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ACT Government
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Executive Branch Manager
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14 March 2023

Dear Ms Hakelis

Supreme Court Amendment Bill (2022) ACT

I write to you on behalf of the Aboriginal Legal Service (NSW/ACT) Limited (ALS) and thank you for the opportunity to respond to the ACT Government's draft *Supreme Court Amendment Bill (2022) ACT* ('the Bill'), specifically the introduction of a right to appeal a conviction on the grounds of fresh and compelling evidence and a wrongfully convicted persons right to compensation.

The Aboriginal Legal Service (NSW/ACT) Limited ('ALS') is a proud Aboriginal Community Controlled Organisation and the peak legal services provider to Aboriginal and Torres Strait Islander men, women and children in NSW and the ACT. The ALS undertakes legal work in criminal law, as well as children's care and protection law and family law. We have 24 offices across NSW and the ACT, and we assist Aboriginal and Torres Strait Islander people through representation in court, advice and information, as well as broader service support such as tenant advocacy.

We provide this submission based on our direct experience representing Aboriginal and Torres Strait Islander people who are disproportionately overrepresented in the criminal justice system across all Australian jurisdictions.

Supreme Court Amendment Bill (2022) ACT

Offences the right to appeal should apply to

Should the right to appeal apply to all offences that may be punishable by sentences of imprisonment where there is a finding of guilt, regardless of whether or not the court imposes sentences of imprisonment?

Any wrongful conviction is a serious concern to our system of justice. That concern is raised by the conviction being wrong. It does not depend on the nature of the charge.

All convictions are recorded on an individual's criminal history which is used to inform future court proceedings in a range of ways including: considering bail applications and aggravating sentence proceedings.

Recorded convictions can also be detrimental for job seekers and inform other penalties.

The ALS is of the view that the right to appeal for wrongful conviction should apply to all offences regardless of penalty as any wrongful conviction is unjust, regardless of the nature of the charge.

Orders on new trial

Should the Bill include a provision such as section 402A(9)(b) of the Criminal Code Act 1924 (TAS) or section 159(5)(b) of the Criminal Procedure Act 1921 (SA), (adopted from an amendment to the determination of appeals in ordinary cases at section 158(5)(b), originally introduced into section 353 of the Criminal Law Consolidation Act 1935 in 2008) which states:

If the court orders that a new trial be held, the Court may not make any other order directing the court that is to retry the person on the charge to convict or sentence the person;

or should section 37P of the Supreme Court Act 1933 be adopted in its entirety, allowing the Court of Appeal to impose conditions and make certain directions and orders that would affect the course of the new trial?

Due to resourcing and capacity constraints, the ALS is unable to fulsomely provide its position on this proposed reform at this time. Should there be further opportunities to engage with the Justice and Community Safety Directorate on this proposed reform, the ALS would welcome the opportunity to provide its view.

More broadly, the ALS is of the view that the Supreme Court must be provided with a broad and unfettered discretion to grant orders that achieve justice in the circumstances of any case.

Powers to grant bail

The power to grant bail under section 9D (Bail for serious offences committed while charge for another pending or outstanding) of the Bail Act 1992 only applies where a person is charged with a serious offence after the court has ordered a new trial. Section 9E (Bail for person sentenced to imprisonment) only applies where a person has been convicted of an offence, not just where they have been found guilty.

Does the court need to be given specific power to grant bail while an appeal is on foot?

The ALS agrees that a specific power to grant bail while an appeal is on foot is necessary and will be addressed by this reform. As the Bill has identified, there is a fundamental gap in the *Bail Act 1992* (ACT), whereby section 9D only applies to a person charged with a serious offence after the court has ordered a new trial and where a person has been convicted of an offence, not just been found guilty.

Further, the statute under section 57AA, has also abolished the common law power to grant bail, see *R v Dennis (No 2) [2011] ACTSC 100* at [68]. For many of our Aboriginal and Torres Strait Islander clients, being released on bail while an appeal is on foot would enable them to reconnect with their

family and community and access critical services. As such, this reform is suitable and supported by the ALS.

Ancillary powers

Section 37P of the Supreme Court Act sets out the orders that the Court of Appeal may make in relation to a new trial:

- ***order that a new trial be conducted generally, or on particular issues;***
- ***impose any conditions that it considers appropriate;***
- ***direct any admissions by a party that it considers appropriate; and***
- ***order that the testimony of a witness examined at the original trial be used in the new trial in the way stated in the order.***

Are any additional express ancillary powers required other than currently set out in section 37P, or are the Court of Appeal's powers and the powers in the Court Procedures Rules 2006, the Bail Act and the Supreme Court Act sufficient. Would setting out specific powers in relation to a new trial be unnecessarily duplicative?

As above, due to resourcing and capacity constraints, the ALS is unable to fulsomely provide its position on this proposed reform at this time. Should there be further opportunities to engage on this proposed reform, the ALS would welcome the opportunity to provide its view.

Right to compensation for wrongful conviction

Should the new right to compensation scheme be a judicial scheme, where compensation is decided by the court pursuant to guidelines set out in legislation, or should it be an administrative scheme?

First, the ALS submits that the mechanism for which applicants can make a claim for compensation due to wrongful conviction under the *Human Rights Act (2004)* (ACT) should remain¹.

However, we note there are barriers to accessing justice under this provision. On many occasions it would require a separate application to the Supreme Court. This is a complicated process. It may raise liability for costs for wrongly convicted persons seeking compensation.

There should be no disincentive, practical or otherwise, for individuals who are wrongly convicted to make such an application. The ALS submits that the costs exposure be removed to provide for appropriate access to justice for all wrongly convicted persons.

Secondly, we are of the view that an additional avenue for accessing compensation could support access to justice, particularly for vulnerable wrongly convicted people not wishing to make a formal application to the Supreme Court.

For example, this could be established through an administrative scheme. A body such as the Human Rights Commission could be empowered to accept applications for compensation. There could be a jurisdictional limit on administrative applications and no requirement for legal representation or liability for costs to ensure full access to justice for wrongly convicted people.

If the administrative body found that the matter was particularly complex or was likely to require significant compensation, the legislation could provide a power to transfer proceedings to the Supreme Court on application by the claimant.

¹ *Human Rights Act 2004* (ACT) s 32.

There have been concerns raised about a flood of applications. However, our experience is that wrongful convictions with fresh and compelling evidence are relatively rare. Accordingly, the additional resourcing requirements for an administrative body would be limited. Further, vexatious matters could easily be vetted on the face of the application with a standard response letter.

Additional concerns

Section 68ZH

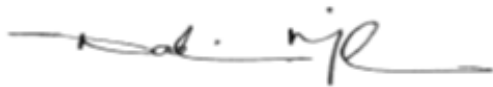
The ALS submits the proposed wording from '*miscarriage of justice*' to '*substantial miscarriage of justice*' at section 68ZH imposes an unnecessary increase to the current accepted threshold in relation to appeals.

The word '*substantial*' interferes with the settled meaning of '*miscarriage of justice*' in the common law. It creates uncertainty in the law and inconsistency with the current statutory test. The term '*miscarriage of justice*' appears in *Supreme Court Act 1933* (ACT) s370(2)(a)(iii).²

The legislation provides that once appeal procedures have been exhausted, if fresh or compelling evidence arises, an individual may bring the evidence to the courts attention. There is no justifiable reasoning the current applicable test should be significantly more onerous than what the law already accepts for an individual who may have been wrongful convicted.

The ALS would welcome the opportunity to discuss this submission further. If you have any questions, please contact ALS Justice Policy Officer, Sascha Kelly via email on sascha.kelly@alsnswact.org.au.

Your sincerely



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² *Supreme Court Act 1933* (ACT) s370(2)(a)(iii).