Law Council
OF AUSTRALIA

Policy Statement on a Commonwealth Criminal Cases Review Commission

1. The community's faith in the criminal justice system rests on both the accuracy of outcomes and the finality of outcomes. A dynamic tension can exists between these competing demands.

2. Accuracy of outcomes requires that every person convicted of a crime has the right to have his conviction reviewed by a higher tribunal according to law. Finality of outcomes requires that there are:

    i. prescribed time limits on the filing of appeals; and
    ii. restrictions on lodging further appeals once a case has already been unsuccessfully pursued through the court hierarchy.

3. Difficulties arise where new or fresh evidence, which bears on the original finding of guilt or the fairness and/or probity of the original proceedings, becomes available after the appeal process has been exhausted. In these circumstances, despite the need for finality of outcomes, the integrity of the system demands that a mechanism is available which allows manifest miscarriages of justice to be considered by the courts and appropriately addressed.

4. At present, there is no adequate mechanism of this type available at the Commonwealth level.

5. Where evidence emerges, after ordinary avenues of appeal have been exhausted, that a person may have been wrongfully convicted of a Commonwealth offence, he or she may petition the Government for a pardon. Section 21D(1) of the *Crimes Act 1914* (Cth) which deals with the sentencing of federal offenders, specifically preserves the powers vested in the Governor General in the exercise of the Royal Prerogative of Mercy.

6. In practice, although it is the Governor-General who exercises the Royal Prerogative of Mercy and formally issues a pardon, he or she does so on the advice of the Minister for Home Affairs or Attorney-General.

7. Statutory provisions also exist in all state jurisdictions which allow the State Attorney-General (or other designated Minister) to refer a case, post conviction and appeal, to the appellate courts for fresh review, often after a petition for mercy has been lodged.[1] Such provisions provide an opportunity for the court to re-examine a case and make appropriate orders to address a demonstrated miscarriage of justice, even after the ordinary avenues of appeal have been exhausted.

8. It is generally accepted, although not finally settled, that the Commonwealth Attorney-General or the Commonwealth Minster for Home Affairs may act as the designated Minister under these State Acts, and thereby refer a Commonwealth case to the state or territory appeal court for fresh review, post conviction and appeal – see *R v Martens* [2009] QCA 351.

9. There are two primary shortcomings with these processes.

    i. It is entirely within the Executive Government's discretion whether or not to issue a pardon or return a case to the courts for further review. There are no statutorily prescribed criteria to guide the exercise of this discretion.

    ii. The Executive Government makes a decision on whether to refer a matter to the appeal court based on the material submitted by the petitioner, that is, the convicted person. The Executive rarely conducts its own inquiry. Further, if a matter is referred to the court for review, the appeal court reviews the case based on the material submitted by the parties. It does not conduct its own inquiry.

    The result is that post-conviction the entire burden, including the financial burden, of identifying, locating, obtaining and analysing further evidence rests entirely with the convicted person.

    He or she has no particular power or authority to compel the production of information, interview witnesses or conduct scientific testing on relevant materials.

    Even where preliminary evidence becomes available which casts doubt on the original conviction, the Executive rarely assumes responsibility for any further inquiry. Effectively, the convicted person must conduct his or her own inquiry and then petition for review based on the material uncovered.

    The exception to this is where a Royal Commission or similar official inquiry is ordered into a conviction, but such inquiries are an expensive and necessarily very rare occurrence.

[1] New South Wales, alone among the jurisdictions, has in place more comprehensive provisions for post conviction review. These are discussed in greater detail below at paragraph 21

10. The Law Council acknowledges that some form of gatekeeper process is required to determine which matters warrant return to the appeal court for further review post conviction and ordinary appeal.

11. However, the Law Council does not regard the Executive Government as the appropriate gatekeeper for a number of reasons, including the following:

    i. further and renewed judicial consideration of certain cases may expose fault on the part of executive agencies, such as the police force; and

    ii. there is a significant risk that the government will only exercise its discretion to refer a matter where there is community pressure for the referral. Persons convicted of certain types of offences, such child sex offences, are unlikely to be able to garner such support even where the evidence of a miscarriage of justice in their case is relatively compelling. In all cases, the result is likely to be that a convicted person, in addition to gathering evidence to support the referral, will also be compelled to engage in a public relations campaign in order to build the type of community support which might help persuade the relevant Minister to refer the matter.

12. A new mechanism for post-conviction review at the Commonwealth level is required.

13. The Law Council recommends that a Commonwealth Criminal Cases Review Commission, which is independent of the Executive Government, should be established. The Commission should be empowered to consider applications for review from people convicted and sentenced for Commonwealth offences.

14. The membership, powers and duties of such a Commission should be clearly set out in legislation. The Commission should be strictly limited to a gatekeeper role, that is, it should not be able to make any findings or orders itself with respect to the relevant verdict or sentence. It should merely be empowered to refer a matter back to the appeal court for review where the Commission is satisfied that there is a *real possibility* that the conviction, verdict, finding or sentence would not be upheld were the reference to be made.

15. The Commission should not be a passive decision making body which only considers the information provided to it by applicants. Rather, in order to perform its important function and apply the real possibility test described above, the Commission should be given information gathering powers which include, where it is reasonable to do so, the power to:

    i. access, obtain and preserve documentation and real evidence held by any public body; and
    ii. appoint an Investigating Officer from another public body to carry out inquiries on its behalf.

16. Applicants to the Commission should first be required to exhaust all available avenues of appeal.

17. Applicants to the Commission should have access to legal aid in order to make their application.

18. The Commission should be confined to reviewing cases which were dealt with on indictment.

19. Where the Commission decides to refer a matter back to the relevant State or Territory appeal court, it should be "*for the whole case to be heard and determined by the court as if it were an appeal by the offender against the conviction or against the sentence (as the case may be)"*.

    This task should be interpreted consistently with the decision of the High Court in Mallard (*Mallard v R* (2005) 224 CLR 125) where in a joint judgment Gummow, Hayne, Callinan and Heydon JJ found (in relation to a like provision in WA legislation) that:

    "…the explicit reference to "the whole case" conveys no hint of any inhibition upon the jurisdiction of the Court of Criminal Appeal on a reference. Indeed, to the contrary, the words "the whole case" embrace the whole of the evidence properly admissible, whether "new", "fresh" or previously adduced, in the case against, and the case for the appellant. That does not mean that the Court may not, if it think it useful, derive assistance from the way in which a previous appellate court has dealt with some, or all of the matters before it, but under no circumstances can it relieve it of its statutory duty to deal with the whole case. The history, as we have already mentioned, points in the same direction. The inhibitory purpose and effect of the words "as if it were an appeal" are merely to confine the Court to the making of orders, and the following of procedures apposite to an appeal, and further, and perhaps most relevantly, to require the Court to consider whether the overall strength of the prosecution case requires the Court to apply the proviso [permitting the judges in the appellate court to dismiss an appeal "if they consider that no substantial miscarriage of justice has actually occurred"].

20. The establishment of a Commission should not replace the prerogative of mercy. The Executive should retain a power of pardon to be exercised independently of the courts and any extraordinary review process.

21. It is noted that, before recommending the establishment of a Criminal Cases Review Commission, the Law Council first gave consideration to the provisions of Part 7 of the *Crimes (Appeal and Review) Act 2001(NSW)* and the desirability of replicating those provisions in Commonwealth legislation.

22. These provisions already provide for a statutory post-conviction review process in New South Wales. In short, the legislation enables a convicted person to petition the Governor or the Supreme Court for a review of his or her conviction or sentence or, in the case of the Governor, for the exercise of the Governor's pardoning power.

    The legislation then enables the Governor or the Court to direct that an inquiry be conducted by a judicial officer into the conviction or sentence, or for the Minister or the Court to refer the whole case to the Court of Criminal Appeal to be dealt with as an appeal.

    Where a judicial officer is tasked with conducting such an inquiry, he or she has the relevant powers conferred on a commissioner by the *Royal Commissioners Act 1923* (NSW). Once the inquiry is complete, the judicial officer must provide a report to the Governor or the Court, and may also refer the matter to the Court of Criminal Appeal, for consideration of the question of whether the conviction should be quashed, or for review of the sentence imposed.

23. While this NSW model is superior to the post-conviction review mechanisms currently in place in other jurisdictions, the Law Council prefers the Criminal Cases Review Commission model for the following reasons:

i. Before an inquiry may be ordered under the NSW provisions, the Governor or the Court must first be satisfied that '*that there is a doubt or question as to the convicted person's guilt, as to any mitigating circumstances in the case or as to any part of the evidence in the case'.* This test has created confusion, as demonstrated in the *Eastman*[2] case, about the extent to which evidence about a defect in the original proceedings may provide the basis of an inquiry, even where that defect does not immediately suggest doubt about the person's actual 'guilt in fact'. Regardless of the High Court's decision on the particular facts of the *Eastman* case, the risk remains that imposing a test of this kind may create an inappropriate procedural hurdle where a convicted person is attempting to impugn the proceedings through which a guilty verdict was secured, rather than the guilty verdict in and of itself.

ii. By involving the Governor and including reference to his or her prerogative of mercy in the relevant provisions, the NSW legislation blurs the line between the prerogative and the introduction of an extraordinary additional appeal process. In so doing, the legislation creates the impression that prerogative of mercy is intended to be subsumed by this new review process.

iii. These provisions are intended to be utilised in cases where a matter has already been finally disposed of by the courts. They are intended to provide a safety net in extraordinary cases, without creating the impression that a verdict or sentence of the court may be subject to ongoing questioning, review and revision. For that reason, it is preferable that an independent, objective, statutory body, which is removed from the trial process and the court system, conducts the inquiry into whether and when a matter should be able to be referred back to the appeal court. The court should not become involved in a matter, and a person should not be seen to have access once more to the courts to re-agitate his or her case, until an independent determination has been made that it is indeed a case where the principle of finality must be set aside in order to avert a likely miscarriage of justice.

[2] Eastman v Director of Public Prosecutions (ACT) [2003] HCA 28; 214 CLR 318; 198 ALR 1; 77 ALJR 1122 (28 May 2003)