



Right to Compensation for Wrongful Conviction (s.23)

Section 23 of the *Human Rights Act 2004* says that:

- (1) This section applies if—
 - (a) Anyone is convicted by a final decision of a criminal offence; and
 - (b) The person suffers punishment because of the conviction; and
 - (c) The conviction is reversed, or he or she is pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice.
- (2) If this section applies, the person has the right to be compensated according to law.
- (3) However, subsection (2) does not apply if it is proved that the nondisclosure of the unknown fact in time is completely or partly the person's own doing.

Note: Under the Act, all rights may be subject to reasonable limits (section 28). The nature of the right is relevant when considering what is reasonable.

This factsheet is not intended to be a substitute for legal advice.

Scope of the Right

This right is drawn from article 14(6) of the International Covenant on Civil and Political Rights (ICCPR).

Although the right to compensation under section 23 of the *HR Act* is limited to individuals who are convicted of an offence, it does not appear that an individual must have been imprisoned. A lesser sanction, such as a community service order, may suffice, as long as the person suffers “punishment” because of the conviction.

Subsection (1)(c) confirms, however, that the right to compensation is conditional upon the conviction being reversed or the individual being pardoned, on the *sole* ground that a new or newly discovered fact conclusively establishes that there has been a miscarriage of justice. International jurisprudence indicates that this provision might be constructed restrictively. See the examples over page for more information.

Additionally, subsection (3) further limits the right to compensation for wrongful conviction by expressly removing from its scope situations where the wrongfully convicted individual fails to disclose a fact known to them that would lead to their release.

In *Morro, N & Ahadizad v ACT* [2009] ACTSC 118 (10 September 2009), the Supreme Court of the ACT confirmed that s 23 provides an independent statutory right to compensation, notwithstanding that there is no general enforcement provision. It is unclear how the *Human Rights Amendment Act 2007*, which expressly precludes the Supreme Court from awarding damages under s 40C, will affect this right.

Ex gratia payments

The *HR Act* is the only Human Rights Act in Australia that expressly provides for a right to compensation.

Neither the *Australian Human Rights Commission Act 1986* (Cth) nor the Victorian *Charter of Human Rights and Responsibilities Act 2006* confer on individuals' a right to compensation. In other jurisdictions, individuals must seek an *ex gratia* payment.

An *ex gratia* payment is a "payment of money made or given as a concession, without legal compulsion" (Butterworths Legal Dictionary). State and Territory governments are not obliged to make *ex gratia* payments for wrongful conviction and a refusal to do so is not reviewable by the courts.

One well-known example of an *ex gratia* payment for wrongful conviction is the Lindy Chamberlain case. After the discovery of new evidence, Lindy and Michael Chamberlain had their conviction overturned and were awarded \$1.3million in compensation.

Examples – new or newly discovered fact

That the right to compensation for wrongful conviction is limited to circumstances where a new or newly discovered fact shows conclusively that there has been a miscarriage of justice is a significant limitation.

Error – *R v Secretary of State for the Home Department; ex parte Bateman* (1994) 7 AdminLR 175

In this case, the United Kingdom Court of Appeal examined section 133 of the *Criminal Justice Act* (UK) which is in materially the same terms as section 23(1)(c) of the *HR Act*, and held that not all miscarriages of justice would satisfy this restrictive provision. The Court found that judicial error, through the admission of inadmissible evidence at trial, did not amount to the emergence of a "new or newly discovered fact", with the result that the wrongfully convicted Bateman would not be eligible for compensation, even though the Court suggested that he had suffered a miscarriage of justice.

Ultra vires laws – *R v Secretary of State for the Home Department; ex parte Howse* [1993] COD 494 DC

The applicant was convicted of trespass on a number of occasions under by-laws later declared ultra vires by the House of Lords. However, the United Kingdom Courts found that this did not satisfy the "new or newly discovered fact" test, and she was not eligible for compensation.

Examples of when this right could be relevant in practice

The actions of public authorities can both promote and limit rights. Section 23 could be engaged by activities that:

- Increase plea bargains and incentives for an innocent accused to plead guilty;
- Over or underestimate the evidential value of expert testimony;
- Reduce the skill and effectiveness of defence counsel, particularly in relation to reducing funds available to Legal Aid;
- Weaken the laws of evidence;
- Increase prejudice towards the class of people to which the defendant belongs;
- Weaken substantive and procedural protections afforded to the accused in police interview rooms.



**ACT HUMAN RIGHTS
COMMISSION**

Australian Capital Territory

PH: (02) 6205 2222

TTY: (02) 6205 1666

WEB: www.hrc.act.gov.au

EMAIL: human.rights@act.gov.au