

INTRODUCTION TO SYMPOSIUM ON WRONGFUL CONVICTIONS

KENT ROACH AND BIBI SANGHA

I INTRODUCTION

As Professor Stephen Cordner put it, ‘the penny is beginning to drop in Australia’¹ with respect to wrongful convictions. This symposium of nine original essays on wrongful convictions, combined with a thematic issue published in 2014,² a new text on the law of miscarriages of justice³ recent law reform in South Australia and Tasmania⁴ and the tireless work of those who advocate on behalf of the wrongly convicted, are all contributing to greater awareness of the causes of wrongful convictions and the need for remedies.

This special issue on wrongful convictions stems from a symposium held in Adelaide in November 2014 and hosted by the Centre for Crime Policy and Research at Flinders University Law School.

All of the papers have been revised and updated since the symposium and subjected to independent peer review. We have divided the essays into three thematic parts. The first part examines the reality and nature of wrongful convictions. It contains an important repository of recognised wrongful convictions in Australia.

¹ See Stephen Cordner, ‘Expert Opinions and Evidence: A Perspective from Forensic Pathology’ in this issue.

² (2014) 37 UNSWLJ, 237-406.

³ Bibi Sangha and Robert Moles, *Miscarriages of Justice: Criminal Appeals and the Rule of Law in Australia* (LexisNexis Butterworths, 2015).

⁴ *Statutes Amendment (Appeals) Act 2013* (SA) enacting s 353A of the *Criminal Law Consolidation Act 1935* (SA) and *Criminal Code Amendment (Second and Subsequent Appeal for Fresh and Compelling Evidence) Act 2015* (Tas) enacting s 402A of the *Criminal Code Act 1924*.

The second part deals with some of the causes of wrongful convictions, with a particular focus on the role of forensic evidence including steps that should be taken both in the practice of forensic medicine and science and in the courts to minimise errors that can contribute to wrongful convictions. The last part deals with remedies for wrongful convictions and contains essays on innovative appeal mechanisms, the role of Innocence Projects and the case for the creation of a Criminal Case Review Commission in Australia as well as some comparisons of Australia's approach with that taken in Canada.

II THE REALITY OF WRONGFUL CONVICTIONS

This part starts with Dr Rachel Dioso-Villa's important study of 71 wrongful convictions in Australia from 1922 to 2015. This long list should dispel any doubts about the reality of wrongful convictions in Australia especially because Dioso-Villa defines wrongful convictions relatively narrowly as factual innocence including cases where a crime did not occur. As she acknowledges, there may be many unrecognised wrongful convictions. In this respect, it is interesting to note that the two states that have recently given the accused a second or subsequent appeal on the basis of fresh and compelling evidence — South Australia and Tasmania — account for only 5.6 percent of wrongful convictions in her list. The numbers of recognised wrongful convictions in South Australia has already expanded with the overturning of two convictions and will likely grow in the coming years. Dioso-Villa's paper is also helpful in classifying the factors that have contributed to wrongful convictions. She identifies the leading causes as police misconduct, erroneous instructions to the jury and misleading forensic evidence.

The next paper by Professor Kent Roach elaborates on what Dioso-Villa identifies as a contributing factor in 14 percent of the 71 wrongful convictions she identifies: the status of the accused as Indigenous. Roach argues that the overrepresentation of Indigenous people among the wrongfully convicted both in Australia and Canada

reflects larger patterns of disadvantage related to colonialism and systemic discrimination. Nevertheless, Indigenous people, especially Indigenous women, may be under-represented among those recognised as wrongly convicted in relation to their gross overrepresentation among those who are imprisoned and thus at particular risk of having being wrongly convicted. The pressure that even the innocent may face to accept a guilty plea may also help to explain the under-representation of Indigenous women among the wrongfully convicted. In Roach's view, this insight supports a broader definition of wrongful convictions than proven factual innocence to include unfair trials and convictions in which an accused may have a valid defence. Roach's examination of known wrongful convictions of Indigenous people in Australia and Canada, outlines both their immediate causes such as false confessions, mistaken eyewitnesses identification, lying witnesses, forensic errors and lack of disclosures and underlying causes related to stereotypes associating Indigenous people with crime and Indigenous alienation from the criminal justice system including linguistic issues. That said, Roach also details how the Australian High Court in the cases of Kelvin Condren and Terry Irving has finessed its self-imposed restrictions on hearing fresh evidence in order to achieve justice for wrongfully convicted Indigenous men.

III SOME CAUSES OF WRONGFUL CONVICTIONS

Although the legal system in the end must take responsibility for preventing and remedying wrongful convictions, it is clear that multi-disciplinary work is necessary to better understand the causes of wrongful convictions. We are particularly fortunate to include an essay by Professor Stephen Cordner, a leading forensic pathologist, on the production of expert opinions and evidence in forensic pathology.

Dr Cordner is attentive to recent jurisprudence and scholarship which warns that Australia (as well as many other countries), does

not ‘have strong safeguards against miscarriages of justice resulting from poor or weak expert evidence’.⁵ He recognises, consistently with Dioso-Villa’s findings, that most wrongful convictions are the product of “multiple problems”. He argues that forensic pathology must implement quality management practices both with respect to the production of expert reports and their presentation in court. He discusses the measures implemented by the Victorian Institute for Forensic Medicine in this regard. They include a “second opinion” that endorses the report as reasonable and an annual evaluation of a forensic pathologist’s testimony in court. Cordner also argues that the expert witness and legal communities must work together. In this regard, he discusses a July 2014 Victorian Practice Note on Expert Evidence in Criminal Trials designed to ensure that expert evidence is based on complete tests and that limitations, uncertainties and controversies are properly acknowledged. The Practice Note also encourages the narrowing of issues in dispute so that the limited resources of the adversarial system can be better devoted to exploring the forensic issues that are in dispute.

The next paper by Professor Gary Edmond examines judicial approaches to the admissibility of expert forensic evidence with a focus on the High Court’s recent decision in *Honeysett v. The Queen*⁶ to exclude evidence given by an anatomist about similarities between a suspect and a person captured on a video recording. Edmond argues that the High Court’s reasoning that the expert’s opinion was not based on specialised knowledge and thus not admissible was a “missed opportunity”. The decision failed to provide a template for trial judges and experts to determine whether the particular evidence was valid, reliable and proficient. Consistent with his scholarship which has influenced the Victorian Court of Appeal,⁷ Edmond argues that courts must concern themselves with questions of reliability. He also discusses the strengths and weaknesses of building in reliability requirements to primary admission decisions under s 79(1) of the *Uniform Evidence Act* or allowing them to influence the

⁵ Stephen Cordner, ‘Expert Opinions and Evidence: A Perspective from Forensic Pathology’ in this issue at 263.

⁶ [2014] HCA 29.

⁷ *Tuite v The Queen* [2015] VSCA 148.

administration of s 137 in determining the balance between probative value and prejudice to the accused in a criminal trial.

The final paper in this section on the causes of wrongful convictions by Dr Robert Moles takes a case study approach to a series of alleged wrongful convictions some of which are in the process of being analysed by the criminal appeal system in South Australia. The lead case of Henry Keogh has already been overturned by the Court of Criminal Appeal in South Australia, and appeals in three additional cases are proceeding. They all involve the work of the Chief forensic pathologist in South Australia for a period of some 30 years. Moles looks at some of the additional cases which are likely to be reviewed. He also discusses the further changes which may be necessary, in addition to the new right of appeal which has now been implemented in South Australia and Tasmania.

Those procedures may well involve a Forensic Science Review Panel with powers similar to those of a Criminal Cases Review Commission (CCRC) such as exists in the UK. Moles also recommends the establishment of a Royal Commission or Judicial Inquiry which would adopt elements of the practice in Canada. He notes that a Forensic Review Panel, similar to a CCRC but restricted to forensic issues was suggested by the Legislative Review Committee in South Australia.

IV REMEDIES FOR WRONGFUL CONVICTIONS

The last section on remedies for wrongful convictions contains four essays that illustrate both the breadth and the importance of the subject. The first essay by Professor Kent Roach again takes a comparative approach. Roach argues that Canadian courts have been more active and creative than Australian courts in recognising the reality of wrongful convictions and providing remedies. He cites as examples the Supreme Court of Canada's creation of a broad right to pre-trial disclosure of non-privileged but relevant evidence possessed

by the prosecutors and the court's willingness to consider fresh evidence on appeal. He also notes that Canadian courts have in a number of cases granted bail pending petitions to the executive and have judicially reviewed the executive's decisions about petitions. Such judicial activities, as well as Canada's judicial-led public inquiries into the systemic causes and remedies for wrongful convictions, have also influenced Canadian prosecutors who have taken an interest in miscarriages of justice. At the same time, Roach argues that Australian legislatures have been more active and creative than the Canadian Parliament. In this regard, he points to the ability in some states for courts to have judicial inquiries and second appeals on fresh and compelling evidence. He also notes that Australian legislatures are more active than the Canadian Parliament in regulating police and prosecutorial practices that contribute to wrongful convictions. He suggests ways that Australia and Canada can learn from each other. In particular, he suggests that Canada can learn from Australia's concerns about accountability for individual misconduct that contributes to wrongful convictions and its legislative activism, and that Australia could benefit from the systemic approach taken in Canada to accountability and from increased judicial reforms.

Associate Professor David Hamer examines the use of judicial inquiries in the David Eastman case. He relates the use of this remedy to Eastman's exceptional tenacity and litigiousness and raises questions about whether the large sums spent in the Eastman inquiry might be better devoted to the creation of an Australian version of the Criminal Cases Review Commission that has been operating in England and Wales since 1997 and has since that time referred about 600 cases back to the Court of Appeal resulting in almost 400 appeals from convictions or sentence being allowed.⁸ Drawing in part on criticism that the English CCRC has not been sufficiently attentive to factual innocence and concerns about political viability, Hamer suggests that an Australian version of the CCRC might be limited to questions of factual innocence. This is an interesting and provocative proposal. Hamer's concern about political viability is important and it may help explain the willingness

⁸ The current statistics are available at <<http://www.ccrcc.gov.uk/case-statistics/>>.

of South Australia and Tasmania to allow second appeals that are patterned on the ability of the state to abrogate double jeopardy rules in similar circumstances. Nevertheless, the present authors would prefer a broader focus on miscarriage of justice that should include the factually innocent but would also concern itself with broader questions of unfairness.⁹

Bibi Sangha in her essay examines the new rights of appeal available in South Australia and Tasmania. The legislation allows for second or subsequent appeals where there is fresh and compelling evidence that there has been a substantial miscarriage of justice. Initially it was thought that the requirement for fresh and compelling evidence might be too restrictive. However, the South Australian appeal court in the second case to come before it (*R v Drummond (No 2)*) has broadened out the definition of what amounts to ‘fresh and compelling’ evidence. If it stands the test of time, the new interpretation might prove to be a fine example of judges developing the law so as to protect the underlying values of fairness and the rule of law.

Finally, this special issue concludes with Lynne Weathered’s article on the role of innocence organisations in Australia. Drawing on her long experience with the Griffith University Innocence Project, Weathered outlines the pedagogical benefits of having students engage in pro bono work on behalf of those who claim to be wrongfully convicted. At the same time, she also outlines the many practical barriers in such work. These include the possible lack of retention of potential evidence including material that might be subject to DNA testimony and the lack of any coercive powers that could be used to demand access to potential evidence, such as exists under the Canadian petition system and the UK CCRC system. The lack of legislation relating to the preservation of DNA evidence helps to explain why Australian Innocence Organisations have not enjoyed the success of their American counterparts in obtaining DNA exonerations. It will be interesting to see in the years ahead how the

⁹ Bibi Sangha, Kent Roach and Robert Moles, *Forensic Investigations and Miscarriages of Justice: the rhetoric meets the reality* (Irwin Law, 2010).

practical barriers that Lynne Weathered aptly identifies affects work in South Australia, Tasmania and perhaps other states with respect to second appeals related to fresh and compelling evidence.

V CONCLUSION

Australia's journey towards greater awareness and better remedies for wrongful convictions is in many ways still a work in progress. Nevertheless, we hope that readers of this special issue will agree with Professor Cordner that the penny is beginning to drop.