



13 May 11

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RB: rp

The Honourable Ann Bressington MLC
Parliament House
North Terrace
ADELAIDE SA 5000

Dear Ms Bressington

Criminal Cases Review Commission Bill 2010

I refer to our discussions at our meeting on 11 May 2011 and thank you for referring the above Bill to the Society for consideration. The Society supports, in principle, the establishment of a Criminal Cases Review Commission ("CCRC") and we are, generally, supportive of the *Criminal Cases Review Commission Bill 2010* ("the Bill"). There are, however, several specific matters which we wish to raise. The principal concern is the scope of the power for the CCRC to refer cases. We believe it is too wide and will, if passed in its current form, undermine confidence in the criminal justice system.

Bill: Part 3 – References to court

General

We note that the Bill is largely based on the United Kingdom legislation establishing a CCRC (*Criminal Appeal Act 1995* (UK)). We have considered this legislation and note the similarities. The fact, however, that the Bill is in similar terms to the UK legislation does not mean that it should be accepted and implemented without careful consideration of the effect of the provisions if passed in its present form.

It is our view that an appropriate mechanism for post-conviction review be established with a view to minimise the occurrence of substantial miscarriages of justice. We believe that a CCRC, properly instituted and empowered, should be that mechanism. In so stating, we caution that a CCRC should not be, in effect, another court of appeal. It is fundamental for the integrity of the criminal justice system that a CCRC does not give rise to the view that a verdict or sentence of a court may be subject to ongoing review and revision after the matter has been finally disposed of.

It is essential, for the reasons set out below, that the role and function of the CCRC is limited in its scope to dealing with potential substantial miscarriages of justice that occurred because the relevant court at the time *could not reasonably have been in a position to consider all the evidence*. Errors made during the course of criminal proceedings by a court or any party, including the accused, are properly the sole domain of our current appellate system of criminal review and should remain so.

We suggest that the CCRC should only consider those matters where it emerges that new evidence, or evidence which could not reasonably have been available at the time, becomes available after the proceedings and which bears on the original finding or the fairness of the original proceedings and which could reveal a substantial miscarriage of justice (ie, a guilty finding of an innocent defendant or a manifestly unjust sentence). In this regard, the CCRC should not become involved until after the defendant has exhausted his/her appeal rights.

As indicated, a CCRC should not be another avenue for an aggrieved defendant to agitate his/her case. Were it to be, it would necessarily have the effect of undermining the criminal justice system and would dramatically increase the number of cases under review. The numbers are likely to be overwhelming (the UK experience suggests as much). The implications of this for victims, the community, the CCRC, the courts and even the defendants will be substantial.

The fundamental principle of finality of litigation applies no less to the criminal jurisdiction as it does in the civil. It is important for all, including the victims and the defendants, that there be an end point to proceedings. It is for this reason that time limits rightfully apply in the appellate jurisdiction and that a person should not be at liberty to further litigate his/her matter after having exhausted all avenues of appeal.

The consequences of being found guilty of a serious offence(s) are significant. There is therefore great motivation for a defendant to "shake the tree" as often as possible to see what falls out. It is important that the CCRC is not permitted to be used in this way.

Justice, however, lies at the heart of our criminal justice system. Nothing undermines our system of justice more than a substantial miscarriage of justice resulting in the conviction of an innocent person. It is essential, therefore, that our mechanisms for review be equipped to uncover and highlight substantial miscarriages of justice.

We believe the system of post conviction review in this State (Royal Prerogative of Mercy), after all avenues of appeal have been exhausted, is not ideal and will not necessarily uncover and highlight all substantial miscarriages of justice. It is for this reason that we support the establishment of a CCRC.

We now comment on the clauses in Part 3 of the Bill.

Clause 11 – Jurisdiction

Clause 11 applies, on its terms, to indictable offences. This term is not defined. Having regard to cl 12, it must include indictable offences dealt with summarily. We consider that the CCRC should only deal with serious offending (ie, matters dealt with in the superior jurisdiction).

The overwhelming majority of criminal matters are disposed of in the summary jurisdiction. Many of these matters are not serious (either the offences do not attract imprisonment or the conduct does not warrant imprisonment). The volume of work that could emanate from this jurisdiction is potentially substantial. The United Kingdom experience is that only a very small percentage of matters the CCRC considers are referred to the Court of Appeal.

For substantially the same reasons as outlined earlier in these comments (finality, public confidence in system, victims, resources etc) we recommend that the work of the CCRC be limited to serious offending.

Clause 11(1)(a)

Clause 11(1)(a) provides that the CCRC may refer convictions to "*the Court*", which is defined as "*the Supreme Court*". We suggest that all referrals should be to the Court of Criminal Appeal. It would be incongruous for a single judge of the Supreme Court to entertain a referral, which is to be treated as an appeal, in circumstances where:

- the defendant's rights of appeal have been exhausted, meaning that a higher authority, the Court of Criminal Appeal, has finally determined the matter on the merits (and the High Court has refused special leave); and
- a single judge does not, in any event, have an appellate function in respect of matters emanating from the District Court. All appeals from the District Court must go to the Court of Criminal Appeal.

In such cases, a single judge, being an inferior tribunal to the one that finally determined the matter, will be called upon to examine and necessarily review the decision of a superior tribunal.

Clause 11(1)(b) (and Clause 11(2)(b))

The reference in cl 11(1)(b) to the term "*sentence fixed by law*" should be defined to ensure clarity. Our understanding of the purport of the clause is that only that part of the sentence fixed by law, being the head sentence, may not be referred. Of course, a sentence encompasses the non-parole period and other orders.

We expect that cl 11(1)(b) is not exempting from referral non-parole periods in respect of sentences where the head sentence is fixed by law. Clearly, this should not occur. We recommend, therefore, that "*sentence fixed by law*" be defined or that cl 11(1)(b) be amended to make it clear that only the fixed portion of the sentence may not be referred and that all other portions of the sentence may be so referred.

Clause 11(2) (and Clause 12(2))

Clause 11(2) provides that the CCRC's reasons for making a reference are to be taken as the grounds of appeal. We consider this to be practically unworkable. Grounds of appeal are required, for good reason, to precisely and unambiguously identify the basis upon which the decision or order of the lower court is impugned. This is necessary for certainty and to enable all parties to properly formulate and prepare their cases. The aim is to ensure the proceedings are as fair and efficient as possible.

However well crafted the reasons of a CCRC, there is likely to be room for debate as to the grounds of appeal. This is unsatisfactory.

One suggestion we propose is that the applicant draft grounds of appeal in accordance with the reasons of the CCRC and submit them to the CCRC for settling. The settled grounds of appeal would then be taken to be the grounds of appeal.

From a drafting perspective, we suggest "*permission*" to appeal in lieu of "*special leave*". This would be in line with the statutory terminology in South Australia which changed to "*permission*" within the last five years.

Clause 12 – Jurisdiction

We refer to our comments under the heading “*Clause 11 – Jurisdiction*”. Those comments apply with even greater force to summary offences.

Clause 12(1)(a)

On the assumption cl 12 is retained, we suggest that the CCRC refer any such matters to the Court of Criminal Appeal for the substantially the same reasons as outlined above (refer our comments under heading “*Clause 11(1)(a)*”). We note that the arguments in favour of doing so are even more compelling given that the District Court does not have a general appellate jurisdiction. It would therefore be totally inappropriate for the District Court to preside over appeals in circumstances where appeal rights have been exhausted at a superior level.

Clause 13(1)(b)

We refer to our comments above under the heading “*Bill: Part 3 – References to court General*”. In particular, we reiterate our view that the jurisdiction of the CCRC should be limited to those matters where it emerges that new evidence, or evidence which could not reasonably have been available at the time, becomes available after the proceedings and which bears on the original finding or the fairness of the original proceedings and which could reveal a substantial miscarriage of justice.

Clause 13(1)(b), as currently drafted, would permit the CCRC to consider a matter where an argument, evidence or information is not raised in the proceedings that led to the conviction. This could occur for many reasons including a tactical decision by the defendant or an error in judgment. In our view, it would be most inappropriate for a defendant to continue to agitate a matter after it has been finally disposed of in such circumstances.

As stated above, errors made during the course of criminal proceedings by a court or any party, including the accused, are properly the sole domain of our current appellate system of criminal review and should remain so.

Clause 13(1)(c)

We do not believe that cl 13(1)(c) goes far enough. As stated above, we consider that the jurisdiction of the CCRC should only be invoked after the defendant has exhausted all avenues of appeal. This would not mean that the defendant must have done so prior to the new or fresh evidence having become available.

In light of the current state of the evidence, defendants regularly accept a verdict or do not continue with the appeal process after an initial failure. Where the new evidence comes to light later, we suggest that the defendant should then exhaust all rights of appeal before the CCRC can act.

We raise for consideration the issue of sentences that have been served. Presently such sentences may be the subject of an inquiry by the CCRC. We query whether this is appropriate. We contrast this to a conviction, which necessarily has an enduring effect.

Clause 14(1)

Clause 14(1) should make it clear that the “*application*” is to be made to the CCRC.

Clause 14(2)

We consider that a reference should not be made without the consent of the defendant (either directly or on his/her behalf). It is unlikely to ever be in the public interest for a Court to review a verdict without the consent of the person to whom it relates.

The force behind the establishment of a CCRC is to ensure that innocent people are not left with the stain of a criminal conviction (after having exhausted their appeal rights). Where a defendant does not consent to a referral it strongly points to an acknowledgment of guilt because the defendant accepts or does not contest the "impugned" verdict.

Referrals should not be made in such cases. Indeed, we are not entirely comfortable with the CCRC taking on a matter except on the application of the defendant.

In practical terms, matters are likely to be brought before the CCRC only upon application by a defendant. There may be circumstances where it is appropriate for the CCRC to consider a matter without an application (as presently provided for by cl 14(1)). Although those are expected to be rare, we consider that it would be beneficial for the CCRC to be so empowered provided that no reference can be made without the defendant's consent.

Clause 14(3)

We make two comments on cl 14(3). The first, as stated above, is that we recommend that any reference by the CCRC be to the Court of Criminal Appeal.

The second relates to the mandatory requirement for the Court to consider the point referred by the CCRC. The power of the CCRC to seek the advice of the Court is akin to a question of law reserved. As currently drafted, the Court "*must*" consider the point referred. We do not believe the CCRC can or should bind the Court to so consider the point.

Clause 14(4)

We consider it of fundamental importance that all parties be heard on a reference. We therefore do not support cl 14(4).

A reference is treated as an appeal: cl 11(2)(a)/12(2)(a). It assumes even greater importance to the parties given that it is the final avenue to agitate the matter. The defendant has an obvious interest in the result and the community, represented by the DPP, has a substantial interest in ensuring that a just outcome ensues (be it the confirmation of the conviction of a serious offence or the release of the innocent).

There is no reason to distinguish a reference from a normal appeal. Even less so given that the Court is asked to review a matter which has been finally disposed of (appeal rights exhausted). The complexities inherent in a review of such a matter are likely to be great.

A fundamental feature of our system of justice is that all parties be heard. There will be too much at stake for this not to occur on a reference. Additionally, the Court will benefit considerably from the assistance of the parties, just as it does on a regular appeal.

Bill: Remaining Provisions

Clause 3(2)

Clause 3(2) provides that convictions are related if they are of the same person, by the same court and on the same day. We suggest that this should not be the test. A person may be convicted of multiple offences on the same day that are otherwise not connected and have no bearing on each other.

We recommend that conduct giving rise to separate convictions should be related if the conduct is in some way connected or otherwise the impugned conviction has some bearing on another conviction(s). This will occur, for example, where the fact of the impugned conviction may lead to a finding of guilt of another offence(s) ("the related conviction").

Where the related conviction may not have occurred but for the impugned conviction then it too should also be referred by the CCRC because the miscarriage of justice would flow to the related conviction. In many instances the related conviction will not be on the same day or in the same court. This should not preclude the related conviction from being referred.

We also suggest that consideration be given to defining the term "*conviction*" for clarity. In context, it seems that it means the finding of guilt (as distinct from the recording of a conviction as part of the sentencing process).

Clause 5(4)(b)

By virtue of cl 5(4)(b) a member of the CCRC may be removed for "*misconduct*". This term is too vague to found a proper basis for dismissal.

Clause 15 / Proposed Section 368 Criminal Law Consolidation Act

Proposed s368 CLCA empowers the Full Court, in respect of any appeal against conviction, to direct the CCRC to investigate and report to it on any matter. This power is not limited to matters referred to it by the CCRC.

We are uncomfortable with the Full Court being empowered to order investigations on any appeal against conviction. It is unlike a court to have such a function. With it, it looks less like a court and more like an inquisitorial body with an investigative arm (the CCRC). The institutional integrity of the Court may be questioned.

The other effect of proposed s368 is that it expands the jurisdiction of the CCRC. We consider that the CCRC should be limited in its operation as stated earlier in these comments.

We do not oppose the Full Court having the power to direct the CCRC to investigate and report, but we recommend that that power be limited to those cases referred to the Full Court (defined inclusively by the CLCA to include the Court of Criminal Appeal).

The other issue that proposed s368 (and cl 15) highlights is the nature of the court to which the CCRC makes referrals. Earlier in these comments we recommend that only the Court of Criminal Appeal should consider referrals. We accept that the court to which referrals are made should be empowered to direct the CCRC to investigate and report.

In its current form, the Bill permits referrals to the "Supreme Court" and to the "District Court". The Supreme Court may be constituted by one, three or more judges. The District Court may only be constituted by a single judge. Proposed s368 only empowers the Full Court, however, to direct an investigation.

We agree that only the Full Court should be so empowered, but that it is incongruous for a single judge (of either the Supreme or District Courts) not to be. We reiterate that our suggested resolution to this anomaly is for all referrals to go to the Court of Criminal Appeal but that the power to direct an investigation be limited to CCRC referrals.

We otherwise make the following drafting suggestions:

1. s368(1): it is inappropriate for the Full Court to direct "*by notice in writing*". We recommend deleting that phrase. Section 368(1) will then conform with s368(2) which only refers to a "*direction*", not a "*notice*" (as it does in the *Criminal Appeal Act 1995*);
2. cl 15(1): presently it provides "*Where a direction is given by the Court, the Commission must...*". Clause 15(1) should outline the legislative authority under which the direction is given and the reference to "*Court*" should be harmonised with s368 (as it does in the *Criminal Appeal Act 1995*). We suggest something like this "*Where a direction is given by the Court of Criminal Appeal under s368 of the [CLCA], the Commission must...*".

Clause 17(4)

Clause 17 empowers the CCRC to obtain documents by compulsion. It is an essential power to support the very important function of the CCRC. The penalty for non-compliance is insufficient. It should include imprisonment (of at least two years).

Non-compliance may frustrate the work of the CCRC and cause a matter not to be referred on the basis of insufficient evidence. A defendant may, therefore, lose a legitimate chance of highlighting a miscarriage of justice (leading to an acquittal etc). The consequences of non-compliance for a defendant are therefore potentially grave.

The penalty should reflect this. Additionally, the Court should be empowered to order compliance. Presently, the Bill does not empower the Court to compel observance with a notice issued by the CCRC. We recommend that such an amendment be included.

Clause 19(2)

Clause 19(2), as drafted, does not appear to make sense. To make sense of it, it seems that it should be in mandatory terms. That is, the word "*may*" should be replaced by "*shall*" (as it is in the *Criminal Appeal Act 1995*).

Clause 19(1) provides that a person appointed as the investigating officer by the CCRC must undertake certain inquiries. Clause 19(2) is directed to that person's employer and provides that the employer "*may*" permit the person to act as directed by the CCRC. This is at odds with the mandatory nature of cl 18 and 19(1). It appears to only make sense if the person's employer is compelled to permit the person to undertake the inquiries as directed.

With every mandatory requirement the legislature should provide a consequence for non-compliance. The Bill should so provide in respect of the non-compliance by the employer.

Right of Review of CCRC

The Bill is silent on whether a decision of the CCRC may be reviewed. One reading of the Bill strongly suggests that the decision is reviewable, even though that does not appear to be the intention of the drafter.

Clause 14(6) provides that the CCRC must provide the defendant with a statement of reasons for its decision not to make a reference. Nothing is said about what the defendant may do with the statement.

Consistent with the principle of finality, and in the context of the defendant having exhausted his appeal rights, we recommend that the decision of the CCRC not be subject to review. The Bill should be amended to deal with this issue.

Right of Appeal/Review of Court

Similarly, the Bill is silent on whether a decision of a Court on a case referred to it by the CCRC may be appealed or reviewed. Subject to one proviso, for the reasons outlined above we do not believe the Court's decision should be appealable or reviewable.

The proviso is that the Court dealing with the matter is the Court of Criminal Appeal. A single judge of the Supreme or District Courts should not have the final say on any case, not even one referred by the CCRC.

The principal reason for this is because of the increased risk of error with a single judge, who may have certain idiosyncrasies or otherwise not understand the case or give it due attention. The other aspect is the dynamics of a single judge, particularly of the District Court, presiding over a case that has previously been considered by the Court of Criminal Appeal and the High Court. The tendency of the single judge may be to favour the status quo. This reinforces our view that only the Court of Criminal Appeal should be referred cases.

I trust this is of assistance.

Yours sincerely



Ralph Bönig
PRESIDENT