LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY
Mr Jeremy Hanson MLA (Chair), Dr Marisa Paterson (Deputy Chair), Ms Jo Clay MLA

Submission Cover Sheet

Inquiry into Supreme Court Amendment Bill 2023

Submission Number: 003

Date Authorised for Publication: 14 June 2023

Bridge of Hope Innocence Initiative

Standing Committee on Justice and Community Safety

ACT Legislative Assembly

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1 June 2023

Submission to Standing Committee on Justice and Community Safety Regarding the Supreme Court Amendment Bill 2023

Thank you for the opportunity to make a submission on the *Supreme Court Amendment Bill 2023* (ACT) which provides for a second right of appeal in the ACT.

The Bridge of Hope Innocence Initiative ('BOHII') is an organisation established at RMIT University with the aim to prevent miscarriages of justice, including wrongful convictions, through advocacy and research. We are part of an international network of innocence projects, sometimes referred to as the "innocence movement", which seek to create a fair, compassionate, and equitable system of justice for everyone.

Whilst we are supportive of the ACT government expanding the options for appeal open to those who have been wrongfully convicted in the Territory, we urge you to reconsider the narrow second right of appeal as currently drafted.

Instead, we recommend different criteria for a new right of appeal encompassing situations where credible evidence in relation to the offence suggests the conviction is unsafe.

Further, we urge the ACT government to consider other options for rectifying miscarriages of justice in the Territory, including the establishment of a conviction integrity unit within the ACT Office of the Director of Public Prosecutions.

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Limitations of Current Second Right of Appeal Legislation

Understandably, this Bill has drawn upon the drafting of other second right of appeal legislation in South Australia, Tasmania, Victoria and Western Australia in determining the criteria for leave and allowance of the appeal.

The wording of the proposed new right of appeal is identical to that used in our jurisdictions, in that the Bill allows the Supreme Court to grant leave to a person to bring an appeal against any conviction or finding of guilt if satisfied that:

a. there is fresh and compelling evidence in relation to the offence that should be considered on an appeal; and

b. it is in the interests of justice for the order to be made.

The test for allowing an appeal is the same as above, but with an extra requirement that there has been a 'substantial miscarriage of justice'.

Whilst BOHII welcomes an expansion of the avenues for appeal for the wrongfully convicted in the Territory, this drafting has replicated the limitations inherent in other Australian jurisdictions.

The criteria that a second right of appeal should only be granted in circumstances of 'fresh and compelling evidence' and where there is a 'substantial miscarriage of justice' is not informed by evidence on the common features of wrongful conviction in Australia. Instead, these criteria came about as a result of drafting convenience.

This test existed within previous reforms allowing prosecutors to overcome the limitations of the rule against double jeopardy, allow further *prosecution* in cases where fresh and compelling evidence arose. These criteria is not, and never has been, informed by the causes of wrongful conviction in Australia.

Judicial review is generally inadequate in dealing with convicted individuals who are factually innocent because they are concerned with legal-procedural rather than factual errors.[1]

The principle of 'finality' in law seeks to close off as many appeal options as possible for a person convicted of a crime to prevent prolonged litigation. This means that, whilst ostensibly one of the main functions of criminal appeals are to safeguard against miscarriages

[1] Findley, Keith A. and Scott, Michael S., The Multiple Dimensions of Tunnel Vision in Criminal Cases. Wisconsin Law Review, Vol. 2, 2006, Univ. of Wisconsin Legal Studies Research Paper No. 1023, Available at SSRN: https://ssrn.com/abstract=911240; Webster, E, The Prosecutor as a Final Safeguard Against False Convictions: How Prosecutors Assist with Exoneration, 110 J. Crim. L. & Criminology 245 (2020). https://scholarlycommons.law.northwestern.edu/jclc/vol110/iss2/4

of justice,[2] in practice, appeals largely serve the function of ensuring some consistency across trial courts and settling questions of law.

The existence of 'fresh and compelling' evidence avenue of appeal is not applicable to the vast majority of wrongful convictions cases in Australia, which often involve a series of errors encompassing inadequate investigations, overzealous prosecutors and incompetent defence counsel.

The narrow second right of appeal available in other Australian jurisdictions explicitly excludes wrongful convictions which were the result of incompetent counsel at trial. This is because it has been consistently found by appellate courts that there is no miscarriage of justice in holding an accused to tactical decisions made on their behalf by counsel.[3]

Non-disclosure or late disclosure and lack of full disclosure continues to be a problem in Australia (see e.g., *Royal Commission into the Management of Police Informants* in Victoria). As a result, the wrongfully convicted may not be aware that certain evidence was available to them at trial because counsel lacked the time and resources to discover disclosure errors, which might otherwise have been corrected pre-trial and during trial.[4] This evidence would not be "fresh" under the narrow requirements of the second right of appeal, nor would it amount to a 'substantial miscarriage of justice' given existing precedent.

Fresh evidence requirements also assume that defendants have the capacity to digest and understand the materials to appropriately instruct counsel, which in turn makes assumptions about defendants' cognitive and linguistic presence in their proceedings.

Given the extensive limitations of second right of appeal avenues in other jurisdictions, it is recommended that the Bill be redrafted to remove the "fresh and compelling evidence" criteria when seeking leave to, and granting, an appeal, as well as to remove the 'substantial miscarriage of justice' requirement for granting an appeal.

This broader second right of appeal would be redrafted as follows:

> (1) The court may, on application by a convicted person, grant leave for the convicted person to bring an appeal against their conviction or finding of guilt if satisfied that—
>
> (a) there is credible evidence in relation to the offence suggesting the conviction is unsafe and a reasonable explanation why the evidence was not adduced at trial; and

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[2] Marshall, P, A Comparative Analysis of the Right To Appeal, 22 Duke Journal of Comparative & International Law 1-46 (2011)
[3] *Ratten v The Queen* (1974) 131 CLR 510 at 517*; Slater v The* Queen [2020] VSCA 270
[4] *Walton v Gardiner* (1993) 177 CLR 378, 392 per Mason CJ, Dean and Dawson JJ; *R v Richard Lipton* [2011] NSWCCA 247.

(b) it is in the interests of justice for the order to be made

(2) The court, on an appeal against a conviction or finding of guilt, may—

(a) allow the appeal if it considers that the conviction is unsafe; or

(b) dismiss the appeal.

(3) A conviction will be 'unsafe' if the evidence would have changed the outcome at trial.

This redrafted version of the second right of appeal has the distinct advantage of broadening the scope of evidence that can give rise to an appeal, to all *credible evidence* which suggests the conviction is unsafe.

Rather than automatically excluding evidence if it was potentially available at trial, this redrafted version allowing credible evidence to be raised if there is reasonable explanation why the evidence was not adduced at trial (such as incompetent counsel or disclosure issues).

Finally, rather than the high bar of a 'substantial miscarriage of justice' this redrafted second right of appeal ensures all 'unsafe' convictions, where evidence would have changed the outcome at trial are capable of being appealed.

Conviction Integrity Units

Given the clear limitations of judicial oversight in identifying and rectifying cases of wrongful conviction, it is further recommended that other agencies such as ACT Office of the Director of Public Prosecutions, play a more active role.

Conviction integrity units, also known as conviction review units, are specialist departments found within prosecution bodies which conduct independent and impartial reviews of challenged convictions.

Conviction integrity units first appeared in the United States in 2002, and have proven particularly useful in identifying wrongful convictions outside of judicial oversight. According to the National Registry of Exonerations Annual Report, Conviction Integrity Units were responsible for 132 exonerations and combined with innocence projects, were responsible for 74% of the total exonerations in 2022.[5]

These units review claims made by people convicted of a crime within the jurisdiction of the prosecutorial agency.

[5] National Registry of Exonerations, 2022 Annual Report, accessible here: https://www.law.umich.edu/special/exoneration/Documents/NRE%20Annual%20Report%202022.pdf

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Generally, a claim will only be accepted for review if there is plausible and verifiable evidence to reasonably support a claim of either factual innocence; or circumstances that would cause a reasonable person to lose confidence in the conviction due to issues of official misconduct, discredited forensic or eyewitness evidence, the misapplication of forensic science, or due process violations.

Once accepted, the conviction integrity unit will perform a review of the case as presented at trial including all relevant evidence and any concerns raised by defence counsel.

Once the review is complete, the findings are presented to an expert Conviction Review Panel consisting of former prosecutors and retired judges. If the Conviction Review Panel is satisfied that a wrongful conviction has occurred, they will present a recommendation to the State's Attorney who will decide on how to resolve the matter.

Following a finding that a wrongful conviction has occurred, a root-cause analysis is conducted by the conviction integrity unit to prevent mistakes occurring in future.

Conviction integrity units provide an ideal avenue for a non-judicial body to review and identify potential wrongful convictions. These units also provide an avenue for internal oversight and continuous improvement within prosecutorial bodies.

We recommend a conviction integrity unit be established within the ACT Office of the Director of Public Prosecutions and a Conviction Review Panel established to reach determinations on potential wrongful convictions in the Territory.

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Thank you for the opportunity to provide feedback on this important reform. Please let us know if we can assist further.

Yours sincerely,

Dr Michele Ruyters and Jarryd Bartle

RMIT University's Bridge of Hope Innocence Initiative