Criminal appeals: SA initiative opens opportunity for other jurisdictions

By Bibi Sangha and Dr Bob Moles

An Act to establish a new right of appeal in criminal cases has just become law in South Australia. The Act provides for renewed defence appeals against conviction in the event that 'fresh' and 'compelling' evidence comes to light after the usual right of appeal has been exhausted.

The issue arose during the course of a public debate which sought to establish a Criminal Cases Review Commission in SA. A similar commission in the UK has led to the overturning of over 350 convictions in recent years, including over 70 murder convictions.

In Australia, the administration of criminal justice is largely a matter for each of the states and territories. For criminal appeals, the legislation in each state and territory provides for similar procedural rights in each jurisdiction.

The problem arises where a person has been convicted and has had an unsuccessful appeal. If totally compelling evidence is discovered after that, which shows that the person has been wrongly convicted (perhaps as the result of DNA evidence), the person has no *legal* right to any further appeal. There are provisions in NSW and the ACT which would allow for an inquiry, but that is not quite the same as a right of appeal.

There is established case law to say that a court of appeal is not allowed to re-open an appeal or to hear a second appeal. The High Court will say that it is not allowed, for constitutional reasons, to admit the fresh evidence. The only remaining procedure is to attempt to have the matter referred back to the court by way of a petition to the Governor. However, there is case law which says that the process is the subject of an 'unfettered discretion' – and experience shows that even the most deserving cases may not be referred.

In a submission to the parliamentary committee in SA, the Australian Human Rights Commission stated that those appeal provisions do not comply with international human rights obligations, in particular the International Covenant on Civil and Political Rights. They said that the current appeal arrangements throughout Australia may not adequately meet Australia's obligations under the ICCPR 'in relation to the procedural aspects of the right to a fair trial.' It also said that the current system of appeals does not provide an adequate process for a person who has been wrongfully convicted or the subject of a gross miscarriage of justice to challenge their conviction. (Almost certainly then, the system

would not meet the requirements under the Human Rights Act in the ACT and the Charter of Rights in Victoria).

It is a necessary implication of what the AHRC said that the appeal system in Australia has been deficient in this regard for more than 30 years. Australia ratified the ICCPR in 1980.

The committee also recommended that there should be a new forensic review panel which could investigate cases which might have involved flawed forensic evidence and, where appropriate, refer such cases back to the courts. It also said that there should be a formal inquiry into the way in which expert evidence has been used in criminal trials. Those initiatives have not been included in the current Act in SA.

The Act poses something of a dilemma for the other states and territories. The criminal appeal rights in Australia were established 100 years ago, and they have remained uniform (and unchanged) throughout the commonwealth during that time. Australia, of course, embraces the Rule of Law, an important principle of which is 'equality before the law'. Many would think it to be a breach of that principle if people living in SA had appeal rights which were not available to people living elsewhere in Australia.

On the second reading of the bill the SA Attorney-General described the current petition procedure as 'very mysterious' because decisions were made 'behind closed doors'.

He said that this Bill will bring the issues to a public forum – a court. Anyone who believes that their case is a miscarriage of justice can take their case to the court and say whatever they want to say in public, hear whatever anyone else wants to say about it in public. He added that "we have that marvellous disinfectant of sunshine just covering the whole circumstance — magnificent. I am starting to feel quite warm about it right now".

In a recent interview, he described the provisions in the Act as being a matter of "common sense". He said that when passed, he would take the SA Act to the Standing Committee on Law and Justice (the committee of Attorneys-General) for their consideration.

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