REVIEW OF SECTION 475 OF THE *CRIMES ACT* 1900:
THE ATTORNEY GENERAL'S ISSUES PAPER

EDITOR'S INTRODUCTION

The terms of section 475 of the *Crimes Act* 1900 (NSW) are as follows:

> 475. Governor or Judge may direct inquiry
>
> (1) Whenever, after the conviction in any court of any person, any doubt or question arises as to his guilt, or any mitigating circumstances in the case, or any portion of the evidence therein, the Governor on the peetition of the person convicted, or some person on his behalf, representing such doubt or question, or the Supreme Court on application by or on behalf of the person or of its own motion, may direct any prescribed person to, and such prescribed person may, summon and examine on oath all persons likely to give material information on the matter suggested.
>
> (2) The attendance of every person so summoned may be enforced, and his examination compelled, and any false statement wilfully made by him shall be punishable, in like manner as if he had been summoned by, or been duly sworn and examined before, the same prescribed person, in a case lawfully pending before him.
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> (3) Where on such inquiry the character of any person who was a witness at the trial is affected thereby, the prescribed person shall allow such person to be present, and to examine any witness produced before such prescribed person.
>
> (4) Every deposition taken under this section shall be stated in the commencement to have been so taken, and in reference to what case, and in pursuance of whose direction, mentioning the date thereof, and shall be transmitted by the prescribed person, before whom the same ws taken, as soon as shall be practicable together with his report as to the conclusions to be drawn therefrom, to the Governor if the inquiry was directed by him, or to the Supreme Court, if the inquiry was directed by the Supreme Court, and the matter shall thereafter be disposed of, as to the Governor, on the report of the Supreme Court, if the inquiry was directed by the Supreme Court, or otherwise, shall appear to be just.
>
> (5) In this section:–
> "prescribed person" means a Justice or a judicial officer within the meaning of the Judicial Officers Act 1986.

The origins of s475 lie in sections 383 and 384 of the *Criminal Law Amendment Act* 1883. These sections provided a means of inquiring into a criminal conviction prior to the introduction of a criminal appellate system in the *Criminal Appeal Act* 1912. A definitive history of s475 remains to be written and would be a useful research project, LLM or PhD topic. The section underwent minor amendment in 1992 to extend its provisions to convictions obtained "in any court" and to provide for initiation by way of summons in the Supreme Court, as suggested in the minority judgment of Kirby P in *Varley v Attorney General (NSW)* (1987) 8 NSWLR 30 at 41. Increased attention has been focussed on s475 in recent years as a result of a spate of inquiries in what might be called "miscarriage of justice" cases such as the Anderson, Alister and Dunn, McLeod-Lindsay, Ziggy Pohl, Douglas Rendell, Arthur Loveday, and a general climate of public concern over cases

such as the Chamberlain and Condren cases in Australia and the Birmingham Six and other such cases in Britain.

The Criminal Law Review Division of the New South Wales Attorney General's Department published an Issues Paper: *Review of Section 475 of the Crimes Act 1900* in November 1992. The paper sought the opinions of interested parties on a range of issues including whether s475 should be retained, its rationalisation with other forms of inquiry, the provision of greater direction in the section by way of various procedural reforms, and others. The time for the making of submissions on the Issues Paper elapsed in December 1992 and the Attorney General's Department is currently considering its options. However in the light of the paucity of information on s475 it seemed useful to reproduce a section of the Issues Paper which sets out the current interpretation and operation of s475. We thank the Attorney General's Department and the Director of the Criminal Law Review Division, Jillian Orchiston, in particular, for permission to publish this excerpt from the Issues Paper.

David Brown
Issue Editor

THE NEED FOR REFORM

In 1992, the Criminal Law Review Division of the Attorney General's Department undertook a detailed review of section 475 of the *Crimes Act*. This was the first comprehensive review of the section since its enactment in 1900.

The increase in applications in recent times, such as the Douglas Rendell, Ziggy Pohl, McLeod-Lindsay, and more recently, Andrew Kalajzich inquiries highlighted certain anomalies in the scope and operation of section 475 requiring detailed examination. In particular, the present mechanism for the quashing of convictions following a successful section 475 inquiry, is not necessarily available to all deserving applicants due to existing procedural constraints. Similarly, persons subject to a special finding of guilt under the *Mental Health (Criminal Proceedings) Act* 1990 appear to be excluded from access to a section 475 inquiry on the basis of definitional problems per se. A further important issue concerns whether any limit should be placed on the number of section 475 applications made by a convicted person. The need to safeguard the right to legitimate further applications as against the costs implications to the criminal justice system of repeated unmeritorious claims, requires careful consideration. Moreover, the language of section 475 is often ambiguous and outdated, falling short of the current ideals of "plain English".

In November 1992, an Issues Paper: *Review of Section 475 of the Crimes Act 1900* was prepared by the Criminal Law Review Division and widely circulated for public comment on key proposals for reform. The views of the many respondents have been analysed and will be taken into consideration by the Government in the formulation of any amendments to the provision.

Jillian Orchiston
Director, Criminal Law Review Division

An extract of the paper is printed below, which outlines the operation and interpretation of the procedure under Section 475 of the Act.[1]

3 CURRENT INTERPRETATION AND OPERATION OF SECTION 475

The procedure under section 475 involves the following principal steps:

1 The Pre-inquiry stage

A section 475 inquiry can be set in train in three ways:

(a) Petitions to the Governor

A person who has been convicted, or someone on that person's behalf, can petition the Governor. The Governor may then direct a judicial officer or justice of the peace to summon and examine on oath all persons likely to give material information on the matters raised in the petition.

The provision does not stipulate that the petition to the Governor must specifically seek a section 475 inquiry. Presumably the Governor can act on the strength of a petition which simply seeks a pardon or, even more generally, the exercise of the prerogative of mercy without alluding to section 475.

Petitions to the Governor are sent to the Attorney General in the first instance who then seeks the advice of the Solicitor-General or the Crown Advocate as to whether an inquiry is justified. In appropriate cases, the Attorney may advise the Governor to direct that an inquiry be held.

(b) Initiation by the Supreme Court of its own motion

The Supreme Court "of its own motion" may give a direction that an inquiry be held. Section 475 does not stipulate how the matter can be brought to the attention of the Supreme Court. In practice, the matter has been drawn to the Court's attention in informal ways. For instance, a request for an inquiry may be made in a letter from the convicted person to the Supreme Court; a media campaign might prompt the Court to act; or a judge who is sufficiently "uneasy" about a conviction following a jury trial in the Court over which he or she presided may consider that an inquiry is warranted.

In such cases, the judge deals with the matter in private chambers and is not obliged to give reasons for his or her decision as to whether an inquiry should be initiated or not.

With the introduction in 1992 of direct applications to the Supreme Court by the convicted person or his or her representative (see (c) below), the instances of the Supreme Court directing an inquiry of its own motion may become comparatively rare and confined to cases where the presiding trial judge is of the opinion that an inquiry should be held.

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(c) Formal application to the Supreme Court

To overcome the lack of formal procedural rights for applicants under (b) above, the section was amended in 1992 to provide an alternative, and third method for invoking the provision, ie by direct application by a convicted person or his or her representative to the Supreme Court. This new procedure should assist in "diminishing the risk of unredressed injustice which it is the purpose of the section to prevent": *Varley v Attorney General* (NSW) (1987) 8 NSWLR 30 (Varley (No 3)). The formal process of summons provides that this initial scrutiny will be heard in open court in such cases.

Availability of alternative avenues:

- under section 475

  Although the section is silent on the matter, it has been assumed that a person need not elect once and for all between petitioning the Governor and formally applying or drawing the matter to the attention of the Supreme Court. For instance, Ronald Varley's unsuccessful petition to the Governor did not preclude his later Supreme Court application. The inquiry into Douglas Rendell's conviction was the result of an application to the Supreme Court which followed an unsuccessful petition to the Governor.

  It has also been assumed that there is no restriction on the number of times that any of these alternative avenues under section 475 can be pursued in connection with any one conviction. The recent inquiry into the conviction of Alexander Lindsay (formerly McLeod-Lindsay) which resulted from an application to the Supreme Court, had been preceded by two earlier petitions to the Governor, one of which led to an inquiry.

- Under the Criminal Appeal Act

  There appears to be no requirement that an election be made between pursuing a section 475 inquiry and seeking a review of a conviction by any of the other means available. For example Diane Lucht and Patrick Hudd appealed to the Court of Criminal Appeal, then sought but were refused special leave to appeal to the High Court before petitioning the Governor under section 475. (That petition led to their case being referred to the Court of Criminal Appeal under section 26 of the Criminal Appeal Act).

  There is no requirement that section 475 be used only as a last resort. For example in the case of Eric Kelly the sequence of events was as follows: conviction, unsuccessful appeal to the Court of Criminal Appeal, section 475 petition, section 475 inquiry, petition to the Governor for a reference to the Court of Criminal Appeal under section 26, dismissal of the section 26 "appeal".

2 The Direction

(a) Factors relevant to the exercise of the discretion

The power of the Governor or of the Supreme Court to direct the holding of an inquiry under section 475 is predicated on a doubt or question having arisen as to

the guilt of a convicted person or as to any mitigating circumstances of the case or any portion of the evidence. The reference to a doubt or question as to a person's guilt or any mitigating circumstances are well-recognised legal concepts and have not required judicial interpretation. However the meaning of the words "any doubt or question as to ... any portion of the evidence [in the case]" is possibly less clear, though apparently there has not yet been any need to explore it.

Section 475 does not expressly require that the doubt or question must be present in the mind of the Governor or of the Supreme Court. However, it has been accepted that neither should direct the holding of an inquiry without having some view as to the existence of the doubt or question. The test to be adopted is whether the matter causes them "unease" or "a sense of disquiet" in allowing the conviction to stand.[2]

The Governor or the Supreme Court need not be satisfied that the doubt or question is well founded. That is an issue for the judicial officer or justice before whom the inquiry is held.[3]

Section 475 does not indicate how the court shall determine whether the material presented does cause a sense of unease of sufficient gravity to justify an inquiry. However, the Supreme Court's consideration of the section provides some guidance. In assessing material put forward the Court is not required to apply the rules of evidence[4] and is not restricted to "fresh evidence" or new material,[5] although if the material was readily available at the trial this would probably influence the weight to be given to it in deciding whether to direct the holding of an inquiry.[6] It would also be appropriate for the Court in exercising its discretion to take into account any failure by the convicted person to pursue other avenues of judicial appeal (eg, to take fresh evidence to the Court of Criminal Appeal) and the reasons for that failure.[7]

As a matter of practice the factors which have been identified as relevant to the Supreme Court's exercise of its discretion under section 475 are also taken into account in the exercise of the Governor's discretion under the section.

In directing that an inquiry be held the Court is acting administratively, not judicially.[8]

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2 *Varley (No 3)* (1987) 8 NSWLR 30 at 35, 48; *Rendell* (1987) 32 A Crim R 243 at 245.

3 *Varley (No 3)*, note 2 at 48.

4 *Varlev v Attornev General (NSW)* Nagle CJ at CL, Supreme Court of New South Wales, 19 October 1979, unreported *(Varley (No 1)* at 11–12.

5 *Sutton* Court of Criminal Appeal, 7 December 1978, unreported; *Rendell*, note 2 at 248.

6 *Rendell* note 2 at 248; *Esposito* Hunt J, Supreme Court of New South Wales, 14 July 1988, unreported at 2.

7 *Rendell* at 248.

8 *Varley (No 3)* note 2 at 49; *Kalajzich* Grove J Supreme Court of NSW, 18 September, 1992, unreported at 3.

(b) Revocability of decision to direct that an inquiry be held

It will not always be a simple matter to determine which of the variety of mechanisms available for the review or scrutiny of criminal convictions is the most appropriate in a particular case. For instance, it is possible that having directed that a section 475 inquiry be held, the Governor may subsequently decide that the matter might more appropriately be referred to the Court of Criminal Appeal under section 26 of the Criminal Appeal Act. It is not clear whether the Governor can legally revoke a prior direction, even with the consent of the convicted person or of the person petitioning the Governor on his or her behalf.[9]

(c) Inquiry by a "prescribed person"

Most of the inquiries which have been held under section 475 have been presided over by Supreme Court judges. Prior to 1992 the section required that the inquiry be conduced by a "justice". Many presiding Judges were not justices and, in consequence, had to be appointed justices of the peace for the purposes of the inquiries. The 1992 amendments have overcome this requirement by providing that an inquiry may be conducted by "prescribed persons", defined to include judicial officers within the meaning of the Judicial Officers Act 1986, and justices.

3 The inquiry

(a) Scope and Procedure

The following propositions concerning the scope and purpose of an inquiry appear now to be generally accepted:

- an inquiry is not simply a retrial of the convicted person;
- its purpose, at least where a question or doubt as to guilt arises, is much wider. It extends to a consideration of the conduct of, and the evidence presented at, the trial in the light of further evidence and submissions received in the inquiry, in order for the judicial officer or justice to determine whether the question or doubt remains;
- the judicial officer or justice is not restricted to evidence which would have been admissible at the trial;
- the judicial officer or justice is not bound by the rules of evidence;
- the giving of a direction to hold an inquiry does not revive either the presumption of innocence in favour of the convicted person or the onus on the Crown to establish that person's guilt;

9 See *Wade Administrative Law* 6th Ed 253277; cf *Parkes Rural Distributions Pty Ltd -v- Glasson* (1986) 7 NSWLR 332 at 3356, *Collector of Customs (NSW -v- Brian Lawlor Automative Pty Ltd* (1979) 24 ALR 307, *Interpretation Act* 1987, s48.

- at the inquiry there is no onus on either the convicted person or anyone who petitioned the Governor or applied to the Supreme Court on his or her behalf to establish that the conviction was wrongfully procured;
- the judicial officer's or justice's task is not to make orders implementing his or her conclusions but to report on them in such a way as to enable the Executive to take action.

For the purposes of the inquiry the judicial officer or justice is to "summon and examine on oath all persons likely to give material information on" the questions or doubts raised in the petition. The judicial officer or justice may review evidence which was given at trial and has a discretion whether to recall trial witnesses for examination or cross-examination.[10] Section 475 does not expressly state that the judicial officer or justice has power to require persons to produce documents or other things in their custody or control.[11] It may have been assumed that the power to summon persons to give material information to an inquiry includes this power.

Apart from the requirement that persons be examined on oath, section 475 leaves the procedure to be followed in the inquiry at large. For instance at the 1969 McLeod-Lindsay inquiry "the strict rules of evidence were not adhered to, except where counsel required adherence to such strict rules".[12] It is left to the judicial officer or justice conducting the inquiry to decide who may appear at the inquiry, how evidence given in earlier proceedings is to be dealt with, and who is to call witnesses before the inquiry. The general practice has been for witnesses to be called by counsel assisting the inquiry.

(b) Procedural fairness

In conducting a section 475 inquiry a justice of the peace is carrying out the duties of the office of a justice. The justice may accordingly be liable to direction by the Supreme Court to do any act in relation to the conduct of the inquiry: section 134, Justices Act 1902.

It has been said that the actual inquiry is judicial in nature "both as to the manner of conducting it, and as to forming a foundation for subsequent determination by the Executive".[13]

However the function of an inquiry is probably not judicial in any strict legal sense. The judicial officer's or justice's conclusions from the inquiry, as set out in the report, do not bind anyone. It is left to the Governor on the advice of the Executive Council whether these conclusions are acted upon. Nonetheless it could be argued that the judicial officer or justice has the power to make

10 *See Report of the Inquiry held under Section 475 of the Crimes Act 1900 into the Convictions of Timothy Edward Anderson, Paul Shawn Alister, and Ross Anthony Dunn*, May 1985, Vol.1 at 49.

11 Contrast s8, *Royal Commissions Act* 1923 and sl4, *Special Commissions of Inquiry Act* 1983.

12 *Report of the Inquiry held under Section 475 of the Crimes Act 1900 into the Conviction of Alexander McLeod-Lindsay*, 1969, at 3.

13 *White* note 1 at 163.

decisions which may affect a person's rights, interests or legitimate expectations[14] and therefore is under a general duty to exercise procedural fairness.

(c) Reports

Section 475 requires the judicial officer or justice to transmit to whoever directed the inquiry, the depositions taken at the inquiry and to report on the conclusions to be drawn from them. The reports of inquiries to date have drawn conclusions from an assessment of the depositions when set against the broader context of the evidence given at the earlier proceedings, the conduct of those proceedings and further evidence and submissions at the inquiry.

Where the holding of the inquiry was directed by the Governor, the judicial officer or justice reports directly to the Governor. Where the holding of the inquiry was directed by the Supreme Court, the Court prepares a further report to the Governor on the report it has received from the judicial officer or justice.

Section 475 leaves entirely open what the Court's report should contain. However these reports have tended to recommend what, if any, executive action should be taken as a consequence of the judicial officer's or justice's conclusions.

(d) The Governor's disposal of the matter

The Governor can only dispose of the matter by executive action. The Governor will refer the matter to the Attorney General for advice. The Governor's powers include the granting of a full or conditional pardon, commutation (substituting one form of punishment for another) or remission (reducing the amount of a sentence without changing its character).[15] Most importantly, the Governor's powers do not include the quashing of a conviction. Traditionally, this power has been the preserve of the courts or the legislature.

14 cf *Annetts v McCann* (1990) 65 ALJR 167.

15 Anson *The Law and Customs of the Constitution* (vol 2, 4th ed, 1935) at 30.