



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: 004

Date Authorised for Publication: 14 June 2023

31 May 2023

Standing Committee on Justice and Community Safety
Legislative Assembly for the ACT
GPO Box 1020
Canberra ACT 2601

By email: LACommitteeJCS@parliament.act.gov.au

Dear Committee,

RE: Inquiry into Supreme Court Amendment Bill 2023

Thank you for the opportunity to contribute to the inquiry into the above bill.

Legal Aid ACT ('the Commission') provides services to the most vulnerable members of the Canberra community as they navigate the justice system. These services range from legal support at all levels of the court hierarchy, as well as non-legal support offered by our Community Liaison Unit.

Consistent with our commitment to fostering access to justice, the Commission supports the provision of adequate avenues for individuals to address wrongful conviction. As such, the Commission supports the establishment of this new right of appeal, and its retrospective application per s 68ZC(2), subject to the below comments.

Restriction of appeal to 'fresh' evidence

The bill restricts the new appeal right to evidence which is "fresh" in the sense that it has not been and could not have been in the course of an exercise of reasonable diligence, tendered in the proceeding in which the convicted person was convicted or found guilty (or any appeal thereof).¹ The Commission notes that in various other jurisdictions, an equivalent right of appeal extends to allow evidence that is 'new and compelling' in addition to evidence that is 'fresh and compelling'.²

The distinction between 'fresh' and 'new' evidence is that the former is 'evidence of which the accused was unaware at the time of [their] trial and which could not be discovered with

¹ *Supreme Court Amendment Bill 2023* s 68ZE(1).

² *Criminal Appeals Act 2004* (WA) s 35E; *Khoury v The Queen* [2011] NSWCCA 118 [104]-[108] (Simpson J).

reasonable diligence.’³ Meanwhile the latter is evidence which either was available, but not used, or could have been obtained with reasonable diligence.⁴

In the view of the Commission, restriction of the appeal to ‘fresh’ but not ‘new’ evidence may have unintended consequences for appellants – for example, in situations where evidence was available at trial, but was not adduced due to the appellant being self-represented and misunderstanding the importance or relevance of that evidence. The right of appeal should also allow for use of such evidence where it was not tendered due to the incompetence or negligence of the lawyer representing the offender (as contributed to the circumstances in *Khoury v The Queen*,⁵ and is contemplated by the equivalent Western Australian right of appeal⁶).

Clarification of operation of s 37N(3)

The Commission wishes to seek clarification that the new right of appeal established by the Bill does not affect the rules for evidence on appeal provided at section 37N.⁷ Ideally, it should be made clear that the new right of appeal does not restrict an appellant from exercising the right in s 37N to present further evidence.

Reiteration of Previous Comments

The Commission has also previously commented on the drafting of this Bill. We made a number of recommendations in response to consultation questions, including that:

- (1) The Bill should include a provision such as section 402A(9)(b) *Criminal Code Act 1924* (TAS) preventing the Court of Appeal from imposing conditions and making directions that would affect the course of the new trial, if a new trial is ordered.
- (2) The Bill should not include any additional express ancillary powers for the Court of Appeal in relation to any new trial which is ordered.

We take this opportunity to reiterate those comments, particularly (1), which has not been reflected in the Bill. A copy of the relevant comments is inserted below:

(1) Orders on new trial

Subsequent trials for a matter may take unexpected turns, especially when considering fresh and compelling evidence. The Commission submits that orders placing limitations upon the appeal hearing under s37P *Supreme Court Act 1933* would risk unintended consequences by curtailing the course of the new trial. As such we support an approach similar to that of the s402A(9)(b) *Criminal Code Act 1924* (TAS), or s159(5)(b) *Criminal Procedure Act 1921* (SA),

³ *Lawless v The Queen* (1979) 142 CLR 659, 675 (Mason J).

⁴ *Khoury v The Queen* [2011] NSWCCA 118 [107] (Simpson J).

⁵ *Ibid* [134] (Simpson J).

⁶ *Criminal Appeals Act 2004* (WA) s 35D.

⁷ *Supreme Court Act 1933* (ACT) s 37N.

preventing the Court making an order to retry a person from making any other order directing the course of that new trial.

However, we acknowledge that this position represents some compromise away from consistency by preventing the Court from being allowed to exercise similar powers regardless of how an appeal is brought.

(2) Ancillary powers

As noted above, the Commission does not consider it appropriate to adopt s37P in its entirety for the purposes of this appeal.

More broadly, we have not identified any other express ancillary powers which would be necessary or appropriate in relation to a new trial. Setting out specific powers in relation to a new trial may, as noted, lead to unintended consequences by setting pre-determined limitations upon a trial which may take an unexpected course.

Should you have any questions in relation to the above submissions, please do not hesitate to contact me at [REDACTED]

Yours sincerely

[REDACTED]
Dr John Boersig PSM
Chief Executive Officer
Legal Aid ACT