# BOOK REVIEWS

## Review of Kerry Carrington and others (eds), *Travesty! Miscarriages of Justice*, 2nd edn, Leichhardt: Pluto Press, 1992. $19.95

I first came across mention of this book in a footnote written by Justice Michael McHugh in the High Court's judgment in *Pollitt v The Queen* ((1992) 66 ALJR 613). He was concerned with the way in which the use of prison informers seemed to have increased significantly in recent years. *Travesty!* was one of his sources for that belief.

But don't allow that fact to mislead you. This is not a dry, academic (in the pejorative sense) textbook account of the workings of the criminal justice system. It is, rather, an exploration, mainly by academics, of some of the ways in which the criminal justice system has gone wrong, both in Australia and England. It says something about Justice McHugh that he had read such a book.

The book is a compilation of a dozen essays which explore particular cases where demonstrably the justice system has resulted in innocent people being convicted of serious crimes. Some of the essays try to discover why this has happened on such a scale, and suggest reforms.

In one sense the book is dated. It first appeared in 1991 and its main focus was the plight of Timothy Edward Anderson, a man twice wrongly convicted. To a considerable extent the book focuses on why the authors believe Anderson was wrongly convicted of the Hilton bombing. But by the time this second edition was going to press, Anderson and his supporters had been vindicated by a decision of the NSW Court of Criminal Appeal. That is mentioned as a one-page postscript to one of the essays, a third of the way through the book. Disconcertingly, no mention is made there of the fact that there is a seven-page epilogue which explores in somewhat more detail the reasons of the appeal court.

About half the book is concerned with different aspects of Anderson's two convictions, including the role of prison informers, the police, the media and prosecutors. A chapter by Tom Molomby looks at developments in England and the reasons why the Guildford Four and the Birmingham Six were wrongly convicted of bombings.

The first chapter is by Paul Wilson, the criminologist who is currently Dean of Arts at the Queensland University of Technology. His is a general essay about miscarriages of justice in which he examines a score of examples and attempts to assign the blame. The most important of those he holds responsible for these

wrongful convictions are suspect police investigations, partisan use of subject forensic evidence, unreliable police or prison informers and prejudicial media.

The concluding chapter, by Russell Hogg, a criminal lawyer who lectures at Macquarie University law school, sees much the same problems and suggests some reforms. Among them are the necessity for stricter control of police investigations; the need for the defence to have access to witness statements; the adoption of electronic recording of witness statements; the strengthening of the jury system; and more responsible behaviour by the media. And who would disagree? The problem is to get action.

The High Court has, to some extent, begun to act. In *McKinney & Judge v The Queen* ((1991) 171 CLR 468) a bare majority of the Court laid down a new rule of practice, which in effect requires a strong warning to the jury unless confessional evidence has been electronically recorded. It has taken account of the dangers of gaol-yard confessions in *Pollitt v The Queen*. It has now reviewed its decision in *McInnis v The Queen* ((1979) 143 CLR 575) where it rejected the notion that an accused had a right to counsel. In *Dietrich v The Queen* (unreported, 13 November 1992) it decided that a trial judge should stay proceedings in most cases where an unrepresented accused is charged with a serious offence. Perhaps it is symptomatic of the attitude of the legal profession that one of the arguments which was associated with that issue was an assertion that an accused should not be entitled to counsel if he was plainly guilty. I am being somewhat naive of course, but I would have thought that the more it seemed to everyone (lawyers particularly) that a person was guilty, the more he or she needed competent counsel. In another case the High Court is about to consider what constitutes a jury, for the purposes of section 80 of the Constitution. Can there be fewer than 12 people in a jury? Is a majority verdict truly a decision by a section 80 jury?

The High Court has a better record in changing the law in a reformist way in the past few years than it had as an appeal court in the previous decade or two. While the Court's decision in the *Chamberlain Case* ((1983) 153 CLR 514), for example, is often quoted for the law it created, few now would look to that particular decision as having provided justice to Lindy and her husband (Justice Murphy, as usual in criminal cases, has to be treated as exceptional, but more often than not he was in the minority). Tim Anderson had one unhelpful experience with the High Court. And so did the Mickelbergs, whose final appeal resulted in the High Court declaring that it did not have the jurisdiction to consider new evidence.

The real problem is that the High Court is very interested in the law, and not at all interested in facts. It does not see the evaluation of facts as being its task. That is why it has emphasised in a series of judgments that the State and Territory courts of criminal appeal should examine the facts in detail. It keeps sending cases back to those courts when applicants complain that the appeal courts have not done their job properly.

Should the system be changed? Perhaps. Might it not be possible for the States and the Commonwealth to give to some kind of criminal ombudsman the power to investigate the facts of cases where there may be doubts about the correctness of a conviction? This is not canvassed in the book, but the idea might be worth pursuing.

I have not said much about the media. Frankly I am unhappy about the way in which many in the media approach the task of reporting crime and the criminal justice

system. There are too many examples of "mistakes" and of trials miscarrying because of the way the media has influenced the public and in particular the jury. Time for an inquiry which would focus attention on the problem? I think so.

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# Review of Marcus S Jacobs, *International Commercial Arbitration in Australia: Law and Practice*, 2 Loose-leaf Volumes, Sydney: Law Book Company, 1992. $490.00 plus costs of updates

International arbitration is now a very important topic. Arbitration is fast eclipsing litigation as the preferred method for the resolution of international commercial disputes. The appearance of a two volume loose-leaf service devoted to *International Commercial Arbitration in Australia* by Marcus S Jacobs QC is therefore a matter of great interest. Its publication is certainly timely. Volume 1 of the work consists of text comprising some 47 chapters examining various aspects of international arbitration. Volume 2 contains primary materials - namely, the Australian legislation and rules of international arbitral organisations.

Despite the timely appearance and impressive size of the work, this reviewer is disappointed with the content, particularly of Volume 1. My overall impression of this volume is that it is largely a compendium of quotes from other sources. In places it appears to be little more than a digest of the views of others and it lacks coherence, fluency and consistency. The organisation of chapters, and parts of chapters, is at times confusing. Many of the references are to materials from overseas. This, by itself, is certainly not a criticism in a work dealing with international arbitration but there are many Australian sources, both secondary and judicial, which are not included. This is surely an omission in a book dealing with international commercial arbitration in *Australia*. The author appears overawed by the views of others. There is too little "Jacobs" and too much quotation from those who have written before.

My reservations commence with the Preface. The author tells us that the law of international commercial arbitration in Australia was "dramatically transformed" when the Commonwealth Parliament passed the International Centre for the Settlement of Investment Disputes ("ICSID") Implementation Act 1990. While Australia's accession to the Washington Convention was undoubtedly a step forward, it is surely going too far to describe it as a "dramatic transformation" of the relevant law in Australia. There have been relatively few arbitrations under the auspices of the Washington Convention. The enactment of the UNCITRAL Model Law, which provided a new international law for domestic arbitrations in Australia, was much