



**Legislative Assembly for the
Australian Capital Territory**

Standing Committee on Justice and
Community Safety

Inquiry into Supreme Court Amendment Bill 2023

Legislative Assembly for the Australian Capital Territory
Standing Committee on Justice and Community Safety

Approved for publication

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About the committee

Establishing resolution

The Assembly established the Standing Committee on Justice and Community Safety on 2 December 2020.

The Committee is responsible for the following areas:

- ACT Electoral Commission
- ACT Integrity Commission
- ACT Ombudsman
- Gaming
- Minister of State (Justice and Community Safety reporting areas)
- Emergency management and the Emergency Services Agency
- Policing and ACT Policing
- Corrective services
- Attorney-General
- Consumer affairs
- Human rights
- Victims of crime
- Access to justice and restorative practice
- Public Trustee and Guardian

You can read the full establishing resolution [on our website](#).

Committee members

Mr Peter Cain MLA, Chair

Dr Marisa Paterson MLA, Deputy Chair

Mr Andrew Braddock MLA

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About this inquiry

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 Committee announced it would inquire into the Bill on 22 May 2023.

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Acronyms and Abbreviations

Acronym	Long form
ACT	Australian Capital Territory
AFPA	Australian Federal Police Association
AM	Member of the Order of Australia
Bill	Supreme Court Amendment Bill 2023
BOHII	Bridge of Hope Innocence Initiative
Committee	Standing Committee on Justice and Community Safety
MLA	Member of the Legislative Assembly
Scrutiny Committee	Standing Committee on Justice and Community Safety (Legislative Scrutiny role)
UK	United Kingdom
USA	United States of America

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.

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.

Recommendation 3

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

Recommendation 4

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

1. Introduction

Conduct of the inquiry

- 1.1. The Committee received six submissions. These are listed in **Appendix A**.

Background to the Bill

- 1.2. The Parliamentary and Governing Agreement of the 10th Legislative Assembly of the Australian Capital Territory included a commitment to consider amendments to the *Supreme Court Act 1933* to introduce best practice right to appeal laws.¹ The Supreme Court Amendment Bill 2023 is the result of that commitment.²
- 1.3. 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.³
- 1.4. The Bill defines ‘fresh’ evidence as evidence that:
- (a) 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
 - (b) could not, in the course of an exercise in reasonable diligence, have been tendered in a proceeding mentioned in paragraph (a).⁴
- 1.5. The Bill defines ‘compelling’ evidence as evidence that is:
- (a) reliable; and
 - (b) substantial; and
 - (c) highly probative in the context of the issues in dispute in the proceeding in which the person was convicted or found guilty.⁵
- 1.6. The new appeal right will apply retrospectively. The Bill does not place limits on the number of appeals permitted under the new right to appeal.⁶

¹ 10th Legislative Assembly of the Australian Capital Territory, [Parliamentary and Governing Agreement](#), p 13.

² Mr Shane Rattenbury MLA, Attorney-General, *Proof Minutes of Proceedings*, 10 May 2023, p 1186.

³ Supreme Court Amendment Bill 2023, Explanatory Statement and Human Rights Compatibility Statement, presented by Mr Shane Rattenbury MLA, Attorney-General, 10 May 2023, p 1.

⁴ Supreme Court Amendment Bill 2023, s 68ZE(1).

⁵ Supreme Court Amendment Bill 2023, s 68ZE(3).

⁶ Supreme Court Amendment Bill 2023, Explanatory Statement and Human Rights Compatibility Statement, presented by Mr Shane Rattenbury MLA, Attorney-General, 10 May 2023, p 2.

Legislative scrutiny

- 1.7. The Bill was considered by the Standing Committee on Justice and Community Safety (Legislative Scrutiny role) (the Scrutiny Committee) in its *Scrutiny Report 29* of 23 May 2023.
- 1.8. The Scrutiny Committee noted that, although the Bill will extend the right (under section 22 of the *Human Rights Act 2004*) of anyone convicted of a criminal offence to have that conviction and sentence reviewed by a higher court in accordance with law, the Bill may potentially limit that right by only allowing a successful appeal where there has been a substantial miscarriage of justice.⁷
- 1.9. This potential limitation is discussed in the Explanatory Statement that accompanies the Bill. According to the Explanatory Statement, the aim of the limitation is to ‘prevent vexatious and untenable appeals, promote trust in the criminal justice system and to use a test that has been consistently used in case law and other jurisdictions in Australia’.⁸
- 1.10. The Scrutiny Committee drew this matter to the attention of the Assembly but did not require a response from the Minister.

⁷ Standing Committee on Justice and Community Safety (Legislative Scrutiny role), *Scrutiny Report 29*, p 22.

⁸ Supreme Court Amendment Bill 2023, Explanatory Statement and Human Rights Compatibility Statement, presented by Mr Shane Rattenbury MLA, Attorney-General, 10 May 2023.

2. Issues raised in evidence

Broad support for the new right of appeal

- 2.1. Submitters expressed their support for the new appeal right that the Bill seeks to establish.⁹
- 2.2. In their submission, the ACT Law Society expressed support in principle for the introduction of a statutory right to appeal on the grounds of fresh and compelling evidence. They also noted that this additional appeal right ‘may ameliorate the risk of wrongful convictions.’¹⁰
- 2.3. Legal Aid ACT’s submission supported ‘the provision of adequate avenues for individuals to address wrongful conviction’. They also supported both the establishment and the retrospective application of the new right of appeal.¹¹
- 2.4. In their submission, the Australian Federal Police Association (AFPA) stated that they supported the Bill. They further noted the Bill’s promotion of the human right to a fair trial, and to rights in criminal proceedings.¹²
- 2.5. The Bridge of Hope Innocence Initiative (BOHII) expressed support in their submission for ‘the ACT government expanding the options for appeal open to those who have been wrongfully convicted in the Territory’.¹³ They welcomed the expansion of avenues of appeal for people in the ACT who may have been wrongfully convicted of crimes.¹⁴
- 2.6. Both BOHII’s submission and Dr Robert Moles and Ms Bibi Sangha’s joint submission noted that similar legislation has been passed in other jurisdictions, namely South Australia, Tasmania, Victoria and Western Australia.¹⁵

Impact on victims of crime

- 2.7. While supportive of the Bill, the AFPA said it was important to recognise that creating any new right of appeal was likely to cause additional stress and anxiety to victims of crime, given that further appeals would lengthen the legal process and add to uncertainty for victims.¹⁶

Committee Comment

- 2.8. The Committee recognises the impact a new right to appeal is likely to have on victims of crime but notes that this needs to be considered alongside the impact of possible miscarriages of justice on people who are wrongfully convicted.

⁹ See, for example: Australian Federal Police Association, *Submission 1*, p 2; Bridge of Hope Innocence Initiative, *Submission 3*, p 1; Legal Aid ACT, *Submission 4*, p 1; ACT Law Society, *Submission 6*, p 1.

¹⁰ ACT Law Society, *Submission 6*, p 1.

¹¹ Legal Aid ACT, *Submission 4*, p 1.

¹² Australian Federal Police Association, *Submission 1*, p 2.

¹³ Bridge of Hope Innocence Initiative, *Submission 3*, p 1.

¹⁴ Bridge of Hope Innocence Initiative, *Submission 3*, p 2.

¹⁵ Dr Robert Moles and Ms Bibi Sangha, *Submission 2*, p 1; Bridge of Hope Innocence Initiative, *Submission 3*, p 2.

¹⁶ Australian Federal Police Association, *Submission 1*, p 2.

Improved compliance with human rights obligations

- 2.9. Dr Robert Moles and Ms Bibi Sangha expressed the view in their submission that existing appeal rights fail to comply with Australia's international human rights obligations.¹⁷ According to the Explanatory Statement, this is a situation the Bill seeks to remedy.¹⁸
- 2.10. In their submission, the AFPA said that 'human rights, such as the right to a fair trial and rights in criminal procedures, would ... be supported by the Bill.'¹⁹
- 2.11. The Bill's *Human Rights Compatibility Statement* states that the Bill promotes the following rights under the *Human Rights Act 2004*:
- the right to liberty and security of person;
 - the right to a fair trial; and
 - rights in criminal proceedings.²⁰
- 2.12. The *Human Rights Compatibility Statement* also states that the Bill places some limitations on rights in criminal proceedings, by including the requirements of 'fresh and compelling evidence' and a 'substantial miscarriage of justice' to be met before the new right to appeal may be accessed.²¹

Committee Comment

- 2.13. The Committee's view is that the Bill's overall impact on human rights is positive.

Concerns new appeal right is too narrow

- 2.14. Some submitters expressed the view that the circumstances in which the new right to appeal created by the Bill could be accessed should be broadened.²²
- 2.15. In their submission, BOHII stated that the Bill shares the 'limitations' of similar legislation in other Australian jurisdictions, specifying South Australia, Tasmania, Victoria and Western Australia.²³ BOHII argued that limiting the new right of appeal to situations where there is 'fresh and compelling' evidence, as those other jurisdictions have done, is overly restrictive.²⁴

¹⁷ Dr Robert Moles and Ms Bibi Sangha, *Submission 2*, p 1.

¹⁸ Supreme Court Amendment Bill 2023, Explanatory Statement and Human Rights Compatibility Statement, presented by Mr Shane Rattenbury MLA, Attorney-General, 10 May 2023, p 3.

¹⁹ Australian Federal Police Association, *Submission 1*, p 2.

²⁰ Supreme Court Amendment Bill 2023, Explanatory Statement and Human Rights Compatibility Statement, presented by Mr Shane Rattenbury MLA, Attorney-General, 10 May 2023, p 2.

²¹ Supreme Court Amendment Bill 2023, Explanatory Statement and Human Rights Compatibility Statement, presented by Mr Shane Rattenbury MLA, Attorney-General, 10 May 2023, pp 3-4.

²² See, for example: Bridge of Hope Innocence Initiative, *Submission 3*, p 1; Legal Aid ACT, *Submission 4*, p 2.

²³ Bridge of Hope Innocence Initiative, *Submission 3*, p 2.

²⁴ Bridge of Hope Innocence Initiative, *Submission 3*, p 2.

- 2.16. The Explanatory Statement to the Bill argues that using the same criteria as other jurisdictions will allow ACT courts to rely on ‘analogous case law’ when making decisions about ACT cases and the new right to appeal.²⁵
- 2.17. In their submission, BOHII stated:
- ...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.²⁶
- 2.18. BOHII argued that such a change would ensure that all ‘unsafe’ convictions, ‘where evidence would have changed the outcome at trial would be capable of being appealed’.²⁷
- 2.19. BOHII stated that ‘fresh and compelling evidence’ is ‘not applicable to the vast majority of wrongful convictions cases in Australia’, but instead such cases ‘often involve a series of errors encompassing inadequate investigations, overzealous prosecutors and incompetent defence counsel.’²⁸
- 2.20. In their submission, Legal Aid ACT note the distinction between ‘fresh’ and ‘new’ evidence, namely that:
- ‘fresh’ evidence is evidence that the accused was unaware of at the time of their trial, and which ‘could not be discovered with reasonable diligence’; and
 - ‘new’ evidence is evidence which was available but was not used, or which ‘could have been obtained with reasonable diligence.’²⁹
- 2.21. Legal Aid ACT argued in their submission that restricting appeal rights to situations where there is ‘fresh’, but not ‘new’ evidence could have unintended consequences. For example, the restriction could disadvantage those who had been convicted in cases where evidence was not used at trial due to the actions of an incompetent or negligent defence lawyer, or a self-represented defendant.³⁰

Committee Comment

- 2.22. In the Committee’s view, expanding the new right of appeal to encompass ‘new’ evidence as well as ‘fresh and compelling’ evidence would provide more convicted persons with reasonable opportunities to appeal their convictions.

²⁵ Supreme Court Amendment Bill 2023, Explanatory Statement and Human Rights Compatibility Statement, presented by Mr Shane Rattenbury MLA, Attorney-General, 10 May 2023, p 4.

²⁶ Bridge of Hope Innocence Initiative, *Submission 3*, p 1.

²⁷ Bridge of Hope Innocence Initiative, *Submission 3*, p 3.

²⁸ Bridge of Hope Innocence Initiative, *Submission 3*, p 3.

²⁹ Legal Aid ACT, *Submission 4*, p 2.

³⁰ Legal Aid ACT, *Submission 4*, p 2.

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.

Limiting the new appeal right to certain convictions

- 2.23. The ACT Law Society argued in their submission that ‘it would be more appropriate for this right of appeal to be limited to offences which carry imprisonment as a maximum penalty’, and that limiting the new right to appeal to such offences would ‘prevent the misuse of this right by vexatious applicants’ and avoid contributing to court backlogs.³¹
- 2.24. The Bill’s Explanatory Statement states that ‘by applying the new right to appeal to all offences, the Bill promotes the right to fair trial’.³²

Committee Comment

- 2.25. In the Committee’s view, limiting the new right to appeal to more serious offences—that is, to those with a maximum penalty of imprisonment—would ensure that attention is focused on potentially more serious wrongful convictions.

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.

Other mechanisms for addressing wrongful convictions

- 2.26. The AFPA noted in their submission that ‘false convictions and miscarriages of justice are uncommon’.³³
- 2.27. In their submission, Dr Robert Moles and Ms Bibi Sangha attempted to estimate the rate of wrongful convictions in Australia, stating that:

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.³⁴

³¹ ACT Law Society, *Submission 6*, p 1.

³² Supreme Court Amendment Bill 2023, Explanatory Statement and Human Rights Compatibility Statement, presented by Mr Shane Rattenbury MLA, Attorney-General, 10 May 2023, p 3.

³³ Australian Federal Police Association, *Submission 1*, p 2.

³⁴ Dr Robert Moles and Ms Bibi Sangha, *Submission 2*, p 2.

- 2.28. Their submission also noted that Australia lacks a review mechanism that would address the issue of wrongful convictions in a systematic way.³⁵
- 2.29. BOHII recommended in their submission that the ACT Government consider establishing a conviction integrity unit within the Office of the Director of Public Prosecutions.³⁶
- 2.30. Conviction integrity units, sometimes referred to as conviction review units, are specialist departments whose role is to carry out independent, impartial reviews of challenged convictions. The units operate within the jurisdiction of the prosecutorial agency.³⁷
- 2.31. In their submission, BOHII explained that:
- 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.³⁸
- 2.32. Accepted claims would then be reviewed by the conviction integrity unit. The findings of the review would be presented to an expert conviction review panel, comprising former prosecutors and retired judges. If a conviction review panel then believed a wrongful conviction had occurred, they would make a recommendation to the jurisdiction's Attorney-General, who would decide how the matter should be resolved. Where a wrongful conviction had occurred, the conviction integrity unit would undertake a root-cause analysis to prevent similar situations occurring in the future.³⁹
- 2.33. BOHII's submission argued that conviction integrity units 'provide an ideal avenue for a non-judicial body to review and identify potential wrongful convictions.'⁴⁰

Committee Comment

- 2.34. The Committee notes that false convictions and miscarriages of justice are not common. However, given the gravity of such situations when they do occur, the Committee believes there would be value in setting up a conviction review panel in the ACT.
- 2.35. The Committee's view is that, given the infrequency with which convictions are challenged, rather than establishing a permanent conviction review unit in the ACT an expert conviction review panel could be convened when required.

Recommendation 3

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

³⁵ Dr Robert Moles and Ms Bibi Sangha, *Submission 2*, pp 3–4.

³⁶ Bridge of Hope Innocence Initiative, *Submission 3*, p 1.

³⁷ Bridge of Hope Innocence Initiative, *Submission 3*, pp 4–5.

³⁸ Bridge of Hope Innocence Initiative, *Submission 3*, p 5.

³⁹ Bridge of Hope Innocence Initiative, *Submission 3*, p 5.

⁴⁰ Bridge of Hope Innocence Initiative, *Submission 3*, p 5.

3. Conclusion

- 3.1. The Committee considers that, given the significant impact of wrongful convictions on affected people, it was important to conduct this inquiry.
- 3.2. In light of the evidence provided in submissions to the inquiry, it is the view of the Committee that the Bill will have a positive impact on the human rights of those in the ACT who are convicted of crimes. The Committee therefore recommends that the Bill should be passed.

Recommendation 4

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

- 3.3. The Committee thanks everyone who participated in this inquiry for their valuable contributions in assisting and informing the Committee's deliberations.
- 3.4. The Committee has made four recommendations in relation to the Supreme Court Amendment Bill 2023.

Peter Cain MLA

Chair

July 2023

Appendix A: Submissions

No.	Submission by	Received	Published
1	Australian Federal Police Association	31/05/2023	19/06/2023
2	Dr Robert Moles and Ms Bibi Sangha	31/05/2023	19/06/2023
3	Bridge of Hope Innocence Initiative	01/06/2023	19/06/2023
4	Legal Aid ACT	05/06/2023	19/06/2023
5	Mr Bill Stefaniak AM	05/06/2023	19/06/2023
6	ACT Law Society	07/06/2023	19/06/2023