Wrongful Convictions: Reforms to the Right to Appeal and Right to Compensation

REPORT ON WHAT WE HEARD

The ACT Government is considering how to deal with wrongful convictions in criminal cases in the ACT Supreme Court where new evidence has come to light. It is also considering how a person should be compensated for being wrongfully convicted of a crime.

Currently, a person convicted of an offence in the ACT has three grounds for appealing a conviction:

- 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.

The limitation with existing appeal rights is that 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.

Three Australian jurisdictions have already legislated in relation to this issue, introducing a further right to appeal. The ACT Government is similarly considering introduction of a further right to appeal – which will sit alongside the existing appeal rights.

A right to compensation for wrongful conviction is currently legislated for in the *Human Rights Act 2004* (Human Rights Act). However, the Human Rights Act does not set out how this right should operate and how any compensation is to be calculated.

Considering amendments to the *Supreme Court Act 1933* (Supreme Court Act) to introduce best practice right to appeal laws is a Government commitment under the *Parliamentary and Governing Agreement – 10th Legislative Assembly Australian Capital Territory*.

THE CONVERSATION

The conversation about the proposed reforms took place from 6 April 2022 to 18 May 2022.

To support the community's consideration of key issues around wrongful convictions, the ACT Government released a Discussion Paper on 6 April 2022. The community was invited to make submissions for a period of six weeks, with consultation closing on 18 May 2022.

The Discussion Paper provided information about two separate proposals relating to wrongful convictions in ACT criminal matters to:

1) consider amendments to the Supreme Court Act to introduce best practice right to appeal laws; and

2) reform to the right to compensation for wrongful convictions.

The Canberra community was invited to make a general submission or respond to discussion questions in relation to each proposal. There were 10 questions about an additional right to appeal against a conviction and three questions about reforming the right to compensation for a wrongful conviction.

Canberrans were invited to upload a written submission on the Government's YourSay website or make an oral submission by leaving a voice message.

WHO WE ENGAGED

The conversation was with the legal profession, government agencies, academics, and an advocacy group.

We received **nine** written submissions on the issues in the Discussion Paper from:

Category of Respondent	Number of Submissions
Legal Profession Associations	2
Government Agencies	2
Legal Professionals	2
Academics	1
Community Legal Centres	1
Advocacy Groups	1
TOTAL	**9**

Key insights from the community

The Discussion Paper invited members of the community to comment on proposals about reforms to right of appeal laws and the right to compensation for wrongful convictions. The community was invited to provide a response to the proposals in general, or to questions provided to stimulate discussion. The community provided numerous valuable suggestions and feedback, alongside creative ideas about how to improve reforms to the ACT's right of appeal and wrongful conviction laws.

This Listening Report will explore these through the following:

Topic 1: New Right to Appeal

A. Broad Support for Right
B. Scope of Right
C. Threshold of Right
D. Impact on Victims

Topic 2: Reform to Right to Compensation

A. Support for Reform in Principle
B. Legal Questions to be Resolved
C. Opposition to Reform

Topic 1: New Right to Appeal

A. Broad Support for Right

All submissions supported the proposal to introduce a second or subsequent right to appeal against conviction on the grounds of fresh and compelling evidence. The Discussion Paper noted that the current appeal rights are limited because even if fresh and compelling evidence arises after the current appeal rights have been exhausted, the convicted person would not be able to pursue an appeal.

However, four submissions suggested the proposed reform does not go far enough and a Criminal Cases Review Commission (CCRC) should be established in addition to the proposal.

'Regrettably, [the South Australian] amendment to the criminal appeals legislation was not accompanied by action in respect of the other recommendations [including the establishment of a Forensic Review Panel], which as we will explain, seriously limits its efficacy.'

Idea: Australia needs a CCRC with adequate resources, power to access relevant material and investigate allegations of wrongful convictions.

We generally heard from these stakeholders that the ACT should favour the establishment of a nation-wide CCRC, as has happened in England, Scotland, New Zealand and is proceeding in Canada. Stakeholders recommended that the ACT should promote the establishment of such a body federally.

Furthermore, one stakeholder suggested a smaller and simpler CCRC system may be appropriate for the ACT, while noting that a full ACT-specific CCRC system is impractical.

Idea: A simpler system of *ad hoc* panels consisting of three suitably appropriate people to undertake a preliminary assessment of a person's claim to innocence, could be adopted.

Underpinning the support of many stakeholders for reform to the right to appeal in the ACT is the belief that, realistically, miscarriages of justice do occur. There is a diversity of opinion about the likely rate of wrongful convictions. One stakeholder, for example, noted that academic studies estimate between two and five percent of prison populations have been wrongly convicted.

Another stakeholder suggested a six per cent wrongful conviction rate is more likely, with this figure derived mainly from United Kingdom comparison and United States' studies. This stakeholder used this figure to estimate that at least 200 to 300 Australians currently in jail have been wrongly convicted of major crimes. Given the ACT's population size, this stakeholder continued, there may be at least four to six people currently detained in the ACT's Alexander Maconochie Centre innocent of the major crimes for which they have been convicted – and likely more innocent of minor crimes.

B. Scope of Right

All stakeholders who provided submissions supported a further right to appeal based on fresh and compelling evidence. However, only one stakeholder explicitly favoured this right just being available to those convicted of an indictable offence.

The rest of the stakeholders who addressed this issue in their submissions did not support limiting a further right to appeal based on fresh and compelling evidence to indictable or serious offences only. Two stakeholders favoured a model of reform where a further right to appeal is dependent on whether the offence is punishable by imprisonment, regardless of whether it is an indictable or serious offence.

'Such right to appeal ought not be limited to indictable/serious matters. The variety of circumstances in which convictions for relatively minor matters can have significant impacts upon defendants are endless. To limit a person's access to the scheme because the offence which they committed (as apart from the impact on them) is not serious enough would inevitably lead to unfortunate and unjust outcomes for individuals. To this end the scheme ought to be open to those convicted or found guilty of an offence where the legislated maximum penalty includes imprisonment.'

'If the right to appeal is invoked in relation to a summary offence which is not connected to an indictable offence, it should only be permitted if the offence carries imprisonment as a maximum penalty (regardless of whether or not imprisonment was imposed).'

We heard from one of these two stakeholders that the justification of not including fine-only offences within the reformed right to appeal is to provide 'a robust threshold' preventing 'vexatious and undeserving applicants' misusing the right.

Most of the submissions – six in total – did not support establishing a distinction based on the seriousness of the offence for which the person was convicted.

Idea: If the right to appeal is contingent on highly probative fresh and compelling evidence, it should be available to any convicted person and not limited to certain categories of offence.

We heard different justifications for why all convictions should, potentially, be open to further appeal. These include that there is no clear-cut distinction between the impacts of an offence on a purported offender, and what may be minor to one person can be devasting to another. We also heard that the Crown has a fundamental obligation to ensure *any* conviction is right and proper, and valid under the rule of law.

Additionally, we heard two stakeholders dispute the necessity of a robust threshold to prevent vexatious appeals. One stakeholder noted there is no evidence allowing second appeals will open the 'floodgates' to appeals lacking merit, given the relative rarity of such appeals in other Australian jurisdictions which have similar legislation. Another said judges can be trusted to differentiate between meritless appeals and significant appeals warranting review.

Three stakeholders also agreed with the Discussion Paper that there should be no limit on the number of applications which can be made, with one agreeing the right to appeal should apply retrospectively.

C. Threshold of Right

The Discussion Paper provided a proposed legal framework for the right to appeal, derived from the South Australian, Tasmanian and Victorian legislation. This includes a mechanism for a second or subsequent appeal against conviction for an indictable offence, as explored above. The other key elements of the framework being considered are:

- 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 for legislative consistency;

- leave to appeal must be sought from the ACT 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.

i. Threshold for the Court to Grant Leave to Appeal

We heard differing perspectives from stakeholders about the threshold required for the Court to grant leave to hear a second or subsequent appeal. Four stakeholders supported the proposed requirement for leave to appeal from the Court of Appeal.

Idea: The proposed requirements will allow for a degree of judicial control over the proceedings.

Three of these stakeholders considered that the currently accepted legal definition of 'compelling' implies the evidence must be highly probative. We heard that, in the view of two of these stakeholders, there is no need for any additional requirement the fresh evidence would have eliminated or substantially weakened the prosecution case if it had been presented at trial. One, however, did consider that this potential requirement may be permissible – but, if so, the prosecution's right to appeal should have an equivalent amendment.

However, we also heard several stakeholders disagree with the Discussion Paper's proposed approach. One suggested the only threshold requirement should be whether the appellant can demonstrate there is fresh and compelling evidence to be put before the court.

Two other stakeholders instead supported having the right to a second appeal being identical to the right to a first appeal – including the test for leave to appeal.

Idea: The test for leave should be the same as a first appeal's to comply with international human rights obligations and the rule of law.

In support of this position, the same stakeholder submitted that case law in other jurisdictions indicates that each of the required elements in the proposed threshold for the court to grant leave to appeal 'can give rise to complexities which are absent on a first appeal'.

Another stakeholder suggested that second appeals should be allowed where senior judges believe they should be permitted to proceed, with this restriction 'more than adequate to exclude meritless appeals'.

One stakeholder, while supporting the basis for the new laws being those in other states, noted that they could be improved further.

Idea: The laws would be improved if they clearly permitted the original trial's evidence to be re-examined, with any benefit of doubt going to the appellant.

ii. Threshold for the Court to Allow the Appeal

We heard clear support for the proposed threshold for the court to allow the appeal from one stakeholder.

A separate stakeholder proposed that 'a substantial miscarriage of justice' should not be a limb in the test for granting an appeal.

Idea: Factual determinations should be left to the jury or finder of fact; therefore, the test for granting an appeal should be *potential* for a substantial miscarriage of justice.

Another stakeholder noted that the Appeal Court is 'well-versed' in determining circumstances within which a miscarriage of justice has occurred, and resultingly no further criteria are necessary.

Two stakeholders favoured the test for granting an appeal on a second or subsequent application being the same as those which apply to a first appeal.

Idea: The substantive test for granting an appeal on a second or subsequent application should be the same as that for a first appeal to comply with international human rights obligations and the rule of law.

iii. Orders

We heard different perspectives from three stakeholders on the orders the Appeal Court should be able to make upon a successful appeal.

One considered that the Court should have the same power to make orders that it currently holds, namely an order setting aside a guilty verdict – and substituting a not guilty verdict – or ordering a new trial. Additionally, though, this stakeholder recommended 'empowering' the Court to make other orders.

Idea: The Appeal Court should be able to make an order of a conviction on an alternative offence, order a new trial for an alternative offence, or enter a different verdict due to mental impairment, as in Victoria.

A separate stakeholder acknowledged such arguments, but favoured an approach whereby alternative orders other than acquittal are only available if they are in the interests of justice. Furthermore, the views of victims of crime must be taken into account regarding any orders a court should be able to make following a successful appeal.

Idea: The Government should consider legislating a requirement for the Appeal Court to consider the views of, or the impact on, the victim of crime in making certain orders.

A third stakeholder supported orders including acquitting the appellant and quashing the conviction, with the Director of Public Prosecutions (DPP) retaining the discretion to retry the appellant. This stakeholder also supported an order finding third parties guilty of offences in relation to the original crime, or alternatively an

order for the DPP to charge this third party, or have the case referred for further criminal investigation.

This stakeholder also offered ideas on how to proceed if the local police force or the DPP is one of the third parties.

D. Impact on Victims

We heard from stakeholders that any reform to the right to appeal convictions will have impacts on victims of crime, which must be taken into consideration. Several submissions provided suggestions for ways to best account for the impact of right to appeal reforms on crime victims.

Idea: The design of any statutory scheme broadening the right to appeal must carefully consider victims' legal rights under the Charter of Rights for Victims of Crime.

Idea: Victims should have the opportunity to challenge the probative value of new fresh and compelling evidence when it challenges the victim's credibility.

Idea: When the Court is considering granting leave to appeal a conviction, the impact on the victim should be considered, such as the risk of re-traumatisation. A balance needs to be found between this risk and the appeals process.

Stakeholders did not, however, believe that the potential impacts on victims obviated the need for right to appeal reform. One stakeholder said that despite concerns over the re-traumatising of victims, and an associated need to put in place support mechanisms for victims, 'this should not displace a miscarriage of justice'. Another noted that allowing an unjust conviction may render the wrongfully convicted a victim of the justice system themselves.

Topic 2: Reform to the Right to Compensation for Wrongful Convictions

A. Support for Reform in Principle

The Discussion Paper provided two options for reform to the right to compensation: either adopting a legislative scheme or creating an administrative scheme under the Human Rights Act.

Stakeholders' responses to these proposed reforms varied. Many stakeholders supported reform in principle, with several pointing to the perceived inadequacy of the current schemes.

Idea Compensation for wrongfully convicted persons should be covered by statutory or regulatory guidelines, not 'ex gratia' payments at the Executive's discretion

' The current schemes involving administrative ex-gratia payments and the uncertainty of actions pursuant to s32 of the Human Rights Act 2004 (ACT) are inadequate to ensure those wrongly convicted are appropriately compensated.'

We heard support from one stakeholder for 'a clear, consistent and human rights compatible statutory scheme' for awarding compensation. However, other stakeholders in favour of reform generally provided no preference between adopting a statutory scheme or creating an administrative scheme.

B. Legal Questions to be Resolved

We also heard concerns from some stakeholders about complex legal issues that need to be resolved to further this reform. These include the legal threshold for access to compensation, with two stakeholders disagreeing with the Discussion Paper's suggestion that to be eligible for compensation, it is necessary to establish beyond reasonable doubt that there was a miscarriage of justice. Those stakeholders suggested that this bar is too high.

We further heard other pertinent legal questions must be addressed, including the right to have a full merits review mechanism for claims for compensation available by an independent and external decision-maker and a further judicial review, if necessary, under the *Administrative Decisions (Judicial Review) Act 1989*.

C. Opposition to Reform

However, support for reform of the right to compensation was not universal. We heard strong disagreement from one stakeholder who raised concerns that introducing either a statutory or administrative scheme for compensation for wrongful conviction is unnecessary and arguably a waste of precious resources as there is 'no pressing demand.'

This stakeholder noted that in the one recorded case for compensation for wrongful conviction in the ACT (*Eastman v The Australian Capital Territory*), the complainant was awarded compensation pursuant to Section 23 of the Human Rights Act. The stakeholder suggested that the judge seemed to have little difficulty determining compensation, and they expressed concern that the proposal in question seeks to limit compensation, rather than clarifying uncertainty.

WHAT'S NEXT?

The next step is for the ACT Government to take these suggestions from interested parties and use them to consider and address potential issues relevant to progressing the reforms.

The Government will additionally undertake further targeted consultation with a range of government agencies, non-government organisations, and other relevant parties to develop a policy position on the proposed reforms.

To keep up to date on Wrongful Convictions Reform, please visit the project page on the Justice website here.

To find out about other initiatives, policies and projects in Canberra, please visit www.yoursay.act.gov.au.

You can also connect with us on **Facebook**, **LinkedIn**, and **Twitter**.

Key Timings

Community Consultation on Discussion Paper opened – April 2022

Community Consultation on Discussion Paper closed – May 2022

Listening Report released and published on YourSay – November 2022
We are here

Developing Policy Position – Mid-2022 onwards

THANK YOU FOR YOUR FEEDBACK

230	**142**	**9**
Number of downloads of the Discussion Paper	Visitors to the YourSay project page	We received 9 written submissions