

2023

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

SUPREME COURT AMENDMENT BILL 2023

**EXPLANATORY STATEMENT
and
HUMAN RIGHTS COMPATIBILITY STATEMENT
(*Human Rights Act 2004*, s 37)**

**Presented by
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SUPREME COURT AMENDMENT BILL 2023

The Bill is a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

OVERVIEW OF THE BILL

The *Supreme Court Amendment Bill 2023* (the Bill) will amend the *Supreme Court Act 1933* to introduce a new right to appeal a conviction or a finding of guilt on the basis of fresh and compelling evidence.

Commencement for the Bill is delayed by six months from the day after its notification day to allow sufficient time for the development of appropriate court processes and resources to support the new appeal right.

New right to appeal

The Bill allows the court to grant leave to a person to bring an appeal against any conviction or finding of guilt if satisfied that:

- a. there is fresh and compelling evidence in relation to the offence that should be considered on an appeal; and
- b. it is in the interests of justice for the order to be made.

The test for allowing an appeal is the same test for granting leave to appeal, except for the requirement that there has been a “substantial miscarriage of justice”. This higher threshold will help to prevent vexatious and untenable appeals and is consistent with the approaches in South Australia, Tasmania and Victoria.

The Bill allows the court to make the following orders when an appeal is allowed:

- a. set aside the conviction or finding of guilt; and
- b. either order:
 - i. a verdict of not guilty to be entered; or
 - ii. a new trial or hearing.

The Bill adopts the powers of the Court of Appeal when it orders a new trial under section 37P of the *Supreme Court Act* in their entirety to ensure consistency in court powers for any type of appeal.

The new right to appeal will apply retrospectively, and there is no limit on the number of appeals allowed under the new right to appeal.

The court's existing powers in relation to granting bail under the *Bail Act 1992* will apply to the new right to appeal.

Furthermore, the new right to appeal will engage rights under the Charter of Rights for Victims of Crime in the *Victims of Crime Act 1994* and victims' rights will apply equally to the new right to appeal as they do to other criminal law proceedings.

CONSULTATION ON THE PROPOSED APPROACH

In the *Parliamentary and Governing Agreement – 10th Legislative Assembly Australian Capital Territory* the ACT Government committed to “consider amendments to the Supreme Court Act to introduce best practice right to appeal laws” (Appendix 2,16).

On 6 April 2022, the *Wrongful Conviction: Reforms to the Right to Appeal and Right to Compensation* Discussion Paper was released on the ACT Government YourSay and JACS websites and was sent to targeted stakeholders. Submissions could be made for a period for six weeks and nine submissions were received.

A Listening Report on the community and stakeholder feedback received during the consultation was published on 21 November 2022.

The ACT Government developed a consultation draft Bill based on community feedback on the Discussion Paper and circulated it to targeted stakeholders for further comment and feedback on 31 January 2023, receiving eight further submissions.

Input and feedback from all stakeholders on the Discussion Paper and consultation draft Bill has been used to inform the amendments proposed in this Bill.

CONSISTENCY WITH HUMAN RIGHTS

Rights engaged

The Bill engages the following rights under the Human Rights Act:

- Section 18 – Right to liberty and security of person (*promoted*)
- Section 21 – Fair trial (*promoted*)
- Section 22 – Rights in criminal proceedings (*promoted and limited*).

Rights Promoted

Section 18 – Right to liberty and security of person

As stated above, the Bail Act will apply equally to the new right to appeal on the grounds of fresh and compelling evidence as it does existing appeal rights.

The Bill promotes the right to liberty and security of person by creating further opportunities for someone to be released from imprisonment under the Bail Act pending the outcome of an appeal (especially where it is possible to discern immediately a patent error in the proceedings which indicates the appellant has a good chance of success)¹ or, in certain circumstances, a stay of enforcement or execution of a decision, conviction, order, sentence or penalty under section 216 of the *Magistrates Court Act 1930*.

Section 21 – Fair trial

The Bill promotes the right to fair trial, particularly the right of everyone to have criminal charges decided by a competent, independent and impartial court or tribunal after a fair and public hearing, by ensuring that the new right to appeal on the grounds of fresh and compelling evidence applies to any conviction or finding of guilt.

The Bill acknowledges that any conviction or finding of guilt can have a significant impact on an individual.

The United Nations Human Rights Committee (UNHRC) has stated that:

anyone convicted of a crime shall have the right to have their conviction and sentence reviewed by a higher tribunal according to law. As the different languages (crime, *infraction*, *delito*) show, the guarantee is not confined to the most serious offences.²

Therefore, by applying the new right to appeal to all offences, the Bill promotes the right to fair trial.

Section 22 – Rights in criminal proceedings

The Bill promotes rights in criminal proceedings, particularly the right of anyone convicted of a criminal offence to have the conviction and sentence reviewed by a higher court in accordance with law, by introducing a new right to appeal on the grounds of fresh and compelling evidence.

Rights Limited

Section 22 – Rights in criminal proceedings

1. Nature of the right and the limitation (s28(a) and (c))

As set out above, anyone convicted of a criminal offence has the right to have the conviction and sentence reviewed by a higher court in accordance with law. The threshold for allowing the new right to appeal includes that there has been a

¹ See e.g. *Kelly v The Queen* [2015] ACTCA 35 [29].

² UN Human Rights Committee, *General Comment No. 32, Article 14, Right to equality before courts and tribunals and to fair trial* (2007) [45] (<https://www.refworld.org/docid/478b2b2f2.html>, accessed 5 April 2023).

“substantial miscarriage of justice”. This limits the right by providing a higher threshold than required to grant leave to appeal, and an additional criterion to “fresh and compelling evidence”.

2. *Legitimate purpose (s28(b))*

Rights in criminal proceedings may be subject to restrictions, set by law, necessary to support the efficient administration of justice by preventing appeals that are unlikely to succeed or are not in the public interest.

The purpose of the limitation is to prevent vexatious and untenable appeals, promote trust in the criminal justice system and to use a test that has been consistently used in case law and other jurisdictions in Australia.

3. *Rational connection between the limitation and the purpose (s28(d))*

The test of “substantial miscarriage of justice” is likely to achieve the objective of preventing appeals that are unlikely to succeed due to the test being used consistently across the jurisdictions. The test has been endorsed by the High Court (*Van Beelen v The Queen* [2017] HCA 48) and has been adopted in South Australia (*R v Keogh (No 2)* [2014] SASCF 136) and Tasmania (*Neill-Fraser v Tasmania* [2019] TASSC 10). Using the same test as other jurisdictions will also allow the ACT courts to rely on analogous case law when making decisions about cases in the ACT about the new right to appeal.

4. *Proportionality (s28 (e))*

A lesser test that was proposed for the new right to appeal was a “potential miscarriage of justice”, on the basis that this would broaden the test further. However, based on existing case law, the test of “substantial miscarriage of justice” has already been interpreted sufficiently broadly and there was nothing to suggest that the word “potential” would broaden the test in practice.

Furthermore, this test aligns with a test that already exists in section 37O(3) of the Supreme Court Act, as well as tests that have been adopted in South Australia, Tasmania and Victoria. Using a different test would create inconsistency within the Supreme Court Act and could mean that ACT courts would have to develop new jurisprudence about its meaning and application.

Given this, the limitation on the rights in criminal proceedings in relation to appeals is considered reasonable and proportionate given the purpose of preventing vexatious and untenable appeals and promoting consistency across the jurisdictions and the statute book.

Supreme Court Amendment Bill 2023

Human Rights Act 2004 - Compatibility Statement

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Supreme Court Amendment Bill 2023**. In my opinion, having regard to the Bill and the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly is consistent with the *Human Rights Act 2004*.

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Shane Rattenbury MLA
Attorney-General

CLAUSE NOTES

Clause 1 Name of Act

This clause provides that the name of the Act is the *Supreme Court Amendment Act 2023*.

Clause 2 Commencement

This clause provides for the Act to commence 6 months after its notification day to allow sufficient time for implementation.

Clause 3 Legislation amended

This clause identifies that the Act will amend the *Supreme Court Act 1933*.

Clause 4 Appellate jurisdiction New section 37E (2) (e)

This clause inserts new section 37E(2)(e) to make it clear that applications and appeals under new part 8AB (Appeals against conviction for fresh and compelling evidence) may be brought before, and heard by, the Court of Appeal.

Clause 5 New part 8AB

This clause inserts new part 8AB to provide for appeals against conviction on the grounds of fresh and compelling evidence.

Section 68ZC – Application—Pt 8AB

New section 68ZC makes it clear that the part applies to convictions and findings of guilt of offences in both the Supreme Court and the Magistrates Court, and that the new right to appeal is intended to apply retrospectively.

Section 68ZD – Definitions—pt 8AB

New section 68ZD provides signpost definitions for **compelling**, **convicted person** and **fresh** which appear elsewhere in the Supreme Court Act and makes it clear that **court** means the Court of Appeal.

Section 68ZE – Meaning of *fresh* and *compelling* evidence—pt 8AB

New section 68ZE defines the terms **fresh** and **compelling** with respect to evidence in relation to an offence. This section mirrors the existing definitions of **fresh** and **compelling** in section 68K of the Supreme Court Act in relation to appealing acquittals to ensure consistency within the Act.

Section 68ZF – Certain provisions of pt 2A taken to apply

New section 68ZF makes it clear that provisions under Part 2A relating to the Court of Appeal, namely section 37E (appellate jurisdiction), section 37H (appeal bench), section 37I (presiding judge), section 37J (appeal court constituted by a single judge), section 37K (decision-making), section 37L (appeal judge unable to continue sitting), section 37M (reserved judgments), section 37N (evidence on appeal), section 37P (new trials) and section 37Q (bail time on appeal does not count towards sentence).

Of note, this section adopts the powers of the Court of Appeal when it orders a new trial under section 37P of the Supreme Court in their entirety to ensure consistency in court powers for any type of appeal.

Section 68ZG – Court may grant leave to appeal conviction

New section 68ZG permits the court to grant leave to appeal a conviction or finding of guilt where there is fresh and compelling evidence in relation to the offence and it is in the interests of justice.

This section makes it clear that there is no limit on the number of times a convicted person may apply for leave to appeal under this section.

Section 68ZH – Orders on appeal against conviction

New section 68ZH permits the court to allow an appeal under section 68ZG where there is fresh and compelling evidence and, after taking into account the fresh and compelling evidence, there has been a substantial miscarriage of justice, or to dismiss the appeal.

The threshold for allowing the appeal is higher than the threshold for granting leave to appeal to prevent vexatious or untenable appeals.

If the court allows the appeal, this section requires the court to set aside the conviction or finding of guilt and either order a verdict of not guilty to be entered or a new trial or hearing.

Clause 6 Dictionary, notes 1 and 2

This clause substitutes existing Notes 1 and 2 of the Dictionary to create a new note that states the Legislation Act contains definitions relevant to this Act, and adds the terms *director of public prosecutions*, *legal practitioner*, *may* (see s 146), *month* and *must* (see s 146).

Clause 7 Dictionary, definition of *compelling*

This clause substitutes the definition of ***compelling*** to reflect the definitions in new section 68ZE(3) as well as the existing definition in section 68K.

Clause 8 Dictionary, new definition of *convicted person*

This clause inserts a new signpost definition of ***convicted person*** for new Part 8AB (Appeals against conviction for fresh and compelling evidence) and refers to new section 68ZC(1).

Clause 9 Dictionary, definition of *court*, new paragraph (c)

This clause inserts a new signpost definition for ***court*** for new Part 8AB (Appeals against conviction for fresh and compelling evidence) and refers to new section 68ZD.

Clause 10 Dictionary

This clause substitutes the definition of ***fresh*** to reflect the definitions in new section 68ZE(1) as well as the existing definition in section 68K.