

Crime, Power and Marginalisation: Miscarriage of Justice Cases in Australia and New Zealand

*Barbara Etter APM, Principal of B*ET*ter Consulting (www.betterconsult.com.au), Hobart, Tasmania
Adjunct Associate Professor, School of Law and Justice, Edith Cowan University, Perth, WA*

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INTRODUCTION

Can you imagine what it would feel like to be convicted and imprisoned for a serious crime you did not commit? Put yourself in the shoes of an innocent person who finds themselves convicted of a heinous crime, such as murder. Imagine the damage to your reputation, your relationships, your livelihood, as well as the dramatic impact on your mental and physical health. Imagine the sense of helplessness and hopelessness. And you are not the only victim, there are also your family members, your friends and band of supporters. Then there is the potential ripple effect – the loss of confidence and trust in our legal institutions and authorities and disillusionment with our current legal system. And there may well be a lack of closure as to what might have really happened to the victim, often a loved one. An event such as a miscarriage of justice certainly changes the lives of many forever.

A miscarriage of justice which involves a wrongful conviction strikes at the very heart of our society, particularly where the person is proven to be factually innocent, as has occurred in a number of high profile miscarriage of justice cases in Australia and New Zealand (such as in the WA cases of Mallard, Beamish and Button (Blackburn 2005; Egan 2010; Corruption and Crime Commission 2008) and the NZ case of Arthur Allan Thomas).

Earlier this year, *The Australian* newspaper reported on the exoneration and release of a Chicago man who had spent 32 years in prison (“Man Exonerated After 32 years in Jail” 2012). Andre Davis was wrongly convicted of the rape and murder of a 3 year old girl decades ago. Tests found that DNA taken from the scene of the 1980 killing was not his.

The article reminded me of the Lindy Chamberlain case, which also took an astonishing 32 years to finally achieve justice in the case. Lindy in her autobiography *Through My Eyes* was disillusioned with the system after her ordeal (2004, pp.3-4):

Having ‘looked at life from both sides now’ ... I can’t help but see inadequacies in our British justice system ... We must fight for the preservation of discerning laws in this country. One day I was just a happy housewife and mother, known only to my friends and acquaintances, next day a household word. I never dreamed it could possibly happen to me – how about you? If this continues will you be next?

As Lindy points out, if wrongful conviction can happen to normal everyday people, who might be next? You, a family member, a close friend or work associate?

In some cases, there is also the danger that the real perpetrator remains free, possibly posing a threat to the safety of others. In fact, it has been suggested that a miscarriage of justice is a triple injustice. MacFarlane QC comments (n.d. p.3):

Public confidence in the criminal justice systems in these countries [Canada, US, UK, Australia and NZ] has been shaken because wrongful convictions represent **a triple failure of justice**: an innocent person has been convicted and imprisoned; the truly guilty person was allowed to go free and, potentially, commit further crimes; and, finally, the victim's family, who had a sense of closure with the conviction, has been re-victimised by opening an emotional wound, which, with an increasingly cold evidentiary trail, may never be healed. (Emphasis added)

This paper has a strong focus on those wrongly convicted or found guilty by the criminal justice system. It is argued that many of those people have become disempowered and marginalised. Particularly, post-conviction, the tables are turned in a dramatic way.

Even prior to conviction, such people do not have ready access to legal advice (unless supported by legal aid), they don't have the financial resources to hire top lawyers and they don't have ready access to important resources such as independent forensic experts and laboratories. They are even more disadvantaged if bail is refused and they find themselves incarcerated with a long wait until the trial.

Our current legal system is extremely valuable but certainly not perfect. Justice Kirby has stated that "... some component of error must be tolerated as an inescapable attribute of our humanness" (1991, p.1040). To my way of thinking it may be inevitable but it is clearly not acceptable to tolerate even a small number of wrongful convictions for serious crimes because of the inherent fallibility of any human institution or system. Mistakes will be made for a variety of reasons, and whilst recognising the importance of finality in criminal matters, we need to work to ensure that there are suitable and accessible means of **timely** redress for such cases.

We may need to rethink some very basic concepts of our justice system like the adversarial approach (as opposed to the inquisitorial system used elsewhere), the meaning of "beyond reasonable doubt" (Whitton 2009, pp.211-212), the effectiveness of juries in complex matters and our appeals and review system. There are also the issues of the horrendous financial costs involved in legal representation and the delays that are inevitably experienced.

On the issue of appeals, why is it, for example, that the High Court of Australia, is unable to accept new or fresh evidence, no matter how compelling it might be? (See also Weathered 2005). As Justice Michael Kirby stated in 2002 in the *Adelaide Law Review* (cited in Bob Moles' foreword in Whitton (2009, p.8)):

The rule [prohibiting the High Court from receiving fresh evidence] means that where new evidence turns up after a trial and hearing before the Court of Criminal Appeal are concluded, whatever the reason and however justifiable the delay, the High Court, even in a regular appeal to it still underway, can do nothing. Justice in such cases is truly blind. The only relief available is from the executive Government or the media – not from the Australian judiciary.

I realise that there are legal reasons for this situation but perhaps it is time to reform this aspect of the system?¹

The limitations of our current approach are clearly demonstrated by the Henry Keogh case in South Australia (where Mr Keogh was convicted in 1995 of murdering his girlfriend/fiancé by drowning her in a bathtub). In that case, serious doubts have arisen about the evidence of the forensic pathologist in the case (Moles 2004 & 2006) and the current mechanisms of review and appeal have failed. But there is good news on the South Australian front, as will be discussed later in the paper.

DEFINING “MISCARRIAGE OF JUSTICE”

This paper is concerned with cases where there is proven factual innocence or for which there is considerable doubt as to the guilt of the convicted person.

Dr Bob Moles in his book *A State of Injustice* states (2004 p.221):

The desired result of a criminal trial is that justice be done; that is, that the accused should receive a fair trial according to law. A miscarriage of justice occurs when there is a failure to achieve that result.

It is not intended to provide a definitive definition of “Miscarriage of Justice” in this paper other than to state that the author is referring to the concept of a **wrongful conviction** (so this paper would not, for example, pick up on cases such as Muhamed Haneef or Lloyd Rayney, who were charged but not convicted).

As Nobles and Schiff in *Understanding Miscarriages of Justice* comment (2000, p.1), it is often difficult to formulate one coherent conception of the term “miscarriage of justice” as it means different things in the discourses of media, politics and the law. They state that, at its widest and most tautological, a miscarriage of justice is “simply a failure to achieve justice” (2010, p.14). They also comment that, while different communities have different conceptions of the matter, a miscarriage of justice carries “widespread abhorrence” (2000, p.259).

Nobles and Schiff point out that there are two principal things about wrongful convictions (2000, pp.16-17):

[T]hat the people who have been convicted of offences did not in fact commit those offences, or that their convictions were flawed because some part of the process that produced those convictions did not operate as it should ... [W]e will call the first a concern with truth and the latter a concern with due process.

¹ The appellate jurisdiction of the High Court is conferred by section 73 of the Constitution. Under the “common form” statutes establishing the state courts of appeal, if the High Court was to admit fresh evidence that would require it to make “an independent and original decision” based on its assessment of the evidence resulting in its exercising an original rather than truly appellate jurisdiction. The suggestion is that because the conferral of original jurisdiction under section 75 of the Constitution is limited to certain federal matters, any exercise of original jurisdiction by the High Court would be unconstitutional and equivalent to investing the High Court with original jurisdiction over matters falling within state judicial power – See Sangha, Roach & Moles 2010, pp.139-140

My primary concern and the focus of this paper are with the wrongful conviction of those persons who appear to be factually innocent. However, in many cases factual innocence may not have been conclusively or independently established. I have focused on murder cases in this paper but do recognise that wrongful convictions occur across the full spectrum of criminal activity.

Some also refer to miscarriages of justice where it is considered the system has failed (i.e. that a seemingly guilty person has walked free or the Coroner has decided not to hold an inquest into a particular death).

The whole issue of miscarriage of justice cases is fraught with tension and emotion. How does the legal system achieve the necessary balance to ensure that the guilty (in a factual and legal sense) are duly convicted and the innocent walk free?

William Blackstone once said:

It is better that ten guilty persons escape than that one innocent suffer.

As a victims' advocate for many years, I can understand that victims of serious crime (including secondary victims) may well consider that there has been a MoJ when an apparently guilty person escapes conviction. I am also well aware of the concerns of Evan Whitton outlined in his excellent book *Our Corrupt Legal System: Why Everyone is a Victim* (2009). Whitton argues that our legal system should be a search for the truth but points out that our current legal system has "24 anti-truth devices" or 6 ways of concealing evidence and 18 other mechanisms which obscure or defeat the truth (2009 pp.156- 21).

Nobles and Schiff on the issue of truth in our criminal justice system also express concern (2000, p.18):

How can one believe that criminal justice is about truth, or due process, when it is so obviously about **power**, expediency, control, class, the aggressive policing of suspect communities, the impossibility of objectivity, and has little, if anything, to do with justice, or any other values which might claim to lie beneath that epithet? (emphasis added)

The situation of the "guilty" escaping conviction is not the focus of this paper. My primary concern is the wrongful conviction of the seemingly innocent, how such incidents can be prevented and how the criminal justice system can be meaningfully reformed.

BACKGROUND

After a 30 year career in policing, spanning a number of Australian jurisdictions, and time as the CEO of the Integrity Commission in Tasmania, I have always had a strong interest in integrity, justice and humanity. However, I must admit, coming from a police perspective, my primary concern in the past was one of detecting, apprehending and prosecuting offenders.

In more recent times, however, in my role as an Integrity and Justice consultant and lawyer, and during my three and a half years as an Assistant Commissioner in charge of Corruption Prevention and Investigation within the WA Police, I have come to see our justice system through a different

lens. I have become much more aware of the very real potential for miscarriage of justice cases, particularly after seeing the case of Andrew Mallard dramatically unravel in recent years in WA. We have also recently witnessed strong criticism of sections of the WA Police in Martin J's decision in the Lloyd Rayney case. I have come to appreciate even more the critical role that police play as gatekeepers to the entire criminal justice system.

Since January 2012, I have been heavily involved in reviewing the conviction of Ms Sue Neill-Fraser for the murder of her long-time partner, Mr Bob Chappell, on Australia Day 2009 in Hobart (see www.susanneillfraser.org). I have spent many long hours reviewing and analysing all the available evidence in the matter, seeking further information under *Right to Information* legislation from Tasmania Police and speaking to key people in the case, including Sue Neill-Fraser. I have recently completed an 85,000 word book manuscript on the case entitled *Murderers Amongst Us*, which I hope to be able to publish soon.

SOME NOTABLE MISCARRIAGE OF JUSTICE CASES IN AUSTRALIA

As far back as 1991, Justice Michael Kirby stated, in a speech delivered in London (p.1038):

Between the idea of British justice and the reality; between the motion of our famous legal procedures and the act of criminal conviction, a shadow has fallen which is called miscarriages of justice. It casts its dark reflection to the four corners of the world where the English language is spoken and where the procedures of justice fashioned in this city have been copied by a quarter of humanity... [T]he shadow which has fallen over it is persistent.

There have been high profile MoJ cases both here in Australia and New Zealand and around the world (see for example Kirby 1991; Weathered 2005; Moles 2004 & 2006; Sangha, Roach & Moles 2010). In relation to the UK, for example, the Birmingham Six, the Cardiff Three and the Guildford Four immediately spring to mind.

Australia too has had its fair share. Dr Bob Moles' website, Networked Knowledge, gives a helpful and enlightening list of what might be regarded as MoJ cases in Australia - See <http://netk.net.au/researchprojectshome.asp>.

There have been a number of **highly controversial cases** or proven MoJ matters. Consider, for example, the following cases in Australia and New Zealand:

- NT - Chamberlain (Morling 1987)
- Queensland - Graham Stafford (Bowles 2007, Crowley & Wilson 2010) and Kelvin Condren (Weathered 2005)
- NSW – McLeod-Lindsay (Brown & Wilson 1992), Gordon Wood (see <http://netk.net.au/WoodHome.asp>; Cross 2009), Jeff Gilham (Bowles 2009) and Keli Lane (Langdon 2007 & Chin 2011)
- SA – Edward Splatt (Shannon 1984) and the ongoing case of Henry Keogh (Moles 2004 & 2006)
- Victoria - Farah Jama (Vincent 2010) and Jaidyn Leskie (Bowles 2001)

- WA - Mallard (Egan 2010; Corruption and Crime Commission 2008), Mickelberg (Lovell 1985 & 2010) and Button and Beamish (Blackburn 2005; Weathered 2005)
- NZ - Arthur Allan Thomas (Yallop 1978; Birt 2012) and David Bain (Karam 1997 & 2012).

In some of these cases, there has not only been a favourable legal outcome but also indisputable evidence of the person's factual innocence (as occurred in Mallard in WA and Farah Jama in Victoria).

THE CAUSES OF MISCARRIAGE OF JUSTICE CASES IN AUSTRALIA AND NEW ZEALAND AND ELSEWHERE

Research has indicated that consistent themes emerge when one examines the causes of known or highly likely miscarriage of justice cases.

The US is an interesting jurisdiction to consider given that 301 convicted persons have now been exonerated by the US Innocence Project (IP) (fact sheet).

Geoffrey Robertson in *Crimes Against Humanity* states (2008, p.140), in relation to the US situation:

The five main reasons for 'miscarriages' are: incompetent defence lawyers; prosecution suppression of evidence; black defendants convicted by all-white juries; and the prejudicial impact of two classes of unreliable evidence – eyewitness identification and the 'jailhouse snitch'.

The US Innocence Project, over 15 years, has specifically examined the many cases of wrongful conviction that it has worked on (which involved DNA exoneration). The Project found that wrongful convictions were not isolated or rare events, but arose from "systemic defects" that can be precisely identified and addressed. The leading causes are reported by the Project to be (n.d.):

- **Eyewitness Misidentification Testimony** – a factor in 75% of the cases studied and the leading cause of their wrongful conviction cases;
- **Unvalidated or Improper Forensic Science** – a factor in 50% of cases;
- **False Confessions and Incriminating Statements** – a factor in 28% of cases;
- **Informants** – a factor in 19% of cases.

Eyewitness evidence can be inherently unreliable. The Canadian *Report of the Working Group on the Prevention of Miscarriages of Justice* (Department of Justice Canada 2004) stated:

There is no denying the powerful impact at trial of a witness for the prosecution stating with confidence and conviction that the accused was the person observed committing the crime. However, experience has shown that erroneous and mistaken identifications have and do occur, resulting in the wrongful conviction of the factually innocent. The most well meaning, honest and genuine eyewitness can, and has been, wrong.

An article by well-known criminologist Dr Paul Wilson, co-written with Juliette Langdon, entitled "When Justice Fails" (2005) provides a valuable insight into the possible causes of miscarriage of

justice cases in Australia and New Zealand. The authors identified factors said to be responsible for actual or possible miscarriages of justice, based on a review of 32 Australian and New Zealand cases since 1985. The factors, which cover general areas such as “Police”, “Evidence”, “Secondary Sources”, “Mass Media”, “Trial Processes” and “Misunderstanding of Cultural Factors”, were identified as:

1. Allegations of Over-Zealous/Unprofessional Police Investigation;
2. Allegations of Incompetent Police Investigation;
3. Allegations of Criminal Police Behaviour;
4. Expert as Advocate (e.g. partisan expert testimony);
5. Inconclusive Expert Evidence;
6. Circumstantial/Suspect Evidence;
7. Unreliable Eyewitness Identification;
8. Possible Witness Perjury;
9. Confession by Other;
10. Unreliable Police Informer;
11. Unreliable Prison Informer;
12. Media Pressure;
13. Media Stereotyping/Prejudice;
13. Possible Erroneous Judge's Instructions;
14. Inadequate Representation;
15. Allegations of Prosecution Misconduct; and
16. Misunderstanding of Cultural Factors such as translation errors.

The study found that “over-zealous” police conduct was recognised as a major contributing factor leading to miscarriages of justice and that it was akin to a “systemic dynamic” (Langdon & Wilson 2005, p.8). Over-zealous police investigation was found responsible or partly responsible in 50% of cases. Langdon and Wilson stated (2005, p.8):

Examples of such conduct include police deliberately distorting a witness’s statement, coercing a confession from a vulnerable suspect, and ignoring exculpatory evidence. The issues relating to over-zealous police investigations are similar to those that Wood (2000) described as ‘process corruption’. Police often appear to engage in such conduct because they strongly believe the suspect is guilty and consequently fail to follow other lines of inquiry.

The study also commented on the fact that police can be prompted to over-zealous behaviour by the strong circumstantial nature of a case (2005, p.10).

Brookman in her book *Understanding Homicide* states (2011, pp.268-269):

As argued, homicide investigations may fail due to the sheer complexity of the case, problems of information overload and the associated difficulties of determining the value and credibility of information, financial pressures and associated under-staffing and certain aspects of police occupational culture. However, there is a further important issue that

merits attention, namely those occasions where the police circumvent standard practice in an effort to 'get a result'. It is, once again, the intense pressures associated with the job that can lead officers to take certain 'short-cuts'. Moreover, where these short-cuts are seen to succeed, they can become rapidly accepted and normalised as standard practice – despite the obvious dangers that such transgressions can engender.

The Wilson and Langdon study also found that media pressure can lead to the premature arrest of suspects before a thorough investigation and relevant forensic tests can be carried out. Wilson and Langdon commented (2005, p.12) that extensive media coverage of a particularly serious crime can lead investigators to form "a conjecture" of the offence and the offender, to which they cling despite the emergence of countervailing evidence. The media's prejudicial influence was found in 22% of cases (2005, p.13). The concept of "trial by media" would seem a very real consideration, particularly when you consider what occurred in the Chamberlain case. The public still seemed to be very taken with the perceived personality and demeanour of the alleged or convicted offender.

It is pertinent to note that the analysis by Wilson and Langdon found that the inadequacy of legal representation and allegations of prosecution misconduct also led to miscarriages. In their study, "Erroneous judge's instructions" was found in nearly 19% of cases; "Inadequate representation" was deemed to have partly led to a miscarriage in 25% of cases; and "Prosecution misconduct" was identified in 15% of cases. Wilson and Langdon comment that the "inadequate representation" factor may be due to lawyers not having time to thoroughly prepare a case (2005, p.17; see also Zellick 2010).

Research such as that conducted by Langdon and Wilson is invaluable in attempting to identify the causes of miscarriage of justice cases. What is needed, however, is a designated position or some institution, with appropriate status and powers, to take responsibility for collating such information and ensuring that appropriate action is taken to institute necessary cultural, procedural and legal reform.

Dr Bob Moles from South Australia in his foreword to Evan Whitton's book (mentioned above) states (2009, p.7):

When Australia used a truth-seeking method (a Royal Commission) in the case of Lindy Chamberlain it found out that virtually all of the scientific evidence which has (sic) been given at the trial was wrong. When it used the same method (a Royal Commission) in the case of Edward Splatt, it found out again that of the numerous pieces of scientific evidence given at the trial, not one of them was without error.

The Chamberlain and Splatt Royal Commission made recommendations, but they were not properly implemented. Since then, the official response to alleged miscarriages of justice has been to ignore them. (emphasis added)

There is fertile ground for reform in a number of areas. For instance, it would seem that, at least in some jurisdictions, greater clarity is required about what is required to be disclosed to the Defence in criminal matters. Consider, for example, that in Tasmania, there is no written disclosure policy

available from the Office of the Director of Public Prosecutions either through the website or by request, as experienced personally by the author.

Accountability for inappropriate actions or misconduct by police, lawyers, DPP's and others, also needs to be a high priority so that there is a strong deterrent in future matters and an ability for personal and organisational learning. Training and education, particularly of police, law students, lawyers and judges, in miscarriage of justice issues, would also seem sensible and appropriate. As Justice Kirby stated (1991, pp.1049-1050):

We, the judges and lawyers, must go on trying to improve the system of criminal justice. Without arrogance or self-satisfaction we must learn from the lessons which miscarriages of justice teach us. We must have the humility to acknowledge error. We must have a sense of urgency to ensure improvements in our institutions. And we must never rest content with institutional injustice which we have failed to repair when it was in our province to do so. Doubtless these are most exacting standards. But it is the highest tribute to our judicial forebears that they are the standards which our communities expect of us today. We must not fail.

POWER AND MARGINALISATION

The Free Dictionary on the Internet defines "marginalization" as:

The social process of becoming or being made marginal (especially as a group within the larger society).

The concept is defined by Burton and Kagan (2003) as follows:

Marginalization is a slippery and multi-layered concept. Whole societies can be marginalized at the global level while classes and communities can be marginalized from the dominant social order. Similarly, ethnic groups, families or individuals can be marginalized within localities. To a certain extent, marginalization is a shifting phenomenon, linked to social status. So, for example, individuals or groups might enjoy high social status at one point in time, but as social change takes place, so they lose this status and become marginalized.

In keeping with the theme of the conference, the paper considers the concepts of power and marginalisation in relation to serious miscarriage of justice matters. The paper does cover some of the power differentials inherent in the system which lead to marginalisation. However, the paper's primary focus is on the process that accompanies the investigative and prosecutorial processes, including the impact of conviction and incarceration. Marginalisation obviously involves a disempowerment of the accused or convicted person and can occur pre-trial, post-trial and even post-exoneration.

Marginalisation can occur via:

- Media (particularly through biased and high profile coverage);

- The reaction of society (loss of reputation of the accused often based on respect for, or blind faith in, the system);
- Police behaviour/misconduct (e.g. leaks to media, spreading of rumours or, even worse, verballing or the planting or suppression of evidence);
- The possible breakdown of family relationships (particularly where police may be instrumental in driving a wedge between conflicted family members);
- The system itself (refusal of bail and fact that the tables are turned dramatically once a conviction is in place, the time taken for various processes, and the delays due to court and lawyer workloads. Then there is the a lack of proper review and appeal mechanisms);
- The complexity of the legal system and the need for the lay person to rely heavily on Defence Counsel to “get it right”. (For instance, they exercise a wide discretion in deciding what issues to contest, what witnesses to call, what evidence to lead or seek to have excluded and which lines of argument to pursue. The Defence strategy is a critical element in serious criminal cases);
- Lack of access to quality legal advice and financial factors including the significant expense of legal representation for many;
- Disempowerment of the individual through devastating and long-term health and psychological effects;
- Lack of compensation for many of those who are exonerated, coupled with their lack of resources and inability to launch a legal action; and
- The lingering social stigma for exonerees if there is no conclusive proof of innocence, including possible ongoing negative media.

THE INNOCENCE MOVEMENT AND STRATEGIES FOR REFORM

There is actually a community of people out there fervently fighting for their family members, friends or clients in order to prove their innocence and have a wrongful conviction overturned. There is an international human rights “Innocence” movement growing in strength around the globe (Weathered 2005, p.203), evidenced by the rapid growth in Innocence Projects and innocence forums. I was fortunate to attend the International Justice Conference in Perth in March 2012 which focused on miscarriage of justice cases.

In light of newly acquired knowledge and experience, I am keen to establish a much needed Innocence Project in Tasmania along the lines of those already established overseas and in Queensland (<http://www.griffith.edu.au/criminology-law/innocence-project>) and WA (www.innocenceprojectwa.org.au). I have commenced discussions with key stakeholders in that regard.

I am also strongly supportive of the concept of a Criminal Cases Review Commission (CCRC) in Australia, similar to the UK model (see <http://www.justice.gov.uk/about/criminal-cases-review-commission> and CCRC 2011). I made two submissions (one of which was confidential in order to ensure the protection of Parliamentary Privilege) earlier this year to the SA Parliament's Legislative Review Committee in relation to a CCRC for South Australia and a possible model for a national CCRC (<http://netk.net.au/CCRC/CCCRTerms.jpg>).

A CCRC in Australia and New Zealand would provide an important and much needed avenue of last resort for those innocent people wrongly convicted.

The UK CCRC is an independent public body that was set up in March 1997 by the *Criminal Appeal Act 1995*. Its purpose is to review possible miscarriages of justice in the criminal courts of England, Wales and Northern Ireland and refer appropriate cases to the appeal courts. The Commission is based in Birmingham and has about 90 staff, including a core of about 50 caseworkers, supported by administrative staff. There are nine Commissioners who work with the Senior Management Team to ensure the Commission runs efficiently. The Commission is said to be completely independent and impartial and does not represent the prosecution or the defence.

According to their website, the CCRC has received 15,332 applications up to 30 September 2012. Of that figure, some 341 cases are waiting for attention and there are 723 cases currently under review. Some 463 matters have been referred to the Court of Appeal. Of that figure 325 convictions have been quashed (and 138 upheld). Such statistics would indicate that there is a real need for a body such as the CCRC.

In addition to the introduction of a CCRC, we also need to ensure appropriate review and appeal mechanisms which reflect the requirements of relevant international law and which allow for timely redress. It is indeed heartening to see significant reforms in this area occurring in South Australia, including the introduction of a Bill in Parliament this week, after a Legislative Review Committee inquiry earlier this year. It seems that the criminal appeal system throughout Australia for the last 32 years has failed to comply with international human rights obligations (according to the Australian Human Rights Commission) and that South Australia is passing the Bill to create a new right of appeal to correct this situation.

In addition to new appeal and review mechanisms, we should also consider a national coalition to co-ordinate existing Innocence Projects and similar interests in Australia. This would be particularly important in the absence of a national CCRC. We already have a very valuable "clearinghouse" of cases, articles, research and relevant information in the Networked Knowledge website (<http://netk.net.au/>) set up, and capably maintained by, Dr Bob Moles and others. Several of us working in the area of MoJ cases have discussed the concept and have also canvassed the possibility of a Miscarriage of Justice Action and Reform (MoJAR) group.

When one considers the major issues identified in the Wilson and Langdon study, we need to ensure that Australia adopts international best practice in police investigative techniques, particularly in the

area of homicide. In my opinion, the UK has been a role model in this regard with the *Core Investigative Doctrine* and *Murder Investigation Manual* (Centrex 2005 & 2006). We also need to ensure the highest ethical and professional standards within policing and the legal profession and ensure appropriate and ongoing training and education in order to prevent miscarriages of justice.

A strong focus on policing, in particular, is essential as police are the gatekeepers to the entire criminal justice system. The judgement of Martin J in the WA Rayney case earlier this month highlighted a variety of police misconduct incidents said to range from “inappropriate” to “reprehensible”. Failed prosecutions like that of Rayney and the case of Johnny Montani, also in WA, certainly give cause for a national inquiry into police conduct in such matters.

The media will also continue to play an important role in this area. In fact, sections of the media have played a critical role in the past in exposing miscarriage of justice cases and bringing pressure to bear on appropriate authorities in order that justice might prevail.

Whilst we are fortunate to have a highly regarded and generally effective criminal justice system, history has shown that mistakes are still made. Consider the statement of Edmond & Roberts (2011) in the *Sydney Law Review*:

In wrongful conviction cases, the criminal standard of proof, even in conjunction with judicial gatekeeping, defence lawyers, cross-examination, the occasional defence expert, judicial directions and warnings, and appellate review did not identify reasonable doubts. DNA exonerations should give proponents of the adversarial trial and its attendant safeguards grounds for pause.

We simply cannot afford to ignore the need for appropriate and timely cultural, procedural and legal reform.

CONCLUSION

In light of the incidence of miscarriage of justice cases in our English-based legal system, both here and overseas, it is essential that we constantly reflect on the notion of justice and the methods of ensuring that justice is truly served. Justice has to be more than a “game” (Robertson QC 1998), particularly a game of power where the stakes are high. When mistakes are made, and a wrongful conviction results, the system must have accessible mechanisms for ensuring the timely and effective redress of such matters. The issue of compensation for wrongful conviction is also an area that simply must be examined.

Police in Australasia are critical players in preventing miscarriage of justice cases. However, they seem to still follow the **crime control investigative model** rather than a **due process investigative model** (Jones, Grieve & Milne 2008, p.476). That is, they have more of a focus on controlling crime - locking up the baddies, getting an arrest and a conviction. Justice Wood in his final report on the Royal Commission into the NSW Police Service stated (1997, p.23):

[P]olice are regularly confronted with law and order campaigns calling for an aggressive and result-oriented style of policing that does not cater for due process, and favours both rough justice and the fabrication of evidence.

In the UK, there has been a push to focus on the due process investigative model which is characterised as being intended to dispense justice, but with the underpinning principle of the rights of the individual and adherence to the rule of law (Jones, Grieve & Milne 2008, p.476). We certainly need to see more of a human rights based culture in our criminal justice system (Gans et al. 2011). Those attending this conference are well placed to influence key stakeholders in the various sectors of our criminal justice system.

We must ensure that persons accused of crime and those wrongly convicted are not disempowered in the process and hence ineffective in their defence or in their challenging quest for justice.

We must work together to prevent miscarriages of justice in the first place. We know that the lives of the wrongly convicted and those of their families and friends are devastated and changed forever. In addition to righting individual wrongs, it is absolutely essential that we maintain ongoing trust and public confidence in our criminal justice system. Simply put, we must be prepared to admit mistakes, learn from them and embrace necessary change.

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