

THE CONTRIBUTION OF CORRUPTION TO MISCARRIAGE OF JUSTICE CASES: THE NEED FOR GOVERNMENTS TO ENSURE INTEGRITY AND ACCOUNTABILITY

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“The fish rots from the head”
Turkish (?) Proverb

ABSTRACT

The paper will discuss the contribution of “corruption” to high profile miscarriage of justice cases in Australia. It will argue that not enough has been done, despite a growing number of high profile cases, to identify the key issues across the criminal justice system, ensure appropriate legal, procedural and cultural reform, and hold those responsible to account. Governments (and others) have not acted to ensure that appropriate mechanisms are in place in relation to: the integrity of, and accountability for, police investigations; the law relating to the admissibility and use of expert opinion forensic evidence; and the fair and appropriate prosecution of all persons charged with serious crimes. In addition, not enough has been done to ensure proper and appropriate appeal and review mechanisms are in place when the system gets it wrong. The paper will talk about steps that Governments should take to ensure enhanced accountability and integrity in our criminal justice system, including the introduction of new appeal and review mechanisms (similar to, but broader than, those recently recommended by the SA Legislative Review Committee), support for Innocence Projects or a national Innocence coalition, and clear criminal procedure requirements, including publicly available and appropriate disclosure policies (and possibly even legislation in all jurisdictions) and useful tools such as Codes of Conduct for Expert Witnesses. Moreover, it is time for the establishment of a national Criminal Cases Review Commission as in the UK and Scotland. The issue of compensation for those wrongly convicted is also a matter requiring urgent attention. It is essential to reduce the marginalisation of those persons who find themselves entangled in our criminal justice system. Following the Andrew Mallard and Gordon Wood cases, the failed Montani and Rayney prosecutions in WA in recent times, and concerns held by the author about the police investigation into the Sue Neill-Fraser case in Tasmania, it will be argued that it is time for a national inquiry into police, prosecutorial and other conduct in miscarriage of justice matters and serious criminal cases in order to stop the “rot” that is eroding public confidence in the administration of justice. It is incumbent upon our Governments to demonstrate absolute integrity in the handling of such matters and provide much needed leadership in this critical area.

INTRODUCTION

This paper should be read in conjunction with the paper “The Contribution of “Corruption” to Miscarriage of Justice Cases” which was presented to the annual Corruption Prevention Network forum in Sydney on 6 September 2012 (Etter 2012a at www.betterconsult.com.au/presentations).

This paper is intended to provide an overview of key issues from that paper and provide additional points relevant to the December 2012 Integrity in Government forum.

The Turkish proverb “The fish rots from the head” indicates the criticality of integrity in Government and the clear need for strong leadership.

The role of government or “governmentality” in the area of miscarriages of justice is stated by Naughton as follows (2012a, p.32):

At root, then, governmentality can be conceived as a *process* by which rule of law societies are managed, operating with the professed interests or rationale of enhancing the wellbeing of the population.

The paper will discuss the contribution of “corruption” to high profile miscarriage of justice cases in Australia. It will argue that not enough has been done, despite a growing number of high profile cases, to identify the key issues across the criminal justice system, ensure appropriate legal, procedural and cultural reform, and hold those responsible to account.

DEFINITION OF MOJ

“Miscarriage of Justice” is used in this paper to refer to a case where there has been a **wrongful conviction**. The person may have been to be factually innocent or there are serious concerns or doubts about the conviction.

Whilst commentators tend to cite high profile cases generally involving homicide, it needs to be recognised that miscarriages of justice can and do occur across the broad spectrum of offence categories.

In this area, there is a dangerous temptation to focus on the high profile cases and to neglect what is going on in the lower and intermediate courts. This is perhaps understandable given that people find it totally abhorrent to think of an innocent person languishing behind bars. As Chester Porter QC states in his book *The Conviction of the Innocent: How the Law Can Let us Down* (2007, p.xiii):

It is not my intention in writing this book to undermine confidence in our justice system. In fact, it is my considered opinion that the common law criminal trial system has proved very successful. However, it is easy to become complacent. The idea that there may be one innocent person serving a lengthy gaol sentence is a matter for grave public concern.

Similarly, it is not my intention to undermine the justice system or the key founding institutions, such as policing. After 30 years in policing, I am well aware of the many hardworking, conscientious and honest police officers who effectively undertake a dangerous and challenging job. However, recent events in Australia and personal experiences have given me significant cause for concern. And along with others, I believe that what we have seen in recent times, with a run of high profile miscarriage of justice cases, is probably “the tip of the iceberg”. It is time to examine what is lurking beneath the surface of our criminal justice system.

Naughton (2012a, p.163) in his recent book *Rethinking Miscarriage of Justice – Beyond the Tip of the Iceberg* states that there is a need to RETHINK how miscarriages of justice and the victims of miscarriage of justice are conceptualised and defined. He states that current definitions mean that miscarriages of justice are conceived as rare occurrences and quantified as small in number (2012a,

p.188). In consequence, attempted change of the system to remedy or avert miscarriages of justice has attempted to impact only within the very limited scope of “procedural problematics” that are exemplified by post-appeal cases.

Naughton (2012a, p.190) states that there is a need to provide “a voice” that might better be able to depict the full range of harms both to individuals (other than the direct victims of miscarriages of justice) and the collectivity or governed as a whole. Naughton prefers to say that there is a need to protect “us” from “errors of justice” and the harms that they cause (2012a, p.191). Naughton claims, in the UK, there has been no governmental “eye” at all upon the scale of miscarriages of justice as evidenced by large numbers of successful appeals that are not “exceptional” (2012a, p. 93).

In Australia and NZ, there has similarly been inadequate Government leadership in regard to this issue, demonstrated, for example, by a reluctance or lack of capability to properly hold people to account for proven misconduct. The Mallard and Arthur Allan Thomas cases are clear examples of this (see below). However, it is acknowledged that positive steps have been taken in some jurisdictions (for example the SA Legislative Review Committee earlier this year and SA Government consideration, and timely reaction to, the Committee’s recommendations).

THE CAUSES OF MOJ

The causes of miscarriages of justice are varied but research both here and overseas has indicated that the following factors are at play (Langdon & Wilson 2005; Naughton 2012a & b; Moles 2004 & 2006; Sangha, Roach & Moles 2010; Weathered 2005; Porter QC 2007; Department of Justice Canada 2004; US Innocence Project n.d.):

- non-disclosure by the Crown (including police) to the Defence;
- “tunnel vision” or “targeting” by police;
- plea bargaining;
- over-zealous police behaviour;
- incompetent police investigation;
- corrupt behaviour by police;
- criminal behaviour by police;
- prosecutorial misconduct;
- eyewitness misidentification;
- the use of unreliable informants or snitches;
- errors in forensic science or problems with expert witnesses;
- media portrayals and treatment of incidents;
- socio-economic and cultural factors including race/ethnicity; and
- bad lawyering or inadequate representation.

As Sangha, Roach and Moles point out (2010, p.194), police investigations are often found to be at the heart of wrongful convictions. Police are the gatekeepers to the entire criminal justice system and can be very resistant and obstructive to being held accountable for flaws or misconduct in investigations. A classic example, mentioned above, is the Arthur Allan Thomas case in NZ (Birt 2012). We have had several Royal Commissions in Australia which have demonstrated what can occur by way of police misconduct and corruption (Kennedy 2004; Wood 1996, 1997 & 1999; Fitzgerald 1989).

In relation to causes of miscarriages of justice cases in the UK, Richard Foster CBE, the Chair of the Criminal Cases Review Commission (CCRC) stated in his Foreword to the CCRC 2010/11 Annual Report (2011 p.5):

The causes of miscarriage of justice are many and varied and include inefficient or misguided investigations, fabricated or suppressed evidence, misconceived expert evidence and confessions obtained through duress ... **The most common basis of referrals remains the non-disclosure of material evidence at the original trial.** (emphasis added)

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 were 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.

Another key issue is the disparity between the resources of the parties which Porter QC states is “the great weakness of our criminal justice system” (2007, p.170; See also Etter 2012b).

The contribution of “corruption” to miscarriage of justice cases (and the definition of “corruption” utilised in that context) is outlined in greater detail in the author’s paper presented to the Corruption Prevention Network (CPN) forum in Sydney in September 2012 (Etter 2012a: see <http://www.corruptionprevention.net/assets/Resources/Barbara-Etter-Paper.pdf>).

THE INCIDENCE OF MOJ CASES

The incidence of miscarriage of justice case is simply unknown as there does not appear to have been extensive research in this area. Nevertheless, there are enough cases in Australia, particularly in more recent times, to warrant concern and attention. Some high profile cases over the years include Chamberlain (Morling 1987), Splatt (Shannon 1984), Farah Jama (Vincent 2010), Andrew Mallard (Egan 2010; CCC 2008), Gordon Wood, Jeff Gilham, Graham Stafford (Crowley & Wilson 2010), the Mickelberg brothers (Lovell 1985; 2010) and John Button and Darryl Beamish (Blackburn 2005; Weathered 2005).

We have also seen some recent high profile failed prosecutions like Lloyd Rayney (Caccetta 2012) and Johnny Montani (Flint 2012), both in WA, and cases such as that of Mohamed Haneef in

Queensland. In the Lloyd Rayney case, the judgment for which was delivered on 1 November 2012, Martin J was critical of a variety of police conduct which he described as ranging from "inappropriate" to "reprehensible" (see an analysis of the decision at www.betterconsult.com.au/blog for 4 November 2012 and the Civil Liberties Australia website www.cla.asn.au). The matters raised by the case have been referred to the WA Corruption and Crime Commission for its consideration and assessment (Hickey 2012).

RESPONSIBILITY OF GOVERNMENTS

It is becoming increasingly clear in this country, as in others, that corruption and misconduct play a clear role in miscarriage of justice cases. Governments must act now to take steps to ensure that the issues coming out of such cases are clearly identified and there is necessary procedural, cultural and legal reform. Dr Bob Moles from South Australia in his foreword to Evan Whitton's book *Our Corrupt Legal System* 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)

Governments can no longer afford to turn a blind eye as to what is occurring in relation to the miscarriage of justice issue. In addition, it must be made clear that persons who breach the trust of the community, particularly in cases of noble cause corruption, will be held to account in an effective and timely way. For instance, those found responsible by the CCC for the wrongful imprisonment of Andrew Mallard (police and prosecutors) escaped largely unscathed (Egan 2010; Perpitch 2009; Thomson 2009 & 2012).

But it is not just about righting the wrongs, once a miscarriage of justice is exposed. Governments must work to **prevent** the occurrence of such issues. It is incumbent upon Governments to ensure that their policing agencies and prosecutorial services maintain the highest ethical and professional standards.

MAJOR REFORMS IMPLEMENTED IN THE UK

Naughton (2012a) outlines the most important legislative events in the UK in this area as:

- the introduction of the Court of Criminal Appeal in 1907;
- the permanent abolition of capital punishment in 1965;
- the introduction of formalised police codes of practice and conduct under the *Police and Criminal Evidence (PACE) Act 1985*; and
- the establishment of a Criminal Cases Review Commission (CCRC), an independent body responsible for investigating suspected miscarriages of justice in England, Wales and Northern Ireland (*Criminal Appeal Act 1995*).

Naughton points out that all of these legislative events were connected with an extra-judicial inquiry. Perhaps what is needed in Australia is an Inquiry into the criminal justice system, as occurred in the UK in 1993 (known as the Runciman Royal Commission on Criminal Justice)? The Runciman Commission not only examined the dangers of miscarriages of justice but also took on board crime control measures that were designed to facilitate the conviction of the guilty (Sangha, Roach & Moles 2010, p.201). The Commission's main recommendation with respect to miscarriages of justice gave rise to the establishment of the CCRC.

Naughton argues that even such major reforms as those outlined above were not sufficient to disturb the underlying structural causes of miscarriage of justice cases (2012a, p. 91). He argues that we need to question the procedures of the criminal justice process and states that reforms are needed that are immanent or integral to the criminal justice process (2012a, p.94).

RECOMMENDATIONS FOR RIGHTING THE WRONGS

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. As Chester Porter QC states (2007, p. xiv):

Those who administer justice must strive for perfection. Nothing less will suffice.

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 valid legal reasons for this situation but perhaps it is time to reform this aspect of the system?¹

In the author's view, there are a range of matters that could be implemented to help prevent miscarriages of justice and address those already within the system including:

- The establishment in Australia of a Criminal Cases Review Commission such as in the UK and Scotland, but with enhancements as a result of the lessons learned from their operations (Naughton 2012b; Sangha & Moles 2011);
- A rethink of some of the basic concepts of our criminal justice system such as the adversarial approach, the meaning and implementation of "beyond reasonable doubt", the effectiveness of juries in complex criminal matters and our appeals and review system;
- The resourcing of a national project (perhaps through the Australia New Zealand Policing Advisory Agency (ANZPAA)) to establish international best practice in homicide investigation and the investigation of other major or serious crime, similar to what has occurred in the UK with the *Murder Investigation Manual* (Centrex 2006) and the *Core Investigative Doctrine* (Centrex 2005);
- Consideration of legislative reform, where necessary, to ensure proper police practice and procedure, similar to the PACE legislation in the UK;
- Adoption of a **due process model** rather than a **crime control model** in our criminal justice system (Etter 2012b);
- Amendments to the current appeal and review mechanisms to allow for a further appeal where it appears that there has been a wrongful conviction and there is significant new or fresh evidence, or the relevant conviction has resulted from fraud, deceit or manifest error (Sangha, Roach & Moles 2010 pp.169-187);
- A national inquiry into police and prosecutorial conduct in major criminal cases in light of cases such as Gordon Wood (NSW), Andrew Mallard (WA), the Mickelberg brothers (WA), Graham Stafford (QLD), Mohamed Haneef (AFP/Commonwealth), Lloyd Rayney (WA) and Johnny Montani (WA);
- Clear requirements in the area of prosecution such as guidelines on pre-trial disclosure to the Defence (or possibly even legislation – See Abrahams QC 2000) and penalties where, for instance, serious or deliberate non-disclosure occurs in criminal cases);
- Legislative reform which would enable the High Court to receive new and fresh or compelling evidence of innocence;
- Clear Codes of Conduct for DPP's and Prosecutors (where not already in existence);
- Codes of Conduct for Expert Witnesses, a tool which was of clear value in the Gordon Wood case (*Wood v R* [2012] NSWCCA 21 (24 February 2012));
- Establishment and support for a national or Australasian coalition for Miscarriage of Justice Action and Reform (MoJAR) or similar;
- An examination of the current admissibility and use of expert opinion evidence (Edmond & Roberts 2011; Moles 2004 & 2006; Sangha, Roach & Moles 2010);
- Appropriately resourced and networked Innocence Projects throughout Australia, possibly attached to law schools within Universities;

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

- Reduced marginalisation of persons by the criminal justice system pre-trial, post-trial and post-exoneration by addressing such issues as proper bail processes, access to legal assistance etc. (Etter 2012b);
- Ongoing training and education for lawyers, police, judges etc. in miscarriage of justice and relevant ethics issues;
- Anti-Corruption Authorities that are appropriately resourced and empowered to investigate the corruption or misconduct leading to miscarriage of justice cases; and
- Just compensation schemes for those who have been wrongfully convicted and imprisoned, particularly where there has been governmental misconduct involved.

CONCLUSION

Governments in Australia have been reluctant in the past to recognise miscarriage of justice cases and take action. An indicator of this is the apparent time (reported anecdotally) that it can take to have petitions of mercy considered by some Attorneys-General in this country. As Woffinden states (1987 at p.342; cited in Naughton 2012a, p.43; See also Porter 2007, p.8):

The major problem (with) miscarriage of justice (cases) is that to acknowledge the case as such would inevitably involve admitting to a catalogue of serious errors in the detection of crime and the administration of justice. The authorities are loath to countenance this ... with the result that ... even allowing murderers to go free and commit further crimes becomes a small price to pay for the maintenance of the facade of judicial infallibility.

Chester Porter QC has stated that the investigation of possibly mistaken convictions in Australia lags behind that in England and America (2007, p.53). Australian Governments need to protect us from "errors of justice" (Naughton 2012a) and the widespread harms that they cause. In fact, miscarriages of justice have been referred to as issues of "triple Injustice" (MacFarlane 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)

In this regard, I have recently completed an 85,000 word book manuscript entitled *Murderers Amongst Us*, which will outline a catalogue of problems, including with the police investigation, and a range of new and fresh evidence in the Sue Neill-Fraser matter (www.susanneillfraser.org) in Tasmania. Ms Neill-Fraser is currently incarcerated in Risdon Women's prison on the outskirts of Hobart for 23 years for the murder of her long-time partner, Bob Chappell, on the Four Winds yacht on Australia Day 2009. My research to date, including an examination of court transcripts, witness statements, the Police Investigation Log and documents disclosed to the Defence, as well as responses from Tasmania Police following Right to Information (RTI) applications, indicate (see also <http://www.betterconsult.com.au/blog/reviewing-murder-investigations/>):

- There was no investigation plan for the operation/murder investigation;
- Statements were not taken from significant Persons of Interest present near the crime scene on 27 January 2009;

- Statements were not taken from some key witnesses or a potential suspect until after Sue Neill-Fraser's arrest;
- Handwritten running sheets with the details of a critical witness (which were not disclosed to the Defence) were not faithfully transposed onto the typed Police Investigation Log;
- There is no critical decisions log or policy file in relation to key decision-making in the case, consistent with best practice in this area;
- There were no written records kept of key meetings with senior personnel and briefings with investigative team members (In fact, written advice from TASPOL was that all investigation team briefings were verbal and **tasks were allocated on a whiteboard**);
- There is no indication on the Police Investigation Log that it was ever checked or endorsed by a supervisor;
- There is no collated record of all phone calls from members of the public to TASPOL or Crime Stoppers for the operation, or in response to a number of high profile media requests for information;
- There are incomplete or limited records of the doorknocking "process" that occurred around Marieville Esplanade foreshore in Sandy Bay and Battery Point for the period immediately following the crime;
- There were misrepresentations made by police to Sue Neill-Fraser during the course of the investigation (for example the nature of the evidence given by a key witness about a person seen in a dinghy around 11.30 pm to midnight on 26 January 2009 (see trial court transcript pp.973-974));
- There was a lack of investigation or inquiry when an important witness came forward and stated that she/he had seen a different dinghy tied up to the Four Winds yacht at a critical time i.e. 5 pm on Australia Day (see trial court transcript pp.812-813); and
- Police took deficient statements from key witnesses such as from another person who gave the description of a grey dinghy seen at 3.55 pm tied to Four Winds on Australia Day (see trial court transcript p.944-945).

This case and others referred to in the paper give cause for concern about the integrity of some police investigations into serious crimes in Australia.

There has been no raft of specific major reforms in Australia as a result of high profile miscarriage of justice cases, unlike in the US and UK (following the Birmingham Six, Guildford Four and the exoneration of 301 persons in the US through the use of DNA (US Innocence Project n.d.)), other than the formation of the National Institute of Forensic Science (NIFS) post-Chamberlain, the electronic recording of police interviews and hopefully changes to DNA testing procedures following the Vincent Report in Victoria (2010), in the wake of the Farah Jama DNA cross-contamination case.

Governments have a clear responsibility in this area as a loss of public confidence in the criminal justice system would be very damaging to the proper administration of justice and our perceptions of safety and wellbeing.

It is surely incumbent upon Governments to prevent future miscarriage of justice cases and ensure that timely, accessible and effective mechanisms are in place to address current and future matters.

If urgent action is not taken by Governments, the emerging "rot", which seems to be appearing, will spread and police and others will continue to act with impunity, further contributing to the conviction and incarceration of the innocent (see Porter 2007). Whilst acknowledging the independence and importance of the judiciary, it is also incumbent upon our Governments to:

- ensure absolute integrity in the handling of such matters by government agencies;

- ensure appropriate legislative and policy frameworks;
- appropriately resource necessary organisations and infrastructure; and
- provide much needed leadership in this critical area.

As Chester Porter QC concluded in his book *The Conviction of the Innocent* (2007, p.320):

We do not achieve a better system by praising what we have. We do that by criticising and improving, in a constant effort to achieve the impossible goal of perfection.

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