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MISCARRIAGES OF JUSTICE IN AUSTRALIA: UNFINISHED BUSINESS

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HUMAN IMPERFECTION AND CRIMINAL TRIALS

No system of criminal justice is perfect. Some are more imperfect than others. The imperfections may arise from the wrongs of tyrannical rulers. During such regimes, the judges may become brutal in the extreme.[1] The chances of securing justice from such judges will be remote. Yet even in jurisdictions which pride themselves on the independence and incorruptibility of their judges may sometimes adopt crimes,[2] or follow practices,[3] that seriously impede the conduct of a trial and lead to unjust and wrongful outcomes.

Australia's procedures of criminal justice were mostly inherited from England. This was the case in most of the other colonies of the British Crown. In fact, it is unlikely that the British settlements in Australia, would have been chosen as penal colonies, but for a crisis at the time in the English criminal justice system.[4] Following the American Revolution of 1776-83, it

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* Chairman of the Australian Law Reform Commission (1975-83); Judge of the Federal Court of Australia (1983-4); President of the Court of Appeal of New South Wales (1984-96); and Justice of the High Court of Australia (1996-2009).

[1] Helmut Ortner, *Hitler's Executioner: Roland Freisler President of the Nazi People's Court*, Frontline Books, London, 2018.

[2] See e.g. the "unnatural offences" then appearing in *Crimes Act 1901* (NSW), ss79, 80, 81, 81A. Consent was no defence: *The Queen v McDonald* (1878) 1 SCR (N.S.) 173.

[3] Such as the prohibition on the accused's entitlement to give oral testimony on oath in support of the defence.

[4] E. Christopher and H. Maxwell Stewart, "Convict Transportation in Global Context 1700-88" in A. Bashford and S Macintyre (eds), *The Cambridge History of Australia,* CUP 2013 at 68, 73.

became necessity for Britain to find an alternative place to which convicted prisoners could be sent, after the American settlements secured their independence. Once that happened, the Americans refused to accept more English convicts, preferring the free labour of unpaid slaves to boatloads of low-class English prisoners. Even the humblest of these carried with them the residual entitlements of the common law of England, a fact that sometimes made them troublesome.

The English law had its protective features; but also a harsh and punitive trial system. There were many capital crimes. There were, at first, no procedures for appeal, least of all appeal on the factual merits. Even for conviction of seemingly trivial offences, the sentences imposed were heavy in order to deter crime. Procedures that today appear irrational (such as forbidding the accused to give oral testimony on oath) lasted well beyond the criticism by reformers, including Jeremy Bentham and J.S. Mill.[5] Throughout the 19th century, despite many calls for reform, some of which were eventually adopted in the great criminal codes exported to countries of the British Empire,[6] the United Kingdom remained resistant. Bentham blamed "Judge & Co" for fighting against reforms, generally with success.

Some reforms reluctantly adopted in elsewhere found their way into the criminal law and practice of the Australian colonies. These included limited systems of appeal by which, at least on issues of law, the trial judge could

[5]HLA Hart, "Jeremy Bentham" AWB Simpson (ed) *Biographical Dictionary of the Common Law*, Butterworths, London, 1984, 44 at 45. *Ibid*, John Stuart Mill, *loc cit*, 364.
[6] Such as the *Indian Penal Code* of 1860. See Thomas Babington Macaulay in *AWB Simpson*, above n.5 at 330 and Sir James Fitzjames Stephen, loc cit, 486.

reserve disputable questions to be resolved by a form of appeal.[7] As well, eventually the prisoner, commonly facing the risk of execution if a jury should return a verdict of guilty, was allowed to give evidence on oath. The jury would hear the prisoner's sworn version of events, if the election was made to give evidence. Before that, the most that was allowed was usually an unsworn statement from the dock – a procedure that persisted for a long time after the alternative became available.[8]

Notwithstanding modest reforms in England, most of which were copied in the Australian colonies, the law and practice in Australia remained tied to the apron strings of the metropolitan power at Westminster. Even when independent dominions of the Crown were established in Canada (1868); Australia (1901); New Zealand (1907); and South Africa (1909), much of the law and many of the procedures remained those still observed in England. Whilst Queensland, Western Australia, Tasmania, and to some extent the Northern Territory of Australia, eventually embraced a criminal code, other jurisdictions continued to apply the common law of crime (especially New South Wales, Victoria and South Australia) and to follow English traditions and procedures, subject to particular statutory variations. When I was taught criminal law in the first year of my law course in Sydney in 1958, the texts that we studied were those written in England by Rupert Cross and Asterley Jones.[9] There was only occasionally a glance at the local statutes that enumerated the crimes punishable and the procedures to be followed in the local jurisdiction.[10]

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[7] This was the procedure of Crown Cases Reserved. It was preserved in *Criminal Appeal Act* 1912 (NSW), s5A
[8] *Azzopardi v The Queen* (2001) 205 CLR 50 at [71]-[73]; *GBF v The Queen* (2020) 94 ALJR 1037 at 1041 [21].
[9] *An Introduction to Criminal Law*, Butterworth & Co, London, 3rd Ed, 1953.
[10] In the *Crimes Act 1900* (NSW). See above n.2.

Against this background, it will be no surprise that, at the time of Australia's federation and political independence, decisions had been taken, copying the United States Constitution and not that of Canada, to leave the bulk of the criminal law as the responsibility of the States and Territories; and not of the Federal Parliament. No national criminal code was adopted. Issues of evidence in criminal trials, criminal procedures and substantive criminal law were thus left to the sub-national jurisdictions concerned. This was another impediment to substantial reform. Because crime was basically regarded as a local matter, change to the law was commonly viewed as controversial. The criminal law was not readily susceptible to change.

One change that was adopted followed, in the manner of those times, a reform to criminal procedure earlier adopted by the British Parliament in 1907. This involved the enactment of a *Criminal Appeal Act* of that year.[11] That Act was designed to provide a larger ambit of criminal appeal involving issues of substantive criminal law; criminal trial procedures; and sentencing, all measured against the risks of illegality and miscarriages of justice. The English Act of 1907 applied initially to England and Wales, but not to Scotland or Ireland. Each of those parts of the United Kingdom had their own criminal laws. In the place of the partial reforms allowing for the reservation of points of law and the issue of a writ of error, the 1907 Act established a new Court of Criminal Appeal with different and larger powers.

[11] *Criminal Appeal Act 1907* (GB). Cf. *Criminal Appeal Act 1912* (NSW) and similar provisions throughout Australia, described in B. Sangha and R. Moles, *Miscarriages of Justice Australia*, LexisNexis Butterworth, Sydney, 2015. Use of, and practice under, the template provisions differed between the Australian CCAs. See Sangha and Moles, 5 [1.1.1].

Much opposition was voiced by the English judges and by many lawyers at the time about this enactment. It was feared that it would undermine the sanctity and finality of jury verdicts and encourage convicted persons to abuse the facility of appeal.[12] The opponents asserted that wrongful convictions were a rarity in England (and systems derived from England) because of the quality of the judges and the high standard of proof required to establish the guilt of the accused. Others emphasised the need to defend the finality of criminal proceedings, assertions that this was necessary to the stability of society in matters of great emotion and potential fear and disputation. In part, the resistance to criminal appeals in Britain was also based on the understanding that truly deserving cases could be dealt with by pardons issued by the executive government on behalf of the Crown, as the residual font of mercy.[13]

Despite the opposition, the 1907 Act became law. What is more, legislation "in common form" was quickly copied in many jurisdictions of the British Empire. It was replicated in common legislative language in all of the sub-national jurisdictions of Australia. It had the consequence of enlarging the engagement of the senior judiciary in the criminal law; promoting many common rules to be followed in criminal trials and on appeals; and enhancing respect for criminal law, procedure and evidence as topics worthy of rigorous intellectual analysis. The existence in Canada, Australia, New Zealand, South Africa and other countries (unlike the United States) of a general national final appellate court (subject to the Privy Council) meant that senior

[12] Sangha and Moles above n.11, 67 [3.3].
[13] B. Berger, "Criminal Appeals as Jury Control" (2007) *Can Crim LRev* 1 at 29-31. The history is set out in *R v Pendelton* [2001] 1 WLR 72; [2001] UKHL 66.

judges were frequently engaged in considering the controversies thrown up by the common form of the criminal appeal statute and by the criminal law and procedure itself.

CONTROVERSIAL CRIMINAL PROCEEDINGS

Notable trials and public parables: In Australia, although the substantive criminal law was largely expressed in legislation enacted by the sub-national legislatures, the catalogue of criminal offences and many of the rules and procedures governing criminal trials were identical or similar because ultimately derived from the model copied from England. Because, until 1986, appeals could be brought from Australia to the Judicial Committee of the Privy Council, by the special leave of that body, high level judicial rulings in criminal cases became important features of the system.[14] The rapid development of public media, including a national broadcaster for radio and later television (in Australia, the Australian Broadcasting Commission, later Corporation and the Special Broadcasting Service) meant that criminal cases, when deemed newsworthy, were commonly covered throughout the nation. Thus, important cases concerning the trial of Aboriginal (First Nations) accused became hotly debated throughout the Commonwealth.[15] So did issues of sentencing of prisoners and specifically the vexed question of capital punishment.[16] Likewise, controversies surrounding the existence of homosexual offences in one State became national stories in other States.[17] There is something about criminal cases that tended to make them specially fascinating for the media.

[14] *Australia Act* 1986 (UK and Cth) s 11(1) (Termination of Appeals to Her Majesty in Council).
[15] See eg *Tuckiar v King* (1934) 52 CLR 334; *Stuart v The Queen* (1959) 101 CLR 1.
[16] *Tait v The Queen* (1962) 108 CLR 620.
[17] *Croome v Tasmania* (1998) 191 CLR 119.

The *Criminal Appeal Act* 1907, and its Australian copies, were aimed at reducing the risk of miscarriages of justice. However, because no human system is entirely free from error, it was often possible to attract attention to particular features of widely covered cases in which the risk of error could quite easily be asserted and illustrated so as to make the case of interest to the seemingly insatiable appetite of the public. One of the commonest features of criminal justice, was the abiding fear that an innocent person might have been convicted. Although, since 1984, capital punishment was abolished in all jurisdictions of Australia (and last carried out in 1967), speculation that a particular prisoner had been condemned to serve a lengthy period of imprisonment for a crime that he or she had not committed, was a thought that citizens, if they ever turned their mind to it, would worry about. Judges and other experts might protest that the criminal justice system was designed to eliminate, or greatly reduce, the risk of wrongful convictions. Yet the nightmare remained. The modern media, not always for wholesome reasons, would play upon the nightmare. They would unsettle those who feared that mistakes were common and who believed that more should be done to prevent them occurring or to provide redress where error could be demonstrated.

There have been many vivid cases of alleged miscarriages of justice in Australia that have become fixed in the national psyche. Commonly, they have included some peculiarity or special feature that meant that the case refused to go away, even when the legal process may have been finally spent.

The Chamberlain case: One such Australian case led to a number of books, television dramas and a movie in which Meryl Streep, no less, secured an Academy Award nomination in 1989. It was a case that laid down a number of important principles on miscarriages of justice. Whilst camping at Uluru (Ayers Rock), in the centre of Australia, in August 1980, Mrs Lindy Chamberlain reported that her baby daughter Azaria had been taken from the family tent by a dingo (wild dog). The initial inquest accepted the mother's version of events. However, there followed a charge of murder, a trial, conviction, a second inquest, more appeals, a royal commission, ultimate acquittal and a third inquest by a coroner who substituted a verdict of acquittal and an apology to the Chamberlain family. This was issued with an amended Death Certificate.[18] The litigation did not end until December 2011. But a huge amount of newsprint and media were consumed in debating the issues and contesting all of the steps along the way. From the point of view of criminal practice, the case laid down principles to be observed in the case of claims of miscarriage of justice. The trial of the accused involved controversies over scientific forensic evidence and the ways in which such testimony might be safeguarded, analysed and verified.

The Mallard case: Another instance involving the long saga of litigation that was likewise the subject of much coverage in the media, especially in Western Australia. Indeed, after the courts had initially rejected Mr Mallard's complaint of wrongful conviction, it was only because he found supporters in the legislature and in the media that he was able to being a second challenge to the High Court of Australia that ultimately led to his exoneration.[19]

[18] *Chamberlain v The Queen [No.1]* (1983) 153 CLR 514; *Chamberlain v The Queen [No.2]* (1984) 153 CLR 521.
[19] *Mallard v The Queen* (2005) 224 CLR 125; [2005] HCA 68.

In 1994 Mr Mallard was convicted of the murder of a jeweller in Perth. His trial lasted 10 days during which his unusual personality became obvious. At the end of the saga it was revealed that he suffered from schizophrenia. Whilst he was under interrogation by the police, he made suggestions about how the murder might have happened. The police evidence was unfair and unreliable. Errors were not corrected by the prosecutor. Mr Mallard's conviction, following the jury verdict of guilty, was confirmed by the Court of Criminal Appeal. Special leave to appeal to the High Court of Australia was refused.

A major element in that appeal had been Mr Mallard's complaint that he had not been subjected to a polygraph test as he had demanded. However, as the reliability of such tests is not generally accepted in Australia, this was an unpersuasive ground to establish a miscarriage. Eventually, after a petition for mercy, the Attorney-General referred the case once again to the Court of Criminal Appeal. That court again dismissed the appeal. However, this time, special leave was granted by the High Court of Australia. The appeal was allowed and the conviction quashed. On his second application to the highest court, Mr Mallard was represented by two very distinguished barristers in the State, one of whom was later appointed Governor of Western Australia and the other a Justice of the High Court.[20]

I participated in the original special leave panel that had rejected Mr Mallard's first application for special leave to appeal to the High Court of Australia.

[20] Hon. M.J. McCusker QC (Governor of WA 2011-14); Dr James Edelman (appointed to the High Court of Australia in 2017).

That fact was disclosed on the second application; but no party suggested that I should recuse myself. The arguments this time were substantially different. There was no mention of lie detectors. The new counsel simply analysed the evidence in fastidious detail and demonstrated the virtual impossibility of Mr Mallard's being able to be at the jewellers' shop at the time of the murder, given other objective testimony about his movements in Perth on that day. My own, albeit innocent, involvement in a miscarriage of justice affecting Mr Mallard, has helped to focus my mind on this danger. Judges in appellate courts work under very great pressure. Generally, they share the burden. They are therefore highly dependent on the time, expertise and perceptiveness of the judges rostered to participate. If I had enjoyed the time to conduct for myself the detailed examination of the evidence performed by counsel in the second appeal, I might have spared Mr Mallard eight years of unwarranted imprisonment.

Subsequently, a judicial commission of inquiry, investigating other evidence, concluded affirmatively that the murder of the jeweller had been the work of another prisoner. The Mallard case showed that even conscientious judges, observing high standards, can make errors and miss points. This is a lesson I have never forgotten. I have shared it with judicial colleagues so that all will be conscious of the risks of miscarriage and of the need for institutional improvements. Mr Mallard, like Mrs Chamberlain, was awarded monetary compensation for wrongful conviction. Sadly, he was later struck down and killed on a highway which would not have happened if he had remained in prison.

The case of Cardinal Pell: A third instance where a sensational trial miscarried in Australia was the trial Cardinal George Pell for alleged historical sexual offences. The cardinal, who had been Archbishop of Melbourne and later Sydney, drew worldwide headlines after a jury in the County Court of Victoria, at a trial in 2018, returned guilty verdicts for alleged sexual offences against a male child under the age of 16 years.[21] The relevant offences were alleged to have occurred at St Patrick's Cathedral, Melbourne in December 1996. The trial did not take place until 22 years later. The accused did not give evidence at his trial before the jury. His defence was an assertion of innocence, a recorded statement of denial to the investigating police, available at the trial and appeal, and the testimony of several church and other witnesses said to combine (even allowing for an apparently credible complainant) to make the charges inherently impossible or so unlikely as to oblige acquittal.[22]

Inferentially, the jury accepted the prosecution's case. They rejected the accused's defence at his trial. They must have accepted the complainant. They entered verdicts of guilty, resulting in the conviction of the cardinal. He was sentenced to imprisonment; began serving his sentence; and immediately lodged an appeal.

On appeal, the Court of Appeal of Victoria, effectively a court of criminal appeal for that State, rostered the Chief Justice, the President and a Senior Judge of Appeal with great criminal law expertise (Weinberg JA) to hear the proceedings. By majority, with Weinberg JA dissenting, the cardinal's appeal

[21] High Court of Australia, 24 October 1997, noted (1997) 191 CLR 646 (Toohey, McHugh and Kirby JJ).
[22] *Pell v The Queen* [2019] VSCA 186 (CA).

was dismissed. The conviction was confirmed. The cardinal was returned to prison. He immediately sought special leave to appeal to the High Court of Australia. That court heard his appeal in March 2020. In April 2020, three weeks later, it delivered a unanimous decision, setting aside the convictions and substituting a judgment of acquittal in favour of Cardinal Pell.[23] He was released at once. He later returned to Rome. Pope Francis noted that he had always asserted his innocence.[24]

In announcing its decision, the High Court of Australia went through, in great detail, the factual evidence that had been presented at the trial. It listed, the testimony such as was unchallenged. It concluded, in a single unanimous opinion of the entire court, that the jury, acting rationally, was obliged to "have entertained a doubt as to the applicant's guilt".[25] The Court went on:[26]

> "Making full allowance for the advantages enjoyed by the jury, there is a significant possibility in relation to [the] charges… that an innocent person has been convicted."

In reaching its conclusion, the Court relied on, and applied, a passage from the earlier decision in *Chamberlain v The Queen [No.2]* [27] expressed by Deane J (then in dissent with Murphy J writing separately). That ruling has subsequently been followed and applied in later decisions of the High Court

[23] (2020) 94 ALJR 394. [2020] HCA 12.
[24] *The Guardian*, "Pope Francis decries unjust sentences after Cardinal George Pell acquitted", 7 April 2020.
[25] *Ibid*, (2020) 94 ALJR 394 at 412 [119].
[26] *Ibid*, at 413 [119].
[27] (1986) 153 CLR 512 at 618-619 per Deane J.

of Australia.[28] The court insisted that this was not substituting a trial on the facts by appellate judges for the "constitutional" mode of trial by a jury of twelve citizens. It was simply giving effect to the protections afforded in the *Criminal Appeal Act* template against a "real possibility" of the conviction of an innocent accused.

It will remain to be seen whether the strong observations in *Pell v The Queen* flow on for the protection a whole range of prisoners, many like Mr Mallard with mental health issues, who present very detailed arguments on the facts at their trials and ask for the same attention to the copious details of the evidence. Because justice is expected to be blind as to the personalities who appear before the judgment seat, it must be hoped and expected that the central principle in Cardinal Pell's case will afford all prisoner applicants the prospect of the same vigilance against the *possibility* (not *probability*) of innocence that was evident in *Pell v The Queen*. Certainly, the strong and unanimous reasoning of the High Court of Australia in Cardinal Pell's case shows the importance of appellate courts, including the final national court, fulfilling the role of an institutional safeguard against the risk of the conviction of an innocent accused. Institutional protections against the risk of such miscarriages of justice are vital both for a prince and a pauper.

TEMPLATE APPEALS TO CCA

A single right to appeal: I will now identify three particular issues which have intervened to limit the capacity of courts of criminal appeal to protect possibly innocent prisoners from the risks of a miscarriage of injustice.

[28] *Chidiak v The Queen* (1991) 171 CLR 432 at 444 per Mason CJ; *M v The Queen* (1994) 181 CLR 487 at 4494, per Mason CJ, Deane, Dawson and Toohey JJ. See also *Pell v The Queen* (2021) 94 ALJR 394 at 397 [9].

The first does not concern itself with the grounds of appeal but with the legal right of appeal against criminal conviction in the language in which that right has been expressed in the 1907 Act and its Australian copies.

In the United Kingdom, as in Australia, the prevailing view has been, from the beginning, that the common form legislation afforded a convicted prisoner but a single right to appeal. In a number of cases judges held that, appeal, being a creature of statute, there were no rights of appeal beyond those that had been expressly granted by the legislature. Moreover, they held that a proper examination of the common form statutory provision resulted in a conclusion that it gave rise to one right only to make an appeal.[29] Once that privilege was exercised, the power and jurisdiction of a court of criminal appeal to entertain an appeal were exhausted. Occasionally, judges, including myself, have expressed doubt that this was a correct construction of the statute.[30] The usual reason given for favouring a limitation to one appeal (which is not expressly spelt out, in terms, in the statute) was that an appellate court "should not attempt to enlarge its jurisdiction beyond what Parliament has chosen to give".[31]

The problem with this interpretation of the legislation is that it was not the only possible interpretation of to the language used by Parliament. That language was facultative and beneficial. It was not restrictive. The Act

[29] *Burrell v The Queen* (2008) 238 CLR 218; 248 ALR 428; [2008] HCA 34; *R v GAM* (No 2) (2004) 9 VR 640 (CA); [2004] VSCA 117.
[30] See *Postiglione v The Queen* (1997) 189 CLR 295 at 305, per Dawson and Gaudron JJ; and at 331, per Kirby J, at 345.
[31] *R v Edwards [No])* [1931] SASR 376 at 380.

simply stated that a person 'may appeal'. It then specified the grounds upon which such an appeal might be brought. The restriction on the *number* of appeals that might be initiated appeared to have had its origin in the judicial distaste for an expansion of appellate rights for convicted prisoners. So much had been evident from the start, before and after the enactment of the *Criminal Appeal Act 1907*. This judicial hostility continued despite the increasing evidence of the utility of the appeal right both in the United Kingdom and in derivative jurisdictions.

Against the background of this restrictive interpretation of the availability of the right to appeal, the High Court of Australia also held that it was itself unable to receive a second application by a person claiming to have been wrongly convicted. In this respect, the High Court affirmed the approach adopted by intermediate courts to the effect that they did not enjoy a right to reopen an appeal or to hear a further appeal or application for that purpose.[32] Additionally, for constitutional reasons, the High Court of Australia took the view that it could not admit fresh evidence in an "appeal", even though such evidence might tend to demonstrate that the applicant had been wrongly convicted.[33] This was an additional view about confining the facility for reopening criminal appeals with which I disagreed. I pointed out that, as a consequence, "Justice in such cases is truly blind. The only relief available is from the Executive Government or the media – not from the Australian judiciary".[34] Such a position appeared unsatisfactory.

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[32] *Grierson v The King* (1938) 60 CLR 431; [1938] ALR 460; Sangha, Moles, above n.11, at p 70.
[33] *Mickelberg v R* (1989) 167 CLR 259; 86 ALR 321; [1989] HCA 35; M.D. Kirby, "The mysterious word "sentences" in s73 of the Constitution" (2002) 76 ALJ 97.
[34] M.D. Kirby, 'Black and White Lessons for the Australian Judiciary' (2002) 23 *Adel L Rev* 195 at 206.

The High Court of Australia does enjoy a statutory power to remit a matter before it to another court to consider admitting fresh evidence and then to refer the matter back to the High Court for final determination. That power still exists. However, it has seldom been exercised. It gives rise to its own complications.[35] If the High Court of Australia, in the *Postiglioni case,* had taken the view about the availability of a second appeal, in cases of demonstrated merit where the prisoner could, by leave, convince an appellate court to grant such leave for a second or further time, many of the problems that have emerged in Australia might have been solved. The contrary decision was not unarguable. However, when the decision was made in the High Court of Australia (and never reversed in later cases) it was inevitable that reformers would endeavour to overcome this impediment by statutory reform. This is what has happened in Australia. It has led to amendments in a number of jurisdictions; yet so far not universally.

Ministerial referral to court: There was a further initiative adopted in the *Criminal Appeal Act 1907*. It allowed an applicant, after exhausting the right to appeal, to apply to the attorney-general for the reference of the question of a possible miscarriage to the appellate court, to be heard as an appeal. However, this exceptional procedure depended in the first instance upon action not by the judiciary but by the relevant executive government.

Given that a manifestation of that government was usually the agency responsible for prosecuting, incarcerating and resisting the complaints of the accused, the defects of this "fail-safe" procedure were clear, including to the

[35] The power is contained in the *Judiciary Act* 1903 (Cth) s44.

prisoner concerned. It presented the arguable existence of a conflict of interest and duty. In *Von Einem v Griffin*, the South Australian Full Court stated that the power of statutory referral following such a petition, provided 'no legal rights' as such to the applicant merely a privilege.[36] It also stated that the Attorney-General had a 'complete discretion' in the matter.[37] In fact, it emphasised that the power did not have to be exercised at all.[38] It held that the decision processes of the Attorney-General were not subject to judicial review.[39] Some of these judicial dicta were written before more recent authority has clarified the ambit of judicial review in such matters.[40] The notion that an official, exercising powers derived under legislation, enjoys a completely unfettered, subjective discretion may be inconsistent with the requirements of the rule of law,[41] which Justice Dixon described in the *Australian Communist Party Case,* as a basic principle of Australian constitutionalism.[42] However, the net effect of the foregoing decisions has been that a person, claiming to have been wrongly convicted, might end up in a legal blind alley. The prisoner was obliged to seek redress from the Attorney-General. Yet that is the very office-holder who has ultimate responsibility for the agencies (such as forensic sciences, police, prosecutions and the courts) that may be the obstacle to the grant of the relief that the prisoner seeks.

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[36] *Von Einem v Griffin* (1998) 72 SASR 110; [1998] SASC 6858.
[37] *Von Einem* at [121].
[38] *Von Einem* at [150].
[39] *Von Einem* at [151].
[40] See e.g.*Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478 at 503-504 [70]; [2002] HCA 22. Cf *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342.
[41] Sangha, Moles above n.11, at p 53 citing French R, AC, Chief Justice, 'The Rule of Law as a Many Coloured Dream Coat' Singapore Academy of Law 20th Annual Lecture, 18 September 2013 p 13.
[42] *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193.

It was in this context that those pressing for legislative reform in South Australia presented a submission to the Australian Human Rights Commission complaining about the situation that they faced.[43] The submission included the complaint that the Australian criminal appeal provisions did not properly protect the right to a "fair trial" or the right to an effective "appeal". The right to "appeal" is mentioned in the *International Covenant on Civil and Political Rights* (ICCPR), art. 14.5. Australia is a party to that *Covenant* and to the *Second Optional Protocol*. Under the latter, persons in Australia, who are adversely affected, enjoy a right of communication to the Human Rights Committee (HRC) of the United Nations. The HRC pointed out that the ICCPR requires that such rights be determined by competent 'judicial' authorities, applying established legal rules in a 'fair and public hearing'. An 'unfettered' executive discretion would not conform to the requirements of the *Covenant*. It was not a 'judicial' decision. It took place behind closed doors. These were defects provided by the *Criminal Appeal Act* procedures. The same defects would appear to exist in the special inquiry procedures provided in New South Wales and the Australian Capital Territory.[44]

Reform in South Australia: The occasion for the 2013 South Australian reform was a Bill, introduced into the State Parliament, designed initially to create a Criminal Cases Review Commission (CCRC) for that State. [45]

[43] The Submission is available at http://netk.net.au/HumanRights/HREOCComplaint.pdf
[44] The provisions are set out in detail at Sangha, Moles, above n.11, 3.5.
[45] The current figures are available at https://ccrc.gov.uk/case-statistics/

The proposal that a CCRC should be created for did not enjoy the support of the then Government of South Australia or of its Attorney-General. Nonetheless, upon receiving the Bill, the Parliament of South Australia referred the Bill to a Legislative Review Committee. That Committee invited public submissions. By that stage, in November 2011, the Australian Human Rights Commission (AHRC) had completed its report concerning the compliance of the then criminal appeal model with Australia's obligations under the ICCPR. In the report of the AHRC, it stated:

> "The Commission is concerned that the current systems of criminal appeals in Australia, including in South Australia, may not adequately meet Australia's obligations under the ICCPR in relation to the procedural aspects of the right to a fair trial. More particularly, the Commission has concerns that the current system of criminal appeals does not provide an adequate process for a person who has been wrongfully convicted or who has been the subject of a gross miscarriage of justice to challenge their conviction."[46]

In the result, the South Australian Legislative Review Committee did not recommend the establishment of a CCRC for the State. However, it did make three important recommendations. These remain relevant to the situation in other jurisdictions of Australia today.

The first recommendation was that a Forensic Review Panel should be established, which should have the capacity to review cases in which it was

[46] 25 November 2011, Australian Human Rights Commission Submission to the Legislative Review Committee of South Australia, Inquiry into the Criminal Cases Review Commission Bill 2010, at 6.2. available at http://netk.net.au/CCRC/AHRCSubmission.pdf

alleged that a wrongful conviction had resulted from incorrect or inadmissible forensic evidence. This panel should have the capacity to refer such cases to the appeal court of the State for review. In effect, this would amount to a kind of CCRC for the State; but restricted to miscarriages based on forensic evidence.

Under current legal arrangements in Australia, a special inquiry may be established under legislation applicable in New South Wales and the Australian Capital Territory. In the other jurisdictions, the Executive Government may establish a Royal Commission, including one addressed to forensic evidence. This is what had occurred in the cases of *Lindy Chamberlain* in the Northern Territory and *Edward Splatt* in South Australia.[47] However, such inquiries are extremely costly. They consume considerable time and large public resources. The *Eastman* inquiry, that followed trials after the murder of a police commissioner in the Australian Capital Territory, also was said to have cost that jurisdiction approximately $12 million. [48] The *Splatt* Royal Commission hearings lasted 196 hearing days. Its cost to the South Australian Treasury was also formidable.

The second recommendation of the South Australian Legislative Review Committee was that there should be a general inquiry into the use of forensic evidence in criminal trials in the State. This suggestion has now been taken

[47] Details of the Chamberlain inquiry are available at http://netk.net.au/NTHome.asp . Details of the Splatt inquiry are available at http://netk.net.au/SplattHome.asp

[48] The Eastman Inquiry arose following *Eastman v The Queen* (1989) 171 CLR 506; *Ex parte Eastman* (1999) 200 CLR 322; *Eastman v The Queen* (2000) 203 CLR 1; and *Eastman v Direction of Public Prosecutions* (ACT) (2003) 214 CLR 318; http://netk.net.au/NewZealandHome.asp and details of the UK CCRC are available here http://netk.net.au/CCRCHome.asp

up by the Attorney-General for Victoria.[49] She, in turn, was picking up concerns that had been expressed by Justice C.M. Maxwell, President of the Court of Appeal of Victoria.[50] He had expressed the view that there was little proof that several forensic techniques used in Australia, including gunshot analysis, footprint analysis, hair comparison and bite mark comparison, reliably identify the guilty in criminal trials. Justice Maxwell called on governments throughout Australia to oblige judges to consider the established reliability of forensic evidence before it was made available to juries.

These concerns were supported by a leading scientist at the Victorian Institute of Forensic Medicine.[51] The concerns drew support from a report of the National Academy of Sciences in 2009 as well as a 2019 Update of that report which found that, of all of the forensic sciences now in use, DNA analysis was the only one which had the capacity for regular reliable validation of results. All others, it was held, involved elements of subjectivity that made the findings unreliable or certainly doubtful.[52]

In 2012, the National Institute of Science and Technology in the United States reported that latent fingerprint analysis gave rise to similar concerns as to reliability. In 2015, another major report in the United States on hair analysis, concluded that, in over 90% of cases involving such analysis, the

[49] 10 October 2019, *The Age*, 'Attorney-General calls for inquiry over fears of innocent people being jailed' available at http://netk.net.au/Forensic/Forensic57.pdf
[50] C.M. Maxwell, "Preventing Miscarriages of Justice: The Reliability of forensic Evidence and the Role of the Trial Judge as Gatekeeper", (2019) 93 ALJ 642.
[51] 3 September 2019, *The Age*, 'Top CSI scientist says police ignoring evidence flaws, jailing the innocent' available at http://netk.net.au/Forensic/Forensic53.pdf
[52] Links to this and the other reports referred to are available at http://netk.net.au/ForensicHome.asp

evidence probably overstated the significance of microscopic hair comparisons. In a significant number of such US cases, the accused had been sentenced to death. Given the practical impossibility of juries making reliable assessments of their own about the acceptability of most forms of forensic evidence, Justice Maxwell called for exploration of the ways by which judges, court rules and trial processes could protect the integrity of criminal trials involving forensic evidence.[53] These recommendations remain a work in progress in Australia.

The third recommendation in South Australia was for the enactment of a right to a second or further appeal where fresh and compelling evidence was presented to the effect that there had been a substantial miscarriage of justice at the first trial. This was the recommendation that gave rise to the amendment to the South Australian law that was enacted by the State Parliament in May 2013.

LEGISLATIVE RIGHT TO SECOND APPEAL

During the course of the parliamentary debate about a possible right to a second appeal in South Australia, the Attorney-General of the State ultimately conceded that it was inappropriate for such applications to be decided behind closed doors, as the petition procedure envisaged. He stated that the public forum of the courts was the appropriate place where which such issues should be resolved.[54] In the Legislative Council of South Australia, a statement that I had provided in support of the measure was read

[53] Maxwell, above n. 50 at 652-654.
[54] 7 February 2013, House of Assembly, Statutes Amendment (Appeals) Bill, the Hon J R Rau, Attorney-General, available at http://netk.net.au/Appeals/Appeals6.asp

on to the record by the Hon. Anne Bressington MLC, the sponsor of the Bill. In that statement I sought to identify what might explain the reasons for the longstanding official hostility to such a measure:[55]

> "The desire of human minds for neatness and finality is only sometimes eclipsed by the desire of human minds for truth and justice. There will always be a disclination to reopen a conviction, particularly where it has been reached after a lengthy criminal trial and a verdict of guilty from a jury of citizens. Sometimes, however, that disinclination must be confronted and overcome with the help of better institutions and procedures than we have so far developed in Australia."

Eventually, the South Australian legislature enacted a provision permitting a further right of appeal against a criminal conviction or sentence notwithstanding an earlier appeal. Tasmania and Victoria later followed South Australia in enacting a similar law.[56] Western Australia has such a law under consideration.

However, progress towards this reform remains glacial in other sub-national jurisdictions. No initiative has been commenced in New South Wales, Queensland or either of the mainland Territories of Australia. It seems inherently unlikely that these Australian jurisdictions are immune from the risks of miscarriages of justice accepted to exist in South Australia, Tasmania and Victoria. In the event, one argument that proved most

[55] 19 March 2013, Legislative Council, Statutes Amendment (Appeals) Bill, available at http://netk.net.au/Parliament/LC16.asp

[56] The Act, and Parliamentary debates in Tasmania are available at http://netk.net.au/TasmaniaHome.asp. Those in Victoria are available at http://netk.net.au/VictoriaHome.asp.

persuasive for the advocates of reform and gained unanimous support in the South Australian Review Committee. This pointed to provisions enacted by all Australian legislatures, notwithstanding an earlier *acquittal*, whereby a prosecutor was permitted to apply to the court for permission to commence a further prosecution based on fresh and compelling evidence of guilt. The South Australian Committee reasoned that it would only be just and equitable to allow a person *convicted* of a serious crime to seek a like permission for reconsideration of the case where there was supporting fresh and compelling evidence of a wrongful conviction. Why this argument has not so far attracted support in the remaining Australian jurisdictions is difficult to imagine. It shows the consequences to which "democratic" politics, repeated 'law and order' electoral campaigns, and occasional media hysteria have driven Australian criminal law and practice towards the ethical bottom.

In the nine years since the law on criminal appeals was amended in South Australia, there have been a number of cases that have given rise to applications for further appeal. Of those applications, at least three have been successful. These led to convictions being overturned, two of them on the basis of established flaws in the forensic evidence admitted at trial.[57] None of these cases has resulted in the conduct of a retrial, still less further convictions.

Of the three unsuccessful appeals in South Australia, one was granted special leave to appeal by the High Court of Australia. In that case it was found that some of the forensic evidence received at the trial was unreliable.

[57] *R v Drummond (No.2)* [2015] SASCFC 82 involved a forensic scientist mis-stating the probabilities in relation to possible DNA transfer during an attempted abduction.

However, in the opinion of the High Court, the defects in the evidence were insufficient to warrant allowing the appeal and setting aside the conviction.[58] The utility of the reformed procedure is nevertheless demonstrated by the outcome in half of the cases decided. It is not undermined by a small number of cases where the application was refused, in some of them by majority and with apparent hesitation.

The most significant of the successful South Australian cases since the second appeal was allowed was that of Mr Henry Keogh. He had already served over 20 years in prison for the murder of his fiancée. He had always denied his guilt. It had been alleged that he had drowned her in a domestic bath. Before the law on appeals was changed, there were a number of requests for referral of his case to the appellate court under the petition procedure then applicable. All of these requests were rejected by the relevant Minister. Following the reform of the law, Mr Keogh's application for leave to appeal was brought to, and granted by, the Full Court of the Supreme Court of South Australia. Mr Keogh's conviction was set aside, and he was released.

Not until his appeal was lodged under the new procedure did the Director of Public Prosecutions of South Australia produce a forensic report of 2004 that had been obtained by the State Solicitor-General nine years earlier. This forensic report was only released to the applicant's advisers on 5 December 2013.[59] The report proved to be a significant consideration in the Full Court's

[58] *Van Beelen v The Queen* (2017) 91 ALJR 1244 affirming the majority orders of the Full Court of the Supreme Court of South Australia (2018) 125 SASR 253 (Kourakis CJ dissenting); [2017] HCA 48 (8 November 2017).
[59] *R v Keogh (No.2)* [2014] SASCFC 136 at [18].

reasoning upholding Mr Keogh's appeal. No explanation has thus far been released as to why the 2004 forensic report was not made available to the prisoner under the former petition procedure, having regard to the Crown's duty of disclosure of relevant material in its possession.[60] Nor was an explanation given as to why the relevant Minster, based on that report, had refused to refer the matter to the Court under the then petition procedure.

The conclusion is that, but for the reform enacted by the Parliament of South Australia affording a right of second appeal, it is likely that the forensic report would never have seen the light of day. Mr Keogh would probably still be in prison on a conviction that he contested, based on yet another instance of suspect forensic evidence.

CRIMINAL CASES REVIEW COMMISSIONS

United Kingdom CCRC: To secure further change to appellate arrangements after 1907, following so much controversy and dispute, required something dramatic to occur. That happened in a form of a series of cases heard in British courts involving mostly Irish offenders convicted of IRA bombing crimes.

In 1980, the so-called *Birmingham Six* sought to pursue the West Midlands Police. Lord Denning said that to allow evidence that police had framed innocent people would be "such an appalling vista that every sensible person in the land would say: it cannot be right that these actions should go any further". This ruling meant that the six prisoners had to spend 10 further

[60] *Mallard v The Queen [No.2]* (2005) 224 CLR 125 at 145-157 [55]-[89]; [2005] HCA 68.

years in prison before they were eventually freed. The Irish cases in which the complaints of the prisoners were ultimately accepted caused shock and distress in the United Kingdom. They resulted in the conviction that institutional change was imperative.[61]

In 1991 the British Government established a royal commission to undertake a fresh review of the criminal justice system in England and Wales. The commission was chaired by Viscount Runciman. It comprised ten members.[62] Its report specially targeted what it saw as defects in the existing arrangements for investigating alleged miscarriages of justice after the established right to appeal had been exhausted.

The commission was especially concerned about the dangers of the conviction of the innocent. It suggested that the Court of Appeal should take a more liberal approach to what constituted "fresh evidence" and should be more willing to quash convictions because of concerns about their "safety". It also recommended improvements in the audit and quality control of forensic sciences, increasingly important in securing criminal convictions. And it recommended the establishment of a new statutory body (the Criminal Cases Review Commission (CCRC)). This was to operate independently of the executive and the judiciary.[63] That recommendation was eventually accepted by the British Government in 1995. The CCRC was set up in 1997.

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[61] *R v Maguire* (1991) 94 Cr App ER 133 ("Maguire Seven"); *R v Richardson* (EWCA-Criminal Division) 20 October 1989 (unreported); *R v McIlkenny* (1991) 93 CrAppR 287 ("Birmingham Six"); *Ward v R* (1993) 96 CrAppR 1.

[62] W.G. Runciman, *The Report of the Royal Commission on Criminal Justice*, HMSO, Cm 2263, 1993. See now, Michael Naughton (ed.) *The Criminal Cases Review Commission: Hope for the Innocent?*, Palgrave Macmillan, London, 2009.

[63] *Criminal Appeal Act 1995* (GB), s8.

It was empowered to consider complaints of miscarriages of justice; to arrange for their full investigation; and where it so decided, to refer the case to the Court of Appeal. The criterion for reference was where the CCRC considered that "there is a real possibility that the conviction, verdict, finding or sentence would not be upheld, were the reference to be made".[64]

In "exceptional circumstances" such a reference could be made although the applicant was unable to demonstrate "fresh evidence" or argument, previously unavailable. The CCRC was empowered to appoint its own investigating officers. The Court of Appeal was empowered to seek special assistance from the CCRC to investigate and report back on an issue in an appeal. At first, the commission received an average of 1,000 applications a year. This number later rose to 1,500 applications a year. They covered the whole range of criminal convictions: recent and very old; minor and very serious.[65]

The creation of this supplementary institution acknowledged the defects and inadequacies that had been demonstrated in the operation of the appellate provisions of the 1907 Act over the preceding ninety years. In effect, the initiative accepted the institutional defects inherent in a system of courts of criminal appeal. Those defects arose, in part, from the over heavy workload and limited powers of the courts. But they also reflected concern, implicit though not express, about the mindset of the approach of some judges to the task of determining criminal appeals. The primacy of the judges and of the Court of Appeal were to be preserved, upon the establishment of the

[64] *Ibid*, s13. See Sangha and Moles above n.11, 484-5 [12.9.2].
[65] *Ibid*, 486 [12.9.2].

CCRC. Specifically, this was to be done by the requirement that any disturbance of a conviction, ruling or sentence was still be reserved to the court not the commission. The CCRC was to be supported in its work by police, lay, legal and other expert staff, with an institutional mandate to re-examine suspect cases deemed appropriate for such attention.

The CCRC in the UK started work in April 1997. Between then and the end of April 2019 it has, according to its website: "Referred 760 cases to appeal courts; of the 689 cases where appeals have been heard by the courts, 466 appeals have been allowed and 210 dismissed; 589 cases are currently under review at the Commission and 115 are awaiting review. So far we have received a total of 27,235 applications (including all ineligible cases) and completed 26,530 cases." [66]

A number of the cases referred by the CCRC involved concerns about forensic evidence. A number of them related to sudden infant death and 'shaken baby syndrome'. [67] Other cases involving forensic evidence have extended to 'firearm residue', 'blood stain pattern analysis' and forensic pathology and medicine.[68] Many cases reflected concerns about the reliability of forensic sciences, as well as the safeguarding of evidence and integrity of expertise. Concerns of this kind have arisen in many 'suspect cases'.[69] As criminal prosecutions increasingly rely on scientific and

[66] See www.ccrc.gov.uk/case-statistics (accessed 30 April 2019).
[67] See Sangha and Moles, above n.11, 486 [12.9.2].
[68] Sangha and Moles, above n.11, 486-7 [12.9.2].
[69] Such as *Stuart v The Queen* (1959) 101 CLR 1 (Aboriginal tracker) and *Chamberlain v The Queen* (paint and blood samples).

technological evidence, safeguards that are new, vigilant and more appropriate are needed to prevent miscarriages.

The CCRC has attracted critics. They have suggested that it should be willing to refer more cases to the Court of Appeal on the "real possibility" test, notwithstanding the consequence that this involves the prospect of overturning jury verdicts. [70] In the first triennial review of the CCRC in 2013, the United Kingdom Government concluded that the CCRC was functioning as was to be expected.[71] Its performance, now extending to England, Wales and Northern Ireland, had to be independent of both the judicial and executive arms of government. As well, it had to be perceived to be independent if it were to gain public and stakeholder support. Whilst media critics have sometimes suggested that the CCRC was the "lap dog" [72] of the Court of Appeal, the statistics of the commission suggest that it is picking up many more cases of miscarriages of justice than the initial CCA model had done. An indication of the broad acceptance of the role, necessity and general success of the CCRC may be seen in the establishment of a similar but smaller CCRC for Scottish cases. It commenced operations in April 1999. [73]

New Zealand CCRC: Based on the operation of the United Kingdom commissions , the Parliament of New Zealand in 2020 established a CCRC for that country. It is based on the model of the CCRC in Britain. It allows any person convicted of a crime in a New Zealand court who believes that

[70] Sangha and Moles, above n.11, 488 [12.9.5].
[71] UK Ministry of Justice, Triennial Review of CCRC, June 2014.
[72] *The Independent*, 22 March 2015. See Sangha and Moles 490, above n.11, [12.9.5].
[73] *Crime and Punishment (Scotland) Act* 1997 (UK), s523.

they have suffered a miscarriage of justice in their conviction or sentence, or both, to apply to the New Zealand CCRC for an independent review of their case.

The New Zealand Commission was established by legislation in 2020.[74] It is an independent Crown Entity. It employs staff with varied backgrounds and expertise. If it considers a miscarriage of justice may have occurred ("possibility"), the New Zealand CCRC may refer the case back to the appeal court. Moreover, it replaces the referral function previously performed by the Governor-General of New Zealand in the exercise of the Royal Prerogative of Mercy. The website of the New Zealand CCRC states that it is established on the basis of models created in the United Kingdom and Scotland. The Chief Commissioner of the CCRC in New Zealand, Mr Colin Carruthers QC, was appointed from 1 February 2020 for an 18-month term. The CCRC was established in Hamilton, apparently to emphasise its independence "from the big bureaucratic and judicial centres, Auckland and Wellington".[75] The statistics on its operation are not available at this time of writing.

Canadian CCRC: On 16 December 2019, the Prime Minister of Canada (Rt Hon. Justin Trudeau) announced the intention of his newly re-elected government to propose to Parliament the establishment of a Canadian CCRC.[76] He said that it would "make it easier and faster for potentially wrongfully convicted people to have their applications reviewed". The Minister of Justice of Canada has appointed the hon Harry LaForme (first

[74] *Criminal Cases Review Commission Act* 1997 (NZ).
[75] Hon. Andrew Little, Minister for Justice, Statement, 21 February 2020.
[76] https://www.newswire.ca/news-releases/minister-of-justice-and-attorney-general-of-canada-takes-important-step-toward-creation-of-an-independent-criminal-case-review-commission-851866349.html

Canadian Indigenous judge and former Justice of the Ontario Court of Appeal and the Hon. Juanita Westmoreland-Treoré (former Justice of the Court of Quebec) to conduct consultations on the creation mandate and structure of the CCRC. However, it appears to be following the United Kingdom concept and the tradition followed after the passage of the 1907 template for the creation of courts of criminal appeal in English-speaking countries.

Australian CCRC: Although law reform proposals for the creation of an Australian CCRC have been made, so far, no such body has been established. When the legislation for the improvement of criminal appeals was introduced into the South Australian Parliament in 2015, a suggestion was made for the creation of a CCRC for that State. Although this was discussed in Parliament, it did not proceed. Inferentially, this was because of concerns about cost and need and because of the acceptance of the initiative to permit a further right of appeal in limited criminal cases. The initiation of that right in South Australia was itself contested and initially opposed by the Government of the day. It was an initiative advanced by an independent member of the South Australian Parliament whose perseverance ensured success. However, the reformist inclination was apparently then exhausted by the adoption of the modest reform enacted.

The institutional defect that led in the United Kingdom to the creation of its CCRCs has, not so, far stimulated a similar momentum in Australia. This fact caused the present writer, in an editorial in the *Criminal Law Journal,* to raise the question: "Whether the South Australian model is an adequate response

to the problem of wrongful convictions in Australia".[77] It was suggested that the answer to that question was "clearly not".

Recent cases in Australia, including some following the facility of further appeals and scholarly commentary on the topic have demonstrated an important institutional defect that needs addressing. It cannot be suggested that the needs that have led to the creation, or intended creation, of CCRCs in New Zealand and Canada are completely absent in Australia. On the contrary, those needs are plainly present, at least to the same degree. They are palliated by the provision of a new additional right of appeal in exceptional cases; but then in only three States. Such further rights of appeal do not confront the institutional defects of overworked judges; hostile or unsympathetic professional mindsets, excessive professional dedication to finality; and apparent indifference to, or acceptance of, some cases of wrongful conviction as "inevitable", "inescapable" and therefore "tolerable". Such indifference was reduced but not fully addressed by the criminal appeal template of 1907.

There is a need in Australia, for greater concern and vigilance about the risk of miscarriages of justice. As *Chamberlain, Mallard, Pell* and other highly publicised cases show, courts of criminal appeal can sometimes rise to the challenge and afford much needed redress. The CCA institution then works as it should. But sometimes they fail. The statistics in the performance of the differently organised, non-judicial institutions of the CCRCs in the United Kingdom suggest that there is a gap in Australian criminal law and practice

[77] M.D. Kirby, "A New Right of Appeal as a Response to Wrongful Convictions: Is it Enough?" (2019) 43 *Crim LJ* 299.

and in our institutional arrangements that is not being met. Seemingly, addressing this institutional defect is not even presently on the horizon. This says something about the tolerance in Australia of a proportion of people who may possibly be innocent of the crimes of which they have been convicted but who cannot secure relief. There is thus an apparent disharmony between the very high standard expressed by the High Court of Australia in *Pell v The Queen* and the somewhat lower standard tolerated by politicians, legislatures and citizens concerning the enactment of institutions that will uphold the higher standards. It is imperative that this disparity should be remedied without delay.