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A 'Right to Appeal' Act for Australia's States and Territories

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The South Australian Parliament has just gazetted (May 2013) a new Criminal Appeal Act which was supported by the Law Society, the Law Council of Australia, the Australian Lawyers Alliance and Civil Liberties Australia. It passed without a single dissent in either the lower or upper house of the SA Parliament.[1]

This is the first time in 100 years that the criminal appeal rights in Australia have been changed. It is also the first time for any difference in appeal rights between the states and territories.

The Australian Human Rights Commission stated that the system of criminal appeals throughout Australia failed to comply with international human rights obligations in that:

1. It failed to respect the right to a fair trial: and

2. It failed to respect the right to an appeal where persons had been wrongly convicted, and the error was not revealed until after an unsuccessful appeal.

The current situation in most States and Territories is that, after a conviction and an unsuccessful appeal, a person has no further legal right to an appeal. This can apply even where totally compelling evidence emerges that there has been a wrongful conviction (miscarriage of justice).

Courts of Appeal are reluctant to re-open an appeal or hear a second appeal except in extraordinary circumstances. The High Court will not admit fresh evidence.[2]

The only remaining procedure is a petition to the Governor which will be referred to the Attorney-General to exercise a statutory right of referral to the court of appeal. There is authority to state that this is subject to an 'unfettered discretion' and a refusal to refer is not judicially reviewable.[3] Experience shows that even meritorious appeals may not be referred: at least one sat on an Attorney-General's desk for four years without a decision being made.

The new Act in South Australia allows for a second or further appeal where there is 'fresh and compelling evidence' that a miscarriage of justice has occurred.

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[1] The Act, parliamentary statements, submissions and media comment are available at http://netk.net.au/AppealsHome.asp

[2] Bibi Sangha and Bob Moles, "Post-Appeal Review Rights, Australia, Britain and Canada" 36 Criminal Law Journal (2012) pp300-316 http://netk.net.au/CrimJustice/CriminalLawJournal.pdf

[3] Bibi Sangha and Bob Moles, "Mercy or Right? Post-Appeal Petitions in Australia", 14 Flinders Law Journal pp293-328 http://netk.net.au/CrimJustice/FlindersLJ2012.pdf

The Hon Michael Kirby AC CMG has stated:

> *I hope that the measure adopted in South Australia will be quickly considered in other Australian jurisdictions because the risks of miscarriage of justice arise everywhere and they need more effective remedies than the law of Australia presently provides.*
>
> *The desire of human minds for neatness and finality is only sometimes eclipsed by the desire of human minds for truth and justice. There will always be a disinclination to reopen a conviction, particularly where it has been reached after a lengthy criminal trial and a verdict of guilty from a jury of citizens. Sometimes, however, that disinclination must be confronted and overcome with the help of better institutions and procedures than we have so far developed in Australia.* [Referred to in statement to Legislative Council of South Australia 19 March 2013]

In the UK since 1997, the court of appeal has overturned 328 convictions which had otherwise exhausted all avenues of appeal following upon referrals from the Criminal Cases Review Commission. These involved around 70 murder convictions and 37 rape convictions.

Given the similarities between the systems, miscarriages of justice are likely to be occurring in Australia also at a similar rate. It is equally clear that the current arrangements do not provide for them to be recognised and dealt with appropriately in Australia.

We recommend

1. Reinstating conformity between States and Territories – and federally – in Australia in terms of appeal rights, and ensuring appeal rights conform to international human rights obligations.
2. The introduction of a Criminal Review Commission to investigate allegations of wrongful convictions, and to refer appropriate cases to the Court of Appeal.

The South Australian Attorney-General has said that he will raise this issue at the Standing Council on Law and Justice in October 2013.

Dr Kristine Klugman OAM
President
Civil Liberties Australia

Briefing paper on new right to appeal

This briefing paper summarises the issues which are explained at greater length, with full citations, in the article at (1) below.

Preliminary issues

For around 100 years the criminal appeal provisions, enacted by each state and territory in Australia, have been in 'common form' which means that they have been substantially similar. They have remained unchanged throughout that time.

In November 2011 the Australian Human Rights Commission made a submission to the South Australian Parliament in which it stated that the existing appeal procedures throughout Australia failed to comply with international human rights obligations (the International Covenant on Civil and Political Rights).

It said the appeal provisions failed to ensure that there had been a fair trial and also failed to provide a proper right of appeal to those who had become victims of a miscarriage of justice.

The basis for this view is that criminal appeal courts in Australia will hear one appeal only. They have refused to entertain a second or further appeal even where evidence or arguments demonstrate a clear miscarriage of justice. The High Court cannot assist because it says that it cannot admit any fresh evidence which shows there has been a wrongful conviction.

The only remaining safety valve is via a petition to an attorney-general to exercise a statutory power of referral back to the court. Experience shows this is seldom exercised even for persuasive cases.

South Australia

South Australia was the first of the Australian jurisdictions to act to correct this situation. It recently enacted (May 2013) legislation to create a second or further right to appeal where there is 'fresh and compelling evidence' that there has been a miscarriage of justice. Other jurisdictions are now considering the adoption of such a model.

On its face the South Australian legislaton appears to be a common-sense response to a practical problem. However, there are hidden difficulties with it.

The problem summary

There are two issues to be considered.

1. The right of appeal

2 The grounds of appeal

1 Right to appeal

The statutory wording granting an appeal states that "the convicted person may appeal against the conviction…"

The decided cases over the years have consistently emphasised that this means that there may be one appeal. After that the court cannot re-open an appeal or hear a further appeal.

To correct this and allow for a second or further appeal the statutory provision only needs to be amended to read

> "the convicted person may appeal or have a further appeal against the conviction…"

2 The grounds of appeal

The statutory basis upon which a first appeal can be allowed is that:

> the verdict of the jury is unreasonable or cannot be supported having regard to the evidence; or there is a wrong decision on any question of law; or on any ground there is a miscarriage of justice.

In effect, this means that an appeal can be allowed where there has been a miscarriage of justice.

The High Court has explained that the operative condition which will trigger an appeal court's intervention is where there is a significant possibility that an error at trial might have affected the jury's verdict. The mere existence of such a possibility means that the verdict of guilty must be set aside:

> [where] there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence. M v The Queen [1994] 181 CLR 487 at [9] (emphasis added).

Therefore, the test for an application for leave to appeal is that it is 'reasonably arguable' that there is such a significant possibility.

The new South Australian test for leave to appeal

The test for leave to appeal introduced in the new legislation in South Australia is that the court may hear a second or further appeal only where there is 'fresh and compelling' evidence which should be considered on an appeal.

The 'leave to appeal' problem

It can be seen from the above that the test for leave to appeal for a second appeal (fresh and compelling evidence) is more demanding than the test to be applied upon the hearing of the appeal (a 'significant possibility' of error which may or may not include fresh evidence issues). This is illogical and could improperly exclude cases which ought to be heard.

The 'non-evidence' cases

There are a significant number of cases which amount to miscarriages of justice and which do not involve 'fresh evidence'. For example, case where there was legal error at trial. A judge may have summed up incorrectly to a jury, or improperly excluded issues from being dealt with or explored. In these cases there may be no fresh or compelling evidence, although there might well be fresh and compelling arguments. Under the existing legislation in South Australia, such issues could be dealt with on a first appeal, but not on a subsequent appeal.

The human rights problem – 1

In respect of non-evidence-based miscarriages of justice, the human rights problem which the AHRC has pointed to has not been fixed: in respect of those cases, there is still a failure to comply with international human rights obligations.

The human rights problem – 2

The AHRC has said that the international obligations require there to be the same level of procedural rights at each level of appeal. Plainly in respect of the second or further right of appeal, the procedural appellate right is more restricted than that available on a first appeal and thus constitutes an additional impediment to human rights obligations compliance.

The human rights problem – 3

The submission from the Australian Human Rights Commission says that each person is entitled to a review of their conviction on law and facts. The second or subsequent appeal right does not extend to a review of 'error of law'.

The procedural problem

Where there has been legal error at trial but no fresh evidence issue is raised the miscarriage of justice cannot be corrected under this new right of appeal. However, if there has been legal error together with a fresh evidence issue, then both issues could be raised during the argument on appeal. The appeal might then succeed on the legal error and fail on the fresh evidence issue. . Such an outcome appears arbitrary and not conducive to proper respect for human rights /the rule of law.

Confusion with double-jeopardy provisions

It is clear from the parliamentary report that the requirement for 'fresh and compelling' evidence has been taken from the double-jeopardy provisions relating to the possibility of a further prosecution following an acquittal. There is a strong presumption in the criminal law which has to be overcome to allow for a further prosecution in such circumstances – hence the requirement there for fresh and compelling evidence for such a prosecution to proceed.

However, there is no similar presumption against the correction of a serious miscarriage of justice. Where a proper case is made out, an appeal should be allowed on a second or further appeal on exactly the same basis as it would be on a first appeal. The matching requirement of fresh and compelling evidence in these circumstances is based upon this misleading analogy.

Recommendation

The only statutory requirement is to amend the 'right of appeal' provision by the addition of the words 'or have a further appeal' as above. There is no need to make any amendment to the grounds of appeal or requirement for leave to appeal.

In addition, the statutory power of referral to the courts by the Attorney-General (following upon a petition) can be deleted, as it is no longer necessary where there is a statutory right to apply directly to the courts for a second or further appeal.

Common form

The 'rule of law' provisions require that there should be equality before the law. This requires all Australians to have the same basic rights of access to the courts. The criminal appeal rights have been in 'common form' for 100 years for good reason. Now there are pressing arguments to make an amendment to allow for a second or further appeal.

The statutory amendment to enable this should also be in common form so as to maintain the unity and integrity of the Australian criminal appeal system.

Criminal review commission / independent assessment mechanism

Currently in South Australia, the applications for appeal in more serious matters will be to the Supreme Court where the Chief Justice will allocate cases to a two-judge or three-judge appeal. This means that all cases will require the attention of 3-4 judges. In the UK, the Criminal Cases Review Commission conducts such reviews and rejects about 96% of applications.

Dealing with such a substantial number of cases without the involvement of judicial and court time will certainly be more a more efficient use of resources. Perhaps the task of initial assessment whilst

being independent, should not involve the judges. Some feel that the assessment stage should also involve an investigative element as it does in the UK and this is where the additional cost element comes in.

Changing the grounds of appeal

The grounds of appeal have remained unchanged in Australia since their introduction 100 years ago. They were the same as the grounds of appeal in the British Criminal Appeal Act 1907. The British grounds of appeal have been amended twice. They were initially amended to state that an appeal will be allowed where the conviction is thought to be 'unsafe and unsatisfactory' and subsequently (in 1995) to the requirement that the conviction is 'unsafe'.

The current statutory grounds of appeal in Australia (and in the UK) do not use the concept of 'compelling' and, if it were to do so, it would amount to a radical change in the way in which the grounds of appeal have been interpreted by the courts. The introduction of this concept in the South Australian amendment as part of the test of leave to appeal is based upon a misunderstanding of the legal principles involved, as explained in the article at (1) below.

Additional resources

(1) "Evaluating a new statutory right of appeal in Australian criminal cases" Bibi Sangha, Robert Moles and Kim Economides. This article is being refereed for publication and sets out in detail the arguments and references referred to in this briefing paper. It is available for consultation purposes for those considering introducing a new right of appeal.

(2) October 2012 - Criminal Law Journal - Volume 36 - Sangha/Moles - Post-appeal review rights: Australia, Britain and Canada – discusses the Australian criminal appeal rights.

(3) December 2012 - Flinders University Law Journal – Sangha/Moles Mercy or Right? Post-appeal Petitions in Australia .

(4) The South Australian Bill, Act, parliamentary submissions and media comments are available at http://netk.net.au/AppealsHome.asp

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