



Australian  
Human Rights  
Commission

# Inquiry into the Criminal Cases Review Commission Bill 2010

**AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION TO  
THE LEGISLATIVE REVIEW COMMITTEE OF SOUTH AUSTRALIA**

25 November 2011

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## **1 Introduction**

1. The Australian Human Rights Commission (the Commission) welcomes the opportunity to make a submission to the Legislative Review Committee of South Australia in its Inquiry into the Criminal Cases Review Commission Bill 2010.
2. The Commission is Australia's national human rights institution and is established by the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
3. Under the AHRC Act, the Commission has functions in relation to the promotion and protection of human rights, including those set out in the *International Covenant on Civil and Political Rights* (ICCPR).<sup>1</sup>
4. This submission considers the broad issues raised by the Bill. It does not make a detailed analysis of each proposed provision. Nor does it make any comment on the suitability of the proposed model of Criminal Cases Review Commission as distinct from any other model.

## **2 Summary**

5. The Commission supports, in principle, the formation of a body to review potential miscarriages of justice and wrongful conviction in South Australia.
6. The Commission is concerned that the current systems of criminal appeals in Australia, including in South Australia, may not adequately meet Australia's obligations under the ICCPR in relation to the procedural aspects of the right to a fair trial.<sup>2</sup> More particularly, the Commission has concerns that the current system of criminal appeals does not provide an adequate process for a person who has been wrongfully convicted or who has been the subject of a gross miscarriage of justice to challenge their conviction.

## **3 Recommendations**

7. The Australian Human Rights Commission supports the intention of the Bill to establish an independent body with powers to investigate claims of wrongful conviction and refer substantiated cases to the Full Court for appeal.<sup>3</sup>

## **4 Article 14 of the *International Covenant on Civil and Political Rights***

8. The Commission believes that establishing a body to review alleged miscarriages of justice and wrongful convictions would better protect the rights of individuals in South Australia to a fair trial.
9. Australia ratified the ICCPR in 1980. Under the ICCPR, all of the States and Territories of Australia have an obligation to protect individuals' right to a fair trial.<sup>4</sup>

10. Article 14 of the ICCPR establishes certain procedural guarantees in civil and criminal trials. Article 14 operates to ensure that no individual is deprived, in procedural terms, of his or her right to claim justice.

11. Relevantly, Art 14(5) of the ICCPR requires Australia to ensure that:

Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

12. The relevant procedural protections in article 14(5) of the ICCPR include:

- the right to a review of conviction and sentence on law and facts
- the right to introduce fresh evidence
- the right to a statement of reasons.

13. Article 14(5) does not impose on States an obligation to provide more than one level of appeal.<sup>5</sup> However, where the law does so, a convicted person is entitled to have effective access to each level of appeal<sup>6</sup> with the procedural protections of article 14 applying equally at each level of appeal.<sup>7</sup>

## **5 The application of article 14(5) of the ICCPR in Australia**

14. The United Nations Human Rights Committee (UNHCR) acknowledges that the exact modality of review of criminal convictions will vary across jurisdictions and legal systems. However, State parties to the ICCPR are under an obligation to provide for the substantial review, by a higher tribunal according to law, of both conviction and sentence.

15. This submission refers to the criminal law as it stands generally across all State and Territory jurisdictions in Australia. Observations about the procedures and processes of criminal appeal apply to South Australia.

### **5.1 Review of law and facts**

#### *(a) The law in Australia*

16. In Australia only appeals based on questions of law are heard as of right.<sup>8</sup> There is no general right to appeal on questions of fact and leave is required for such an appeal to be heard.

17. It is clear that where an appeal has been heard on its merits and a final decision made, the matter cannot be re-opened.<sup>9</sup> There may be an exception where there has been a denial of natural justice or procedural fairness.<sup>10</sup>

18. The standard applied by courts in Australia for overturning convictions on the basis of factual evidence is generally that the conviction is unreasonable, unsafe or cannot be supported by the evidence or that there has been a miscarriage of justice.<sup>11</sup> In making that determination, the Court must consider whether 'it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty<sup>12</sup>' based on the factual evidence available at the time of trial.

(b) *International human rights standards*

19. The United Nations Human Rights Committee has found that review proceedings that are limited to questions of law are in violation of article 14(5); individuals have the right to review of law and facts by a higher tribunal.<sup>13</sup> This does not entitle a convicted person to a factual retrial, but requires that the higher tribunal evaluate the evidence presented at the trial and the conduct of the trial.<sup>14</sup>

## **5.2 Fresh evidence**

(c) *The law in Australia*

20. In some jurisdictions in Australia, the appellate Court has a limited ability to admit and consider 'fresh' evidence that has become available between the conviction or the passing of sentence and the appeal.<sup>15</sup> Fresh evidence does not include evidence that could have been available with the exercise of reasonable diligence nor evidence that was reasonably available but not presented at trial.<sup>16</sup>
21. Further, with the leave of the Court, a person may appeal their conviction to the High Court. However, there are strict jurisdictional limits on the evidence the High Court may consider. Pursuant to its designation as an appellate court under ss 73-76 of the *Constitution*, the High Court has held that it cannot receive fresh evidence.<sup>17</sup>
22. The fairness of the rule prohibiting the High Court from receiving fresh evidence has been questioned.<sup>18</sup> Speaking extra-curially, the Hon Michael Kirby has stated that the ability of a convicted person to seek justice may be compromised by the rule prohibiting the High Court from receiving fresh evidence.

[The prohibition] means that where new evidence turns up after a trial and hearing before the Court of Criminal Appeal are concluded, whatever the reason and however justifiable the delay, the High Court, even in a regular appeal to it still underway, can do nothing. Justice in such cases is truly blind. The only relief available is from the Executive Government or the media – not from the Australian judiciary.<sup>19</sup>

(d) *International human rights standards*

23. Individual members of the Human Rights Committee have considered the extent to which article 14(5) affords a right to review in circumstances where fresh material evidence becomes available after the conclusion of the trial.<sup>20</sup>
24. One member, when considering a legal system under which no retrial is permissible and pardon remains the only recourse available for a convicted person, even if fresh evidence conclusively shows that the conviction was pronounced erroneously stated:

I feel obliged to express my concern about legal systems under which no retrial is permissible and pardon remains the only available recourse in such cases. For

one thing, a retrial provides an opportunity for the judiciary to re-examine its own conviction and sentence in the light of fresh evidence and correct its errors. In my opinion, pardon being the prerogative of the executive, the institution of retrial is essential for the principle of independence of the judiciary. Furthermore, retrial ensures that the erroneously convicted person is given an opportunity to have his or her case re-examined in the light of fresh evidence, and to be declared innocent. If he or she is innocent, it would be difficult to justify why he or she should need to be pardoned pursuant to the prerogative of the executive.<sup>21</sup>

25. A range of bodies in Australia have for a number of years supported the establishment of a body to review convictions where new evidence, including DNA evidence, becomes available and may establish a person's innocence.<sup>22</sup> For example, in his review of the operation of the NSW Innocence Panel, Professor Mark Findlay observed:

It would be preferable for the Attorney General to extend the role of the Panel in the direction of a wider Criminal Cases Review Commission, as in the United Kingdom, or Miscarriages of Justice model as in Scotland, to examine all cases of wrongful conviction of innocent people, irrespective of whether DNA evidence formed part of the case... What Government can do here, we advise, is to create a wider institutional framework that can adjudicate on the innocence of claims brought before it and provide resources for the appropriate testing of any such worthy claims.<sup>23</sup>

### **5.3 A right to review**

(e) *The law in Australia*

26. The final and last avenue of review available in Australia is via the petition procedure. In each jurisdiction in Australia, a convicted person has the right to petition for a review of or inquiry into their conviction. In most jurisdictions, the petition is made to the Attorney-General to refer the conviction to the Court of Appeal for review. This is the position in South Australia.<sup>24</sup>
27. In South Australia, the Court in *Von Einem v Griffin and Anor* found that the decision to exercise the Governor's discretion to refer a petition to the Court is not subject to judicial review. The Court found that the petition procedure:
- does not create legal rights. A petition for mercy directed to the Governor does not give rise to any legal rights in favour of the petitioner. The petition assumes all legal rights have been exhausted.
28. The decision in *Von Einem* has been distinguished in cases where the petition was against a conviction under the *Crimes Act 1914* (Cth). In *Martens v Cth*, the decision whether to exercise the discretion in relation to a prisoner convicted with an offence under the *Crimes Act* was found to be made pursuant to s 68 of the *Judiciary Act 1903* (Cth) and as such was amenable to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

(f) *International human rights standards*

29. The UNHCR has found that there is a right to reasons and to a written judgment in an appeal and in a decision to refuse leave to appeal.<sup>25</sup> A decision to dismiss an appeal without providing written reasons is a violation of the right guaranteed by article 14(5).<sup>26</sup>

## **6 Why South Australia needs a body to review wrongful convictions and miscarriages of justice**

30. The right to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law. The right to a fair trial includes a number of guarantees that apply whenever the law entrusts a judicial body with a judicial task.

31. The current system of criminal appeals in Australia for a person who has been wrongfully convicted or who has been subject to a gross miscarriage of justice to challenge their conviction may not be fully compatible with the right to a fair trial as set out in ICCPR article 14(5).

32. In the absence of a national body, the establishment of a South Australian Criminal Cases Review Commission is one mechanism by which South Australia could ensure compliance with international human rights standards.

## **7 The additional procedure in NSW**

33. The Commission notes that the Committee can also consider alternative approaches to the issues identified concerning the criminal appeal procedures in South Australia.

34. New South Wales has adopted an alternative approach. It is the only jurisdiction in Australia with an additional review procedure.

35. Under the *Crimes (Appeal and Review) Act 2001* (NSW), a person may petition for a review of a conviction or sentence or the exercise of the Governor's pardoning power.<sup>27</sup> The Act sets out a non-exhaustive list of factors to which the Governor or Minister may have regard in considering a petition and requires that the Minister report to the Criminal Division of the Supreme Court any action taken in relation to a petition.<sup>28</sup>

36. In addition, a person may apply to the Supreme Court for an inquiry into a conviction or sentence.<sup>29</sup> Again, the Act sets out a non-exhaustive list of factors to which the court may have regard in considering the application.<sup>30</sup> The court must report to the Minister on any action taken in relation to a petition.<sup>31</sup>

37. Any inquiry into a conviction ordered pursuant to sections 77 or 79 of the Act is conducted by a judicial officer appointed by either the Governor or the Chief Justice.<sup>32</sup> The judicial officer must report on the results of the inquiry to either the Governor or the Chief Justice and may also refer the matter to the Court of

Criminal Appeal for consideration of whether the conviction should be quashed or for review of the sentence imposed on the convicted person.<sup>33</sup>

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<sup>1</sup> Including those set out in the *International Covenant on Civil and Political Rights*, (hereinafter ICCPR) opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>2</sup> Article 14, ICCPR.

<sup>3</sup> The Hon. A. Bressington, *Criminal Cases Review Commission Bill*, Second Reading Speech, 10 November 2010.

<sup>4</sup> ICCPR article 50, note also that the United Nations Human Rights Committee examined the operation of a law in force only in Tasmania in *Toonen v Australia*, Communication No 488/1992; UN No. CCPR/C/50/D/488/1992 (1994).

<sup>5</sup> *Leon R. Rouse v. Philippines*, Communication No. 1089/2002, 2005.

<sup>6</sup> *Reid v. Jamaica*, Communication No. 355/1989, U.N. Doc. CCPR/C/51/D/355/1989 (1994); *Henry v. Jamaica*, Communication No. 230/1987, U.N. Doc. CCPR/C/43/D/230/1987 (1991).

<sup>7</sup> In *Reid v. Jamaica*, Communication, the Court found that the complainant was entitled to have access to a written judgment in all instances of appeal.

<sup>8</sup> Lynne Weathered, 'Pardon Me: Current Avenues for the Correction of Wrongful Conviction in Australia', *Current Issues in Criminal Justice*, vol.17 no. 2, 2005-2006, p207. See for example, *Crimes (Appeal and Review) Act 2001* (NSW), ss 52, 53.

<sup>9</sup> *Grierson v The King* [1938] HCA 45; *R v Saxon* (1998) 101 1 A Crim R 71; *Re Matthews* [1973] VR 199.

<sup>10</sup> *Pantorno; R v Saxon* (1998) A Crim R 101.

<sup>11</sup> See, *Criminal Code 1899* (QLD) s 668E(1); *Criminal Appeal Act 1912* (NSW) s 6; *Crimes Act 1958* (VIC) s 568; *Criminal Code 1924* (TAS) s 402; *Criminal Code of the Northern Territory of Australia* s 411,

<sup>12</sup> *M v The Queen* (1994) 181 CLR 487, 493.

<sup>13</sup> *Gelazauskas v Lithuania*, Communication No 836/1998, 17 March 2003.

<sup>14</sup> *Perera v Australia* Communication No. 536/1993 28 March 1995 CCPR/C/53/D/536/1993. Although not expressly stated, it appears that this right of appeal relates to factual evidence available at the time of trial.

<sup>15</sup> 'Fresh evidence' is evidence that did not exist or was not available at the time of trial.

<sup>16</sup> See *Ratten v the Queen* (1974) 131 CLR 510; *R v Abou-Chabake* (2004) 149 ACrimR 417; *Lawless v R* (1979) 142 CLR 659. See for example *Criminal Code Act 1899* (QLD) s 678B; *Criminal Law Consolidation Act 1935* (SA) s 337.

<sup>17</sup> *Mickelberg v The Queen* [1989] HCA 35, [2].

<sup>18</sup> *Sinanovic's Application* (2001) 180 ALR 448, (Kirby J) 451.

<sup>19</sup> Justice Michael Kirby, 'Black and White Lessons for the Australian Judiciary', (2002) *Adelaide Law Review* 195, 206.

<sup>20</sup> *L.G. v. Mauritius* Communication No. 354/1989, 31 October 1990.

<sup>21</sup> *L.G. v. Mauritius* Communication No. 354/1989, 31 October 1990, Individual opinion of Mr Nisuke Ando.

<sup>22</sup> See for example, New South Wales Bar Association, *Submission to Parliament concerning the New South Wales Innocence Panel*, 13 July 2006; Australian Law Reform Commission, Report 96, *Essentially Yours: The Protection of Human Genetic Information in Australia*, Recommendation 45-2.

<sup>23</sup> Finlay M, *Review of the NSW Innocence Panel*, 2003, 31.

<sup>24</sup> *Criminal Law Consolidation Act* (SA) s 369.

<sup>25</sup> *Reid v. Jamaica*, Communication No. 355/1989, U.N. Doc. CCPR/C/51/D/355/1989 (1994); *Henry v. Jamaica*, Communication No. 230/1987, U.N. Doc. CCPR/C/43/D/230/1987 (1991).

<sup>26</sup> *Reid v. Jamaica*, Communication No. 355/1989, U.N. Doc. CCPR/C/51/D/355/1989 (1994).

<sup>27</sup> Section 76.

<sup>28</sup> Section 77.

<sup>29</sup> Section 78.

<sup>30</sup> Section 79.

<sup>31</sup> Section 79.

<sup>32</sup> Section 81.

<sup>33</sup> Section 82.