

2023

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

TENTH ASSEMBLY

**STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY - REPORT NO 17 - INQUIRY
INTO SUPREME COURT AMENDMENT BILL 2023**

GOVERNMENT RESPONSE

**Presented by
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Attorney-General
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Introduction

The Supreme Court Amendment Bill 2023 (the Bill) was presented to the Assembly on 10 May 2023. It was then referred to the Standing Committee on Justice and Community Safety (the Committee) as required by clause 5 of the establishing resolution. This clause allows committees to inquire into and report on bills within two months of their presentation.

The Bill proposes to amend the *Supreme Court Act 1933* to introduce a new right to appeal a conviction or finding of guilt when there is fresh and compelling evidence, and when granting leave to appeal is in the interests of justice. Considering that fresh and compelling evidence, if the Court of Appeal finds there has been a substantial miscarriage of justice, the court may set aside the conviction or finding of guilt, and either order a verdict of not guilty to be entered or order a new trial or hearing.

The Committee announced it would inquire into the Bill on 22 May 2023. It published its report in July 2023.

The Committee received six submissions, published on 19 June 2023, all of which were broadly supportive of the Bill.

The Committee considered:

1. The broad support for the new right of appeal;
2. The impact the new right of appeal would have on victims of crime;
3. The positive effect the new right of appeal would have on compliance with human rights obligations;
4. The scope of the new right of appeal; and
5. Other mechanisms for addressing wrongful convictions.

The Committee made three recommendations that went to amendments to the Bill, and recommended that, after considering those recommendations, the Bill be passed.

ACT Government Response to Recommendations

Recommendation 1

The Committee recommends that the ACT Government amend the Bill to broaden the new right of appeal to include ‘new’ as well as ‘fresh and compelling’ evidence.

Not Agreed

The Committee noted evidence from the Bridge of Hope Innocence Initiative and Legal Aid ACT that expanding the new right of appeal to include ‘new’ as well as ‘fresh and compelling’ evidence would provide more convicted persons with reasonable opportunities to appeal their convictions.

It was argued that a wider scope would allow appeals on the basis of ‘inadequate investigations, overzealous prosecutors, and incompetent defence counsel’¹ and ‘where evidence was not used at trial due to the actions of an incompetent or negligent defence lawyer, or a self-represented defendant’². ‘Fresh’ and ‘compelling’ are defined in proposed section 68ZE of the *Crimes Act 1900*. ‘Fresh’ means the evidence:

¹ Bridge of Hope Innocence Initiative, *Submission 3*, p 3.

² Legal Aid ACT, *Submission 4*, p 2.

1. has not been tendered in the proceeding in which the convicted person was convicted or found guilty of the offence, or any appeal against the conviction or finding of guilt; and
2. could not, in the course of an exercise of reasonable diligence, have been tendered in a proceeding mentioned in paragraph (a).

‘Compelling’ means the evidence is:

1. reliable; and
2. substantial; and

highly probative in the context of the issues in dispute in the proceeding in which the person was convicted or found guilty. ‘New’ evidence would be any evidence that had not already been introduced, even if it could have been introduced with reasonable diligence.

Having considered the information provided by stakeholders throughout the development of the Bill, and the further evidence provided to the Committee in its inquiry, the Government is satisfied with the model proposed in the Bill, and does not agree to this recommendation.

The Bill strikes a balance between promoting the right of anyone convicted of a criminal offence to have the conviction and sentence reviewed by a higher court in accordance with law, and other factors including the need to support the efficient administration of justice by preventing appeals that are unlikely to succeed or are not in the public interest, and the impact of appeals on the criminal justice system and the community, including victims of crime and their families.

The issue raised in the Committee’s recommendation was explored during the public and stakeholder consultation undertaken by the Government during the development of the Bill. Whilst a range of views were submitted, several stakeholders supported the adoption of the “fresh and compelling” standard. Consistency with existing ACT law, and other jurisdictions, also informed the model adopted in the Bill. The threshold of ‘fresh and compelling’ is used for the purposes of an acquittal appeal at section 68K(3) of the *Supreme Court Act 1933* (ACT). Adopting a similar concept for the new right to appeal promotes consistency across the statute book and allows courts to draw on existing case law to interpret the provisions. This approach is also broadly the same standard used in other jurisdictions (South Australia, Tasmania, and Victoria) and is based on the lessons learnt from those jurisdictions about how to find the right balance between interests.

The Bill proposes to introduce a new right of appeal that will operate in addition to the existing right to appeal and the right to seek an inquiry into the conviction under Part 20 of the *Crimes Act 1900*. This ensures that should the new right to appeal not be available to a person due to the circumstances raised in submissions to the Inquiry, another avenue to seek their conviction be reviewed remains available to them.

Recommendation 2

The Committee recommends that the ACT Government consider whether the Bill should be amended to limit the new appeal right to offences for which imprisonment is the maximum penalty.

Not Agreed

The Bill proposes a new right to appeal for those convicted or found guilty of any offence. There is no minimum threshold of seriousness to be met. Given the costs involved in appealing a sentence, to a great extent applicants will self-select according to their

assessment of the costs and benefits. This is consistent with our system of legal procedure in general. This also consistent with the approach taken in South Australia.

The Committee noted evidence from the ACT Law Society and the concern that the right would be abused by vexatious litigants. There was a concern that a new right to appeal would unreasonably contribute to court backlogs. To address this concern, the Committee proposed that the right of appeal should be restricted only to offences which carry a maximum penalty of imprisonment.

Imposing a threshold standard would be arbitrary and could result in other injustices. During the development of the Bill a range of stakeholders made submissions to the Government that the new right to appeal should apply to any offence given the significant impact any conviction or finding of guilt may have on an individual. For example, in the ACT, a criminal history check is a routine requirement of employment. As a result, any conviction might have a serious negative consequence for a person's life.

Applying the right to all findings of guilt and criminal convictions also better supports the right to fair trial under section 21(1) of the *Human Rights Act 2004*: "[e]veryone has the right to have criminal charges, and rights and obligations by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing".

In 2007, the United Nations Human Rights Committee stated that "anyone convicted of a crime shall have the right to have their conviction and sentence reviewed by a higher tribunal according to law". As the different languages (crime, *infraction*, *delito*) show, the guarantee is not confined to the most serious offences.

The Government notes the devastating effect that any wrongful conviction could have on a person's right and views the current model as appropriately adapted. The Government considers that the threshold of "a substantial miscarriage of justice" is sufficient to ensure that the court may dismiss vexatious or untenable claims. On this basis the Government does not agree to the Committee's recommendation.

Recommendation 3

The Committee recommends that the ACT Government consider establishing a conviction review panel to independently review challenged convictions.

Noted

The Committee noted arguments from Bride of Hope Innocence Initiative (BOHII) and from Dr Robert Moles and Ms Bibi Sangha that suggested systemic approaches were also needed to address the issue of wrongful convictions. BOHII recommended that the ACT Government consider establishing a conviction integrity unit within the Office of the Director of Public Prosecutions to carry out independent, impartial reviews of challenged convictions.

The Committee noted this argument but instead recommended that, instead of establishing a permanent conviction review unit, the ACT consider establishing a conviction review panel.

The Government notes this proposal. Further policy work would be needed to ascertain whether such a proposal is appropriate for the ACT, particularly noting potential overlap with existing practice and legislation, including Part 20 of the *Crimes Act 1900*, and potential resourcing implications across the justice system.

Recommendation 4

The Committee recommends that after considering the recommendations in this report the Assembly passes the Supreme Court Amendment Bill 2023.

Noted

Conclusion

The ACT Government thanks the Committee for its Report on the Inquiry into Supreme Court Amendment Bill 2023. The ACT Government recognises the need to balance the interests of those found guilty and convicted, the interests of victims of crime and their families, and the interests of the wider ACT community in this issue of justice. The Bill represents a significant step along the path to best practice in ensuring that the community has confidence in the safety of convictions and that there are pathways available for those who might have been wrongfully convicted.