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13/54

13 November 2013

Ms Emma Hoiberg
NSW Law Reform Commission
DX 1227 SYDNEY

Dear Ms Hoiberg

Criminal Appeals

I refer to the Association's submission dated 16 August 2013 in relation to this reference.

Abolition of the DNA Review Panel

I note the introduction of the Crimes (Appeal and Review) Amendment (DNA Review Panel) Bill 2013 in Parliament yesterday.

The Bill abolishes the DNA Review Panel, with the result that the only avenue now available to those desiring a post-conviction review is Part 7 of the *Crimes (Appeal and Review) Act 2001.*

The Association's submission to the Law Reform Commission in relation to Criminal Appeals recommended the establishment of a Criminal Cases Review Commission, based on the UK model.

The Association is not concerned about the abolition of the DNA Review Panel in view of the fact that the Panel failed to contribute to the correction of a single wrongful conviction. The Association is, however, concerned with the failure to replace the DNA Review Panel with an appropriate alternative.

There appear to be a number of reasons why the DNA Review Panel failed to refer a single matter to the Court of Appeal. Applicants to the Review Panel are subject to very tight eligibility restrictions: unless there are special circumstances the offence must be punishable by life or 20 years or more (s 89(3)), the applicant must still be in detention or under supervision (s 89(5)), and the conviction must have occurred prior to 19 September 2006 (s 89(3)).

We note that the Panel, in its Annual Report for 2011/2012, suggests that with a relaxation of these requirements the 'work of the Panel would potentially increase significantly' (pp 36-37). However, the Association considers that the Panel's effectiveness is also hampered by other factors.

An applicant will only be eligible if his or her 'claim of innocence may be affected by DNA information obtained from biological material *specified in the application*' (s 79(2), emphasis added). To meet this requirement, the applicant would need to have some knowledge of the nature of the offence and the investigation. Many applicants would lack this knowledge, and would not possess the skills and resources to obtain it. The DNA Review Panel would be more effective if it had greater resources and powers enabling it to carry out its own investigations. Wrongfully convicted defendants are generally in no position to investigate and uncover the flaws in their convictions (see eg Edward P MacCallum, *Report of the Commission of Inquiry into the Wrongful Conviction of David Milgaard* (Government of Saskatchewan, 2008), p 356).

However, even if these restrictions were addressed, the Association considers that the DNA Review Panel would still constitute a very limited response to the problem of wrongful convictions. Clearly, the Panel's work could only uncover wrongful convictions in cases where identity is in issue and the crime generated biological evidence which was gathered and preserved. This is a very narrow class of case.

The Association recognises that defendants claiming to have been wrongfully convicted have other avenues open to them. If they fail on their first appeal, they may petition the Governor or apply to the Supreme Court for a judicial inquiry or a further appeal (ss 76-79). However, it is not easy to persuade the decision-maker that the previous decisions are flawed, and few defendants have the skills and resources achieve this.

The Judicial Commission's report, *Conviction Appeals in NSW* (NSW Judicial Commission Monograph 35, 2011, by Hugh Donnelly, Rowena Johns and Partizia Poletti) identified a dozen successful referred appeals over the period 2001 to 2007. However, as noted in that report (at p 183), virtually all of these were cases of police corruption uncovered by the Royal Commission into the NSW Police Service. Over the last few years, since the backlog of police corruption cases has been cleared away and police integrity reforms have been put into place, there have only been a couple of successful referred appeals.

The DNA Review Panel has corrected no wrongful convictions, and the other provisions in the *Crimes (Appeal and Review) Act* correct very few. The Association does not take this as a sign of the rarity of wrongful convictions, notwithstanding assertions to the contrary in the Second Reading Speech to the Bill.

A more effective review body may uncover many more wrongful convictions. The resources dedicated by the Government to the investigation of police corruption in the 1990s revealed a dozen or so wrongful convictions. Police corruption is just one recognised cause of wrongful convictions. There are many others – false confessions, police tunnel vision, eyewitness error, lying witnesses, biased experts, prosecutorial misconduct, inadequate defence representation (eg Steven A Krieger, 'Why our justice system convicts innocent people, and the challenges faced by innocence projects trying to exonerate them' (2011) 14 *New Criminal Law Review* 333, 341-359). A body with the powers and resources to conduct investigations into potential wrongful convictions of all kinds would be far more effective than narrowly focused bodies.

An alternative model for criminal appeals based on DNA evidence

England's CCRC is a well-resourced body, independent of government, with broad-based powers to investigate potential wrongful convictions, and refer cases to the Court of Appeal, Criminal Division. It can also conduct inquiries as directed by the Court. Since 1997 the Commission's work has resulted in the quashing of more than 350 convictions and sentences at the rate of twenty or so a year (http://www.justice.gov.uk/about/criminal-cases-review-commission/case-library). (There are few DNA exonerations among them: *R v Shirley* [2003] EWCA Crim 1976 and *R v Hodgson* [2009] EWCA Crim 490 may be the only ones so far.)

Prior to its establishment, only about four or five convictions were quashed each year by the Court on references from the Home Secretary. The Association considers that a NSW CCRC may achieve a similar increase in the correction of wrongful convictions.

The Association appreciates that the establishment of a CCRC would reduce the finality of the jury verdict and increase the workload of the Court of Criminal Appeal. However, the English experience is that these costs are manageable and outweighed by the benefits the Commission brings to the criminal justice system. The English Commission receives the strong support of the judiciary. In *R v Spicer* [2011] EWCA Crim 3247, for example, the Court expressed its 'wish ... to record and underline [its] immense debt of gratitude ... to the Criminal Cases Review Commission and pay tribute to and emphasise the importance of [the Commission] being well funded to be able to undertake such enquiries so essential to the administration of justice' (at [20]). Even in these difficult financial times the British Government considers that the CCRC provides good value for money. This year the CCRC not only passed its Triennial Review but had its budget increased by about 10 per cent. Scotland and Norway have both successfully adopted CCRCs on the English model.

Concerns with the Bill

The amendments contained in the Bill retain the tight eligibility restrictions with the exception of the restriction regarding offences committed prior to 19 September 2006.

The Bill also makes it more difficult for an applicant to get DNA testing done. The regime established by the Bill requires applicants to rely upon police cooperation in the first instance. Failing such cooperation from the police, the applicant is then required to make an application to the Court. One of the advantages of the existing DNA Review Panel is that it exercises control over the process independent of any other body, including the police. The costs involved with making such an application are currently borne by the Panel, however under the Bill those costs will be borne by the applicant. Further, the Bill dilutes the obligation on police to retain evidence, requiring only the retention of swabs or samples.

A justification given for the abolition of the Panel is that the review provisions contained in Part 7 of the *Crimes (Appeal and Review) Act 2001*are sufficient. On the contrary, in the Association's experience, few convictions are overturned under these provisions.

The Association supports the establishment of a CCRC for New South Wales, and respectfully suggests that the Law Reform Commission should give consideration to this possibility in the preparation of its report in relation to criminal appeals. Should you or your officers require any further information, please do not hesitate to contact me or the Association's Executive Director Mr Philip Selth on 9232 4055 or at pselth@nswbar.asn.au.

Yours sincerely

Phillip Boulten SC
President