary offence if it was related to the indictable offence;[52]
- the Victorian model contains an extra element to the meaning of 'compelling' – that is, 'it would have eliminated or substantially weakened the prosecution case if it had been presented at trial';[53] and
- the Victorian model allows the Court of Appeal to make additional orders on successful appeal. For example, conviction for an alternative offence including imposing a sentence for that offence,[54] new trial for an alternative offence,[55] change of verdict due to mental impairment,[56] vary a sentence,[57] or impose a substitute sentence.[58]

Prior to this amendment, once a convicted person had exhausted their appeal rights, the only available avenue to have their case re-examined by a court was through petitioning the Attorney-General to refer their case to the Court of Appeal pursuant to section 327 of the *Criminal Procedure Act 2009* (Vic).[59] This has been criticised as being undesirable, as it requires decisions to be made in private by the Executive

[45] Tasmania, *Parliamentary Debates*, Legislative Council, 22 September 2015, 48 (William Edward Hodgman).
[46] Tasmania, *Parliamentary Debates*, Legislative Council, 22 September 2015, 48 (William Edward Hodgman).
[47] Tasmania, *Parliamentary Debates*, Legislative Council, 22 September 2015, 48 (William Edward Hodgman).
[48] Tasmania, *Parliamentary Debates*, Legislative Council, 22 September 2015, 48 (William Edward Hodgman).
[49] Tasmania, *Parliamentary Debates*, Legislative Council, 22 September 2015, 48 (William Edward Hodgman).
[50] Tasmania, *Parliamentary Debates*, Legislative Council, 22 September 2015, 48 (William Edward Hodgman).
[51] *Criminal Procedure Act 2009* (Vic), s 326A(1).
[52] *Criminal Procedure Act 2009* (Vic), s 326A(2).
[53] *Criminal Procedure Act 2009* (Vic), s 326C(3)(b).
[54] *Criminal Procedure Act 2009* (Vic), s 326E(1)(c).
[55] *Criminal Procedure Act 2009* (Vic), s 326E(1)(d).
[56] *Criminal Procedure Act 2009* (Vic), s 326E(1)(e) and (f).
[57] *Criminal Procedure Act 2009* (Vic), s 326E(3).
[58] *Criminal Procedure Act 2009* (Vic), s 326E(4).
[59] Victoria, *Parliamentary Debates*, Legislative Council, 31 October 2019, 3851 (Jaala Pulford).

government, rather than being subject to a transparent and public process through the Courts.[60] In the debate on this amendment it was noted that petitions of mercy based on legal arguments are considered without a formal legal process and could be criticised as lacking transparency[61] and there is a risk that they could be considered by a government through the lens of the political issues of the day.[62]

It was also acknowledged that a person may appeal on a point of law to the High Court if granted leave.[63] However, the High Court has previously ruled that it does not have jurisdiction to consider fresh evidence which has not been put before a criminal appeal court.[64]

Other issues to consider

Bail

The issue of bail must be considered in relation to the right to appeal reform, particularly because the proposed legislation could involve the acquittal of a person and the ordering of a new trial.

The South Australian and Tasmanian models provide that if the Court orders that a new trial be held, the Court may 'make such other orders as the Court thinks fit for the safe custody of the person who is to be retried or for admitting the person to bail'.[65]

The Victorian model allows the Court of Appeal to stay a sentence,[66] and allows the convicted person to apply for bail to the Court of Appeal.[67] The Court of Appeal may remand the appellant in custody or grant the appellant bail pending the commencement of the new trial.[68]

For the ACT, the proposed reform could operate in conjunction with the *Bail Act 1992*, rather than displacing or amending its provisions. The *Supreme Court Act 1933* does not have additional or differing requirements in relation to bail pending a new trial. Section 37Q states that for a person who has been convicted and sentenced to a term of imprisonment and has appealed to the Court of Appeal, any time spent while released on bail pending the decision on the appeal does not count as part of the term of imprisonment.

Number of appeals allowed

The ACT proposal includes not restricting the number of appeals that a convicted person can seek. This would ensure that if fresh and compelling evidence emerged on more than one occasion, there would be no barrier to bring forward an appeal.

The South Australian, Tasmanian and Victorian legislation do not restrict the number of appeals that a convicted person can seek. If a convicted person's appeal on the grounds of fresh and compelling evidence is not allowed, there does not seem to be any barrier to the person appealing at a later date, provided they have different fresh and compelling evidence.

Proposal 1 – key elements

The ACT Government is considering amendments to the *Supreme Court Act 1933* to introduce a right for a person to appeal their conviction on the grounds of fresh and compelling evidence. The legal framework under consideration would be derived from the South Australian, Tasmanian and Victorian legislation. The key elements under consideration are:

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[60] Victoria, *Parliamentary Debates*, Legislative Council, 31 October 2019, 3857 (Jaala Pulford).
[61] Victoria, *Parliamentary Debates*, Legislative Council, 31 October 2019, 3857 (Jaala Pulford).
[62] Victoria, *Parliamentary Debates*, Legislative Council, 31 October 2019, 3857 (Jaala Pulford).
[63] Victoria, *Parliamentary Debates*, Legislative Council, 31 October 2019, 3857 (Jaala Pulford).
[64] Victoria, *Parliamentary Debates*, Legislative Council, 31 October 2019, 3857 (Jaala Pulford).
[65] *Criminal Procedure Act 1921* (SA) s 159(5)(a), and *Criminal Code Act 1924* (Tas) s 402A(9)(a).
[66] *Criminal Procedure Act 2009* (Vic), s 326F(1).
[67] *Criminal Procedure Act 2009* (Vic), s 326F(2).
[68] *Criminal Procedure Act 2009* (Vic), s 326K.

- a mechanism to allow a second or subsequent appeal against conviction for an indictable offence;
- the grounds for a second or subsequent appeal against conviction would be 'fresh and compelling evidence'. The definition of 'fresh' and 'compelling' would be the same as section 68K of the *Supreme Court Act 1933* for legislative consistency;
- leave to appeal must be sought from the Court of Appeal. In line with other jurisdictions, the requirements to grant leave to appeal would be the court is satisfied that:
    - there is 'fresh and compelling evidence'; and
    - to grant leave is 'in the interests of justice'.
- the requirement for the Court to allow the appeal would be:
    - there is 'fresh and compelling evidence'; and
    - based on that evidence the court is satisfied there was a 'substantial miscarriage of justice'.
- if the appeal is allowed, the Court will quash the conviction and either order an acquittal or order a new trial.

The reforms would also:

- address the issue of custody and bail while the appellant is awaiting a new trial;
- allow evidence that would have been inadmissible in the original trial;
- not impose a time limit based on the date of conviction, on when the appeal must be lodged. This will ensure that older convictions can be considered for appeal;
- apply to convictions that occurred before the commencement of the amendment;
- not impose a limit on the number of appeals allowed. This will ensure that if fresh and compelling evidence emerges after an appeal was heard, the convicted person will be able to lodge a new appeal.

PROPOSAL 2: REFORM TO THE RIGHT TO COMPENSATION FOR WRONGFUL CONVICTION

The common law does not recognise a cause of action for damages for wrongful conviction.

The *Human Rights Act 2004* (ACT), section 23 (Compensation for wrongful imprisonment) provides that if anyone is convicted by a final decision of a criminal offence and suffers punishment because of the conviction, and the conviction is reversed or the person is pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, then the person has a right to be compensated according to law. This reflects Article 14(6) of the International Covenant on Civil and Political Rights.

Although the Human Rights Act contains a right to compensation for wrongful conviction it does not set out how this cause of action should operate and how any compensation is to be calculated, other than it being according to law. When Article 14(6) was ratified by Australia, the United Kingdom and New Zealand (among other state parties) reserved that compensation could be provided for by administrative procedures rather than pursuant to specific legislative provision.

Currently in the ACT, a person who has experienced a miscarriage of justice may seek an ex-gratia or act of grace payment under the *Financial Management Act 1996*. Section 130 (act of grace payments) allows the ACT Treasurer to make an act of grace payment where they consider it appropriate to do so because of 'special circumstances'. Act of grace payments are generally used as a last resort when there are no other viable avenues for redress. Although these payments are purely discretionary rather than reflecting an entitlement to compensation as required by the Human Rights Act, they are determined in accordance with guidelines that have been established.

The Eastman Decision

In *Eastman v Australian Capital Territory*,[69] Mr Eastman sought compensation for wrongful imprisonment pursuant to section 23 of the Human Rights Act. The court found that Mr Eastman met the requirements set out in section 23(1) and consequently had a right to be compensated according to law pursuant to section 23(2). Mr Eastman was awarded $7,020,000 plus costs for the proceedings. The Court considered that an ability to seek an act of grace payment did not satisfy the right to compensation in s 23 of the Human Rights Act. However, the right to compensation for wrongful conviction in s 23 of the Human Rights Act is not set out as clearly causes of action in other legislation. Accordingly there is some uncertainty about when compensation can be claimed and how any compensation is to be calculated.

The Government considers that there is value in improving the certainty about how the right to compensation for wrongful conviction should operate, and how any compensation should be calculated in future cases.

The Government is considering establishing a scheme that would provide clear parameters for the assessment of compensation, in a way that is consistent with the right to compensation for wrongful conviction set out in Human Rights Act.

One option would be to create a stand-alone legislative scheme for compensation for wrongful conviction similar to that in the United Kingdom. A second option would be to create a scheme under the Human Rights Act, set out in a legislative instrument or regulation.

In either case, a reference could be added to the Human Rights Act to confirm that the right to compensation for wrongful conviction is to be given effect through the scheme. This would be consistent with the right to compensation for wrongful conviction and would provide greater certainty for people who may be eligible compensation.

These options are discussed below.

Proposal 2

Option 1 - Adopt a statutory regime

The Government is considering adopting a legislative scheme that would provide a mechanism for assessing liability and determining compensation payable for wrongful conviction. In the United Kingdom, a statutory scheme based in separate legislation, has been developed to address compensation requirements for miscarriage of justice/wrongful conviction. It establishes an administrative scheme that is administered by the Secretary of State.

This is set out in section 133 of the *Criminal Justice Act 1988* (UK). This scheme requires that a person be convicted of a criminal offence and that the conviction is subsequently reversed or that the person be pardoned on the grounds of new or newly discovered fact that establishes, beyond a reasonable doubt, that there has been a miscarriage of justice.

A scheme such as this could be drafted to indicate that it gives effect to the right in section 23 of the Human Rights Act. This scheme has the advantages of creating clarity and transparency around the circumstances in which a person may be entitled to compensation while also clarifying the class of persons to whom the scheme applies.

[69] [2019] ACTSC 280.

Option 2 – Create an administrative scheme under the Human Rights Act

Alternatively, it would be possible to amend the Human Rights Act to provide that compensation for wrongful conviction will be made in accordance with a regulation or other legislative instrument made under the Human Rights Act. Such a regulation or instrument could also provide for a guideline to be made (as exists in the UK model) to guide the way in which such claims are assessed and how the amount of compensation is calculated to provide consistency in dealing with these issues.

It will be important for any such mechanism to be sufficiently certain to meet the requirement of section 23 – so that a person has the right to be compensated according to law, and that the scheme properly gives effect to this right.

Under either Option 1 or 2, an amendment could be made to the Human Rights Act to clarify that the right is to be given effect through the relevant scheme established by law.

NEXT STEPS

This public consultation paper is an important step in the development of best practice right to appeal laws and reforms to the right to compensation for wrongful conviction. Submissions received from interested persons will assist the ACT Government in considering and addressing potential issues relevant to progressing law reform.

The ACT Government will additionally undertake targeted consultation with a range of government agencies, non-government organisations, and other relevant parties to further support the development of the reforms.

Call for submissions

The ACT Government invites all interested persons to make a submission in response to this consultation paper by [date]. Submissions are welcome in respect of any matter raised in this paper.

How to make a submission

You can tell us your views about the proposals in this paper by sending –

- an email to JACSLPPCRIMINAL@act.gov.au (preferred)
- submissions via https://www.yoursay.act.gov.au/projects, under Wrongful Conviction
- by post:

  Wrongful Conviction – Submissions
  Legislation, Policy and Programs
  Justice and Community Safety Directorate
  ACT Government
  GPO Box 158
  CANBERRA ACT 2601

The closing date for submissions is **11.59pm 18 May 2022.**

Generally, submissions will be published unless requested to be treated as confidential. All requests for the submission to be treated confidentially will be respected and dealt with in accordance with any applicable laws, including freedom of information legislation.

APPENDIX 1

Excerpt from *Criminal Procedure Act 1921* (SA)

159—Second or subsequent appeals

(1) The Court of Appeal may hear a second or subsequent appeal against conviction by a person convicted on information if the Court is satisfied that there is fresh and compelling evidence that should, in the interests of justice, be considered on an appeal.

(2) A convicted person may only appeal under this section with the permission of the Court of Appeal.

(3) The Court of Appeal may allow an appeal under this section if it thinks that there was a substantial miscarriage of justice.

(4) If an appeal against conviction is allowed under this section, the Court may quash the conviction and either direct a judgment and verdict of acquittal to be entered or direct a new trial.

(5) If the Court of Appeal orders a new trial under subsection (4), the Court—

  (a) may make such other orders as the Court thinks fit for the safe custody of the person who is to be retried or for admitting the person to bail; but

  (b) may not make any order directing the court that is to retry the person on the charge to convict or sentence the person.

(6) For the purposes of subsection (1), evidence relating to an offence is—

  (a) ***fresh*** if—

    (i) it was not adduced at the trial of the offence; and

    (ii) it could not, even with the exercise of reasonable diligence, have been adduced at the trial; and

  (b) ***compelling*** if—

    (i) it is reliable; and

    (ii) it is substantial; and

    (iii) it is highly probative in the context of the issues in dispute at the trial of the offence.

(7) Evidence is not precluded from being admissible on an appeal referred to in subsection (1) just because it would not have been admissible in the earlier trial of the offence resulting in the relevant conviction.

APPENDIX 2

Excerpt from *Criminal Code Act 1924* (Tas)

402A. Second or subsequent appeal by convicted person on fresh and compelling evidence

(1) In this section –

convicted person means a person who, before a court of trial, has been –

(a) convicted of a serious crime; or

(b) acquitted of a serious crime on the ground of insanity –

whether that conviction or acquittal occurred before or after the commencement of this section;

fresh and compelling evidence has the meaning given by subsection (10);

serious crime means a crime punishable upon indictment listed in Appendix D.

(2) The Court may hear a second or subsequent appeal by a convicted person if the person has been granted leave to appeal under this section.

(3) A convicted person may apply to a single judge for leave to lodge a second or subsequent appeal against the conviction on the ground that there is fresh and compelling evidence.

(4) At any time after receiving an application for leave to appeal under this section, the single judge may refer the matter to the Court for determination.

(5) On hearing the application of a convicted person for leave to appeal, the single judge or Court –

(a) must grant leave to appeal if satisfied that –

(i) the convicted person has a reasonable case to present to the Court in support of the ground of the appeal; and

(ii) it is in the interests of justice for the leave to be granted; or

(b) must refuse to grant leave to appeal if not so satisfied.

(6) The Court may uphold the second or subsequent appeal of a convicted person if satisfied that –

(a) there is fresh and compelling evidence; and

(b) after taking into account the fresh and compelling evidence, there has been a substantial miscarriage of justice.

(7) The Court may dismiss the second or subsequent appeal of a convicted person if not satisfied as specified in subsection (6).

(8) If the Court upholds the second or subsequent appeal of a convicted person, the Court may quash the conviction and either –

(a) direct that a judgement and verdict of acquittal be entered; or

(b) under section 404, order that a new trial be held.

(9) If the Court orders under subsection (8)(b) that a new trial be held, the Court –

(a) may make such other orders as the Court thinks fit for the safe custody of the person who is to be retried or for admitting the person to bail; but

(b) may not make any other order directing the court that is to retry the person on the charge to convict or sentence the person.

(10) Evidence relating to the serious crime of which a convicted person was convicted –

(a) is fresh evidence if –

(i) it was not adduced at the trial of the convicted person; and

(ii) it could not, even with the exercise of reasonable diligence, have been adduced at that trial; and

(b) is compelling evidence if –

(i) it is reliable; and

(ii) it is substantial; and

(iii) in the context of the issues in dispute at the trial of the convicted person, it is highly probative of the case for the convicted person.

(11) Evidence that would be admissible on an appeal under this section is not precluded from being fresh and compelling evidence merely because it would have been inadmissible in the earlier trial of the convicted person for the serious crime of which he or she was convicted.

(12) Section 407 does not apply to an appeal, or an application for leave to appeal, under this section.

APPENDIX 3

Excerpt from *Criminal Procedure Act 2009* (Vic)

Part 6.4—Second or subsequent appeal to Court of Appeal

Division 1—Appeal against conviction

326A Right of second or subsequent appeal against conviction

(1) A person convicted of an indictable offence by an originating court who—

(a) has exhausted the person's right to appeal against conviction under Division 1 of Part 6.3; or

(b) has previously appealed under this Part but leave to appeal was not granted or the appeal was dismissed, in whole or in part—

may appeal to the Court of Appeal against the conviction if the Court of Appeal gives the person leave to appeal.

Note

See the definition of ***originating court*** in section 3.

(2) An appeal under subsection (1) may also include an appeal against a conviction for a related summary offence.

326B How appeal is commenced

(1) An application for leave to appeal under section 326A is commenced by filing a notice of application for leave to appeal in accordance with the rules of court.

(2) The Registrar of Criminal Appeals of the Supreme Court must provide to the respondent a copy of the notice of application for leave to appeal within 7 days after the day on which the notice of application is filed.

326C Determination of application for leave to appeal under section 326A

(1) The Court of Appeal may grant leave to appeal under section 326A if it is satisfied that there is fresh and compelling evidence that should, in the interests of justice, be considered on an appeal.

(2) The Court of Appeal may grant leave to appeal under section 326A against a conviction for a related summary offence only if it grants leave to appeal under subsection (1) in relation to the indictable offence.

(3) In this section, evidence relating to an offence of which a person is convicted is—

(a) ***fresh*** if—

(i) it was not adduced at the trial of the offence; and

(ii) it could not, even with the exercise of reasonable diligence, have been adduced at the trial; and

(b) ***compelling*** if—

(i) it is reliable; and

(ii) it is substantial; and

(iii) either—

(A) it is highly probative in the context of the issues in dispute at the trial of the offence; or

(B) it would have eliminated or substantially weakened the prosecution case if it had been presented at trial.

(4) Evidence that would be admissible on a second or subsequent appeal is not precluded from being fresh or compelling only because it would not have been admissible in the earlier trial of the offence that resulted in the conviction.

326D Determination of second or subsequent appeal against conviction

(1) On an appeal under section 326A, the Court of Appeal must allow the appeal against conviction if it is satisfied that there has been a substantial miscarriage of justice.

(2) In any other case, the Court of Appeal must dismiss an appeal under section 326A.

326E Orders etc. on successful appeal

(1) If the Court of Appeal allows an appeal under section 326A, it must set aside the conviction of the offence (***offence A***) and must—

(a) order a new trial of offence A; or

(b) enter a judgment of acquittal of offence A; or

(c) if—

(i) the appellant could have been found guilty of some other offence (***offence B***) instead of offence A; and

(ii) the court is satisfied that the jury or, in the case of a plea of guilty to offence A, the trial judge must have been satisfied of facts that prove the appellant was guilty of offence B—

enter a judgment of conviction of offence B and impose a sentence for offence B that is no more severe than the sentence that was imposed for offence A; or

(d) if the appellant could have been found guilty of some other offence (***offence B***) instead of offence A and the court is not satisfied as required by paragraph (c)(ii), order a new trial for offence B; or

(e) if the court is satisfied that the appellant should have been found not guilty of offence A because of mental impairment, enter a finding of not guilty because of mental impairment and make an order or declaration under section 23 of the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997**; or

(f) if the appellant could have been found guilty of some other offence (***offence B***) instead of offence A and the court is satisfied—

(i) that the jury must have been satisfied of facts that prove the appellant did the acts or made the omissions that constitute offence B; and

(ii) that the appellant should have been found not guilty of offence B because of mental impairment—

enter a finding of not guilty of offence B because of mental impairment and make an order or declaration under section 23 of the **Crimes (Mental Impairment and Unfitness to be Tried) Act 1997**.

(2) If the Court of Appeal orders a new trial, the court must order that the appellant attend on a specified date before the court in which the new trial will be conducted.

Note

Section 326K enables the Court of Appeal to remand the appellant in custody or grant bail pending a new trial.

(3) If the Court of Appeal sets aside the conviction of offence A, it may vary a sentence that—

(a) was imposed for an offence other than offence A at or after the time when the appellant was sentenced for offence A; and

(b) took into account the sentence for offence A.

(4) A power of the Court of Appeal under this section to impose a sentence in substitution for the sentence imposed by the originating court may still be exercised even if the sentence imposed by the originating court is an aggregate sentence of imprisonment.

(5) If at the conclusion of an appeal the appellant remains convicted of more than one offence, the Court of Appeal may either—

(a) impose a separate sentence in respect of each offence; or

(b) impose an aggregate sentence of imprisonment in respect of all offences or any 2 or more offences.

Division 2—Powers and procedure

326F Stay of sentence and bail pending appeal

(1) If a notice of application for leave to appeal is filed under section 326B, the Court of Appeal may stay a sentence if satisfied that it is in the interests of justice to do so.

(2) A prisoner within the meaning of the **Corrections Act 1986** who applies for leave to appeal to the Court of Appeal under this Part may apply to the Court of Appeal to be granted bail.

(3) On an application under subsection (2), the Court of Appeal may grant the prisoner bail pending the appeal.

326G Abandonment of appeal

An appeal under this Part may be abandoned in accordance with the rules of court.

326H Powers which may be exercised by Court of Appeal constituted by a single Judge of Appeal

(1) The Court of Appeal constituted by a single Judge of Appeal may exercise the following powers in this Part—

(a) to give leave to appeal;

(b) to grant the appellant bail;

(c) to order stays of sentence.

(2) If the Court of Appeal constituted by a single Judge of Appeal refuses an application to exercise a power referred to in subsection (1) in relation to any ground of appeal, the applicant is entitled to have the application determined by the Court of Appeal constituted by 2 or more Judges of Appeal.

326I Application of sections 316 to 320 and 326

Sections 316 to 320 and 326 apply with any necessary modification to a proceeding under this Part.

326J Sentence in absence of offender

The Court of Appeal may impose a sentence on a person under this Part even though the person does not attend the hearing of an appeal or an application to the Court of Appeal.

Note

The Court of Appeal cannot impose a sentence that requires the consent of the person, for example a community correction order, in the absence of the person.

326K Bail following appeal

If on an appeal under this Part the Court of Appeal orders a new trial, the Court of Appeal may remand the appellant in custody or grant the appellant bail pending the commencement of the new trial.

Note

Section 326E(2) requires the Court of Appeal to order that the appellant attend on a specified date for the new trial.

326L Warrants

For the purposes of this Part, the Court of Appeal may issue any warrant necessary for enforcing the orders of the court.

326M Ancillary orders

(1) On an appeal under this Part, the Court of Appeal may set aside or vary an ancillary order, if the court is satisfied that it is in the interests of justice to do so.

(2) In this section—

ancillary order means an order (other than the order that is the subject of the appeal) made by the originating court in the proceeding or by the Court of Appeal on an earlier appeal.

Justice and Community Safety Directorate

6 April 2022