LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY
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Submission Cover Sheet

Inquiry into Supreme Court Amendment Bill 2023

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NETWORKED KNOWLEDGE

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31 May 2023

Submission: Inquiry into Supreme Court Amendment Bill 2023

I request that this submission be published on the website including our names.

[Our previous and more detailed submissions are available at the ACT Homepage on Networked Knowledge – they include links to the following issues]

The proposed new legislation intends to create a right to a second or further appeal, where it is established that there is 'fresh' and 'compelling' evidence which should be heard 'in the interests of justice'.

Similar legislation was initially passed in South Australia, followed by Tasmania, Victoria and Western Australia.

Prior to that we had initially presented a submission to the Australian Human Rights Commission to support the view that the existing appeal rights, in similar form in all states and territories of Australia, failed to comply with our international human rights obligations. The AHRC agreed with that submission and presented a report to that effect to the parliament of South Australia.

The parliament was aware that legislation had already been passed in the Australian states and territories to allow for a second or further *prosecution* where it could be established that there was fresh and compelling evidence to show that a person previously acquitted of a crime may in fact have committed that crime.

The parliament reasoned that if a prosecutor could have a 'further prosecution' why shouldn't a convicted person be allowed a 'further appeal'. They copied the wording of the further prosecution legislation into the legislation to allow for a further appeal – the requirement for 'fresh and compelling evidence'. In doing so, they made a serious error.

There had been a longstanding principle of the law against double jeopardy. Clearly in any case (every case) where it was determined to prosecute a person a second time, there would have to be compelling evidence that the person had in fact committed that crime.

However, there is no such principle to invoke against a person who has been wrongly convicted. Indeed, the courts should be most willing to consider such a case. In the USA over the last 25 years or so, they have identified over 3,000 wrongful convictions. In the UK there have been over 560. Academic studies indicate that the rate of wrongful convictions may be between 3-4%. Given the number of people imprisoned in Australia (around 40,000) 3% wrongful convictions would amount to 1,200 innocent people in prison. At the cost of over $100,000 a year for each prisoner, there is much to be said for identifying such cases and sending them home.

It is important to note that of those wrongly imprisoned, the 'fresh evidence' appeals only make up a small proportion of the total number. For example, the grounds of appeal state that a person may appeal where there has been 'an error of law' or where there has been 'an unreasonable jury verdict'. If an error of that sort was not identified upon a first appeal, is there any reason why such a person may not bring that issue to the attention of the court when it is identified?

For example, in the recent case of Cardinal Pell, the appeal court affirmed his conviction. However, on appeal to the High Court, it was found that the jury had failed to appreciate that the evidence disclosed a fatal error in the Crown's case. His conviction was set aside. However, under the ACT's new appeal right, if Cardinal Pell's legal team had discovered

that error after an unsuccessful first appeal, he would have been refused leave for a further appeal because he was not pursuing an appeal based upon fresh evidence.

In the UK, in the case of Derek Bentley, the appeal court overturned his conviction over 40 years after he had been hanged. The appeal court accepted that the judge had summed up to the jury in a manner which was unfair. The judge had presented his view of the evidence to the jury as if he was a member of the prosecution team rather than taking a more balanced view of the evidence. Under the ACT's new provisions such an application for leave to appeal would be refused because it lacked fresh evidence.

The Australian Human Rights Commission identified that the current appeal laws in Australia failed properly to protect the right to a fair trial and the right to an effective appeal. The current proposal for a second or further appeal fixes that problem in so far as wrongly convicted people can produce fresh evidence. But it does nothing for those people, also wrongly convicted, as a result of legal errors or jury errors.

In our more detailed submission, we have explained how best to overcome that problem. The current appeal rights state that 'a person may appeal' – and then specifies the grounds of appeal. If the introductory words to the section were amended to read 'a person may appeal or have a further appeal' that would be sufficient to remedy the problem. The simple addition of just five words!

As the Hon Michael Kirby wrote in his editorial in the Criminal Law Journal, the wording of the Criminal Appeal Act did not support the view that there could only be one appeal. That limitation was imposed by the judges applying a more restrictive meaning to the provision than the words themselves warranted. No doubt this was because the judges, by and large, were not initially supportive of the right to appeal against jury verdicts.

Now that we are more aware of the frequency and social cost of wrongful convictions, we should be more prepared to address that issue. As Mr Kirby points out, Australia is the

only comparable jurisdiction which does not have any mechanism (such as a Criminal Review Commission) to address these problems. For the ACT to fix the human rights problem in respect of criminal appeals so that it fails to encompass the full range of criminal appeal cases would be disappointing.

The ACT has stated that an amendment which corresponds to similar amendments in other states would harmonise with the judicial interpretations of those other provisions. However, the experience so far has not been straightforward.

In the case of Frits Van Beelen, the appeal court was divided as to whether the evidence produced on appeal was 'compelling'. The Chief Justice thought it to be so, and would have overturned the conviction. The other two appeal judges disagreed and would have refused leave to appeal. On appeal to the High Court, the judges agreed with the Chief Justice in SA that the evidence was compelling but disagree about overturning the conviction. That involved just one piece of evidence.

In the case of Derek Bromley, the situation is far more disturbing. After being in prison for 30 years for murder, he attempted to avail of the new right of appeal. Henry Keogh had brought an appeal based upon very similar evidence (and using two of the same experts) to that of Mr Bromley. Mr Keogh had been in prison for over 20 years and his conviction was overturned within 18 months of the appeal right being introduced.

Mr Bromley was not so fortunate. He has been represented by some of Australia's leading senior lawyers. He has had eight of the country's leading experts supporting his appeal. Five of them (including the Crown's own expert) agreed that the evidence of the eye-witness at the trial had not been properly explained to the jury and was fundamentally misleading. Three further experts on the forensic pathology (including the Crown's own expert) were agreed that the forensic evidence put to the jury at the trial was fundamentally misleading. They said the autopsy had been incompetent, it had failed

to properly identify a cause of death and that a death by natural causes could not be excluded.

However, on his appeal to the intermediate appeal court, the judges determined that the evidence put forward on the appeal was not sufficiently 'compelling'. Mr Bromley was refused leave to appeal.

It is now ten years since the appeal right was introduced into South Australia. Despite the earnest endeavours of Australia's most senior lawyers throughout that time, it has still not been determined whether Mr Bromley can be given 'leave to appeal'. The matter is now before the High Court awaiting determination.

As we pointed out in our detailed submission, on an application for a first appeal, it is the practice of the appeal courts in many states to ignore the provision for the grant of leave to appeal and go straight to the hearing of the appeal. Yet, on an application for a second appeal, the process has become tortuous in the extreme - and it applies only to a small range of possible appeal cases.

The determination of the legislators to establish a 'higher hurdle' for second or further appeals is also problematic. The ICCPR, the Human Rights Act and the 'rule of law' principles must ensure 'equality before the law'. Yet, a person applying for a first appeal is treated more favourably than a person applying for a second appeal. As mentioned above, Cardinal Pell was fortunate to have his conviction overturned on a first appeal, albeit with an application to the High Court. However, if he had presented exactly the same case by way of an application for a second appeal, he would have been refused leave and would be in prison to this day.

If the new appeal right with all of its additional complexity cannot resolve an application for leave to appeal within ten years, then it can hardly be regarded as much of an improvement to the system of criminal appeals.

We respectfully request that the ACT should consider introducing a right to a second or further appeal along the lines which we have outlined above. Amend the words ‘may appeal’ to read ‘may appeal or have a further appeal’.

Yours sincerely,

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