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Dr Bob Moles - Networked Knowledge

## Melbourne Briefing Paper - Miscarriages of Justice: Australia, Britain and Canada

### Can you believe this guy?

What I am about to put before you today might well strike those who are unaware of it as highly improbable if not fanciful. It will involve hundreds of cases of miscarriages of justice in South Australia; thousands of improperly conducted autopsies; and the claim that the criminal appeal system in all states and territories of Australia, until recently, has been in breach of fundamental international human rights obligations.

### Conferences

Somehow, I need to close the credibility gap, otherwise you might quickly determine that I am off my trolley, and not worth listening to. I did address the [Australian Institute of Judicial Administration judges' conference](#) in Sydney in September 2011, the biennial conference of [District and Co Court judges](#) of Australia and New Zealand in Melbourne in April 2015 and the [Australian Institute of Judicial Administration](#) in November 2015, amongst others.

### TV programs, books, articles

However, we first published our concerns in the ABC 4 Corners program "[Expert Witness](#)" program in October 2001. To date we have completed 103 radio and television programs, many of them national.<sup>1</sup> After conferring with the DPP and the forensic witnesses whose conduct had been impugned in the ABC program, the Attorney-General determined that we had been 'mischievous' and that we had 'an axe to grind, but had hidden it from the ABC reporters.'<sup>2</sup> Following the lack of official action after the 4 Corners program, we thought that we might be able to contribute further to the public discussion of these issues so we published two further books. [A State of Injustice](#) in 2004 covered a number of cases which we thought contained the clearest possible errors of a forensic nature, involving the work of the Chief Forensic Pathologist in South Australia, Dr Manock. [Losing Their Grip – the case of Henry Keogh](#) was published in 2006. The errors set out in [chap 11](#), subsequently formed an important part of the reasoning upon which the conviction was subsequently overturned.

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<sup>1</sup> Transcripts and links to videos of the programs [are available from our web site](#).

<sup>2</sup> The response was given in 2003 and is set out in [Losing Their Grip](#) chap 7 '[There was no miscarriage of justice](#)'.

A recent paper '[Institutional Reforms in the context of criminal appeals](#) in South Australia' was published in the Flinders Law Journal.<sup>3</sup> It explains much of what I am to talk about today. [Michael Kirby](#), the former justice of the High Court, who has shown a great deal of interest in our work over many years, said after reading it, that what we had disclosed was 'shocking' and that its contents should be widely distributed.<sup>4</sup> [Malcolm McCusker QC](#), the former Governor of Western Australia has also been a keen supporter of our work, and he discussed various aspects of it in his speech to WA lawyers.<sup>5</sup>

In 2010 we published our book [Forensic Investigations and Miscarriages of Justice](#), in Toronto.<sup>6</sup> It is a comparative analysis of the law and cases on miscarriages of justice in Australia, Britain and Canada. Our joint author is [Professor Kent Roach](#), Canada's leading expert on the topic of miscarriages of justice. It was favourably discussed by the Hon Thomas Cromwell, [a judge of the Supreme Court of Canada](#), when he was giving [the MacFadyen lecture](#) in Edinburgh.

In 2015, we published our book on [Miscarriages of Justice: Criminal Appeals and the rule of Law](#)<sup>7</sup> dealing more specifically with the Australian issues. It was published by the practitioners' department of LexisNexis. It dealt with the recent developments in establishing the new statutory right of appeal in criminal cases in South Australia and Tasmania, and the overturning of the conviction in the case of Henry Keogh.

#### Academic acceptance – the DASSH Committee

It should be noted that the Deans of Arts, Social Sciences and Humanities for the university sector across Australia issued an Infographic on their work in [October 2015](#). They stated that they had been responsible for \$17b of funding over around 5,600 projects. The identified four projects in Australia which they thought deserved special mention. This included the Flinders University Miscarriages of Justice Project because it had a change in the law on criminal

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<sup>3</sup> Robert Moles, [Flinders Law Journal 17 \(2\)](#) December 2015.

<sup>4</sup> He did of course give me permission to publicly repeat the remarks he had made to me in his email.

<sup>5</sup> 24 June 2015, '[Miscarriages of Justice](#)', an address to the Anglo-Australian Lawyers' Society of WA.

<sup>6</sup> Bibi Sangha, Kent Roach, Robert Moles, *Forensic Investigations and Miscarriages of Justice: The Rhetoric Meets the Reality*, Irwin Law, Toronto, 2010.

<sup>7</sup> Bibi Sangha, Robert Moles, [Miscarriages of Justice: Criminal Appeals and the Rule of Law in Australia](#), LexisNexis, 2010.

appeals, We would hope that with the overturning of a number of significant convictions in Australia, their enthusiasm for our project will continue.

### **The troubling cases**

#### Frits Van Beelen 1972

This case involved the murder of a young girl on Taperoo beach just outside Adelaide in the early 1970s. Dr Manock said that he was ‘virtually certain’ he could determine the time of death to within half an hour by the visual inspection of stomach contents, after they had been frozen and stored for months.<sup>8</sup> A few years later in another case he admitted that this method was ‘very unreliable’.<sup>9</sup> No one thought to go back and review the conviction of Mr Van Beelen who was still serving his lengthy prison sentence. The convictions in the Canadian case of [Stephen Truscott](#) (2007)<sup>10</sup> and the New Zealand case of [Mark Lundy](#) (2013)<sup>11</sup> have both been overturned because of the unacceptability of this type of evidence. In July 2016, the appeal court accepted that Manock’s evidence about time of death had no scientific support. The Chief Justice said he would overturn the conviction as being a substantial miscarriage of justice, but the other two judges said that the error was not sufficiently substantial.<sup>12</sup> An application for leave to appeal to the High Court has been granted.

#### David Szach 1979

This case involved the shooting murder of a prominent criminal lawyer in Adelaide. Derrance Stevenson was in his mid-40s and Szach his lover was aged 18. It was said that Szach had shot Stevenson in the head and then placed his body in the chest freezer at his home / office. The timing of death was crucial.<sup>13</sup> Without knowing anything more than the core body temperature after it was removed from the freezer, Dr Manock said that he could calculate to within half an hour when Stevenson had been shot which coincided with a witness statement placing Szach at the scene. The prosecutor (Brian Martin) said ‘... the objective and scientific

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<sup>8</sup> The case of Frits Van Beelen 1972: See [LRC submission](#) p32 and *A state of Injustice* [chapter 5](#) ‘Time and Tide’.

<sup>9</sup> In the matter of Wendy Cooke 1984, CH Manock XXN at [829].

<sup>10</sup> [Re Truscott 2007 ONCA 575](#)

<sup>11</sup> [Lundy v The Queen](#) (New Zealand) [2013] UKPC 28 (7 October 2013).

<sup>12</sup> Links to the judgments are available at the [Van Beelen homepage](#).

<sup>13</sup> The [David Szach](#) case 1979: See *A state of Injustice* [chapter 6](#), and [Report of Professor Bernard Knight](#), Professor of Forensic Pathology, Home Office Pathologist, 14 July 1994, cited in [LRC submission](#) p32.

evidence means that [the deceased] was dead by 6.40, *and the accused was there.*<sup>14</sup> A world-leading authority on the timing of death, based upon post mortem temperatures, said the calculations were ‘speculative’, ‘ill founded’ and ‘cannot be substantiated.’<sup>15</sup> Mr Szach is now proceeding with an appeal. He is suffering from motor-neurone disease.

#### Mrs Emily Perry 1981

This case involved the allegation that Perry had attempted to murder her husband by the malicious administration of arsenic. In overturning the conviction in the High Court, Justice Murphy said that the prosecution should use people who are *substantially* and not merely *nominally* experts in their field.<sup>16</sup> He added, the case ‘revealed an *appalling departure* from acceptable standards of forensic science..’ and that ‘the evidence was *not fit to be taken into consideration*’.<sup>17</sup>

#### Derek Bromley 1984

He was convicted of the murder of Stephen Docoza in 1984. It was said that he got into a fight after his sexual advance was rejected and Docoza ended up in the river where his body remained for five days before being recovered. The principal witness for the Crown was in a florid psychotic state at the time of the incident. He saw and heard the devil, and thought he was the King of Adelaide, a Kung-Fu expert and a minister of religion. The psychologist giving evidence at the trial said his observations and recollections of Bromley assaulting Docoza were not necessarily affected by his acute psychotic condition. Current expert evidence says that is not possible.

Dr Manock gave evidence as to the cause of death (drowning) and the injuries (kicks, punches, scrape on the ground) which coincided with the witness statement of the altercation. The forensic evidence makes it clear that in such a decomposed body it is not possible to determine either cause of death or the timing and cause of injuries.

Although he completed his non-parole period in 2008, he remains in prison because he maintains that he is innocent of the crimes for which he was convicted. The evidence given at

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<sup>14</sup> Trial Transcript p 1557 (emphasis added) cited in [Petition for David Szach](#) 2006 [35].

<sup>15</sup> [Professor Bernard Knight Report](#) 14 July 1994.

<sup>16</sup> *A state of Injustice* [chapter 7](#) p 115.

<sup>17</sup> *A state of Injustice* [chapter 7](#) pp 115-6.

his trial in relation to the cause of death and injuries was inconsistent with the known facts about drowning deaths and the causes of injuries in such cases.<sup>18</sup>

#### Terry Akritidis 1990

This case involved a possible suicide or murder after he was said to have jumped to his death from a police radio tower. Dr Manock explained that although his body had knocked a hole in the concrete roof of an adjacent building, his 'clothing' had protected his body from serious injuries. Dr Manock said that he learned about the severity of injuries in such cases by reading his own previous autopsy reports.<sup>19</sup> He stated that Akritidis had died 12 hours before his body was undressed at the autopsy at 8.15am. This turned out to be two hours after his dead body already stiff with rigor mortis had been found by the police around 6pm the previous evening. No one seemed to notice there was a problem with this. The original pathologist had said that he had died 12 hours before his body was discovered. That would have placed him in the custody of police at the local police station.

#### Gerald Warren 1992

Dr Manock said that the young aboriginal boy had fallen from a moving vehicle whilst intoxicated and the marks associated with his injuries had been caused by the fabric of corduroy (his trousers). He subsequently learned that he had been beaten with a metal pipe with a thread on the end, and his body had been run over by a 'ute'. In explaining his inconsistent autopsy reports, Dr Manock said that the pressure from the fabric of corduroy would cause similar injuries to those of a blow from the threaded end of a metal pipe. He said that a person falling out of a moving vehicle would have similar injuries to a person who had a vehicle driven backwards and forwards over their body. Apparently, it was his expert opinion that 'the forces involved in either scenario are very similar.'<sup>20</sup> Clearly, that was not correct.

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<sup>18</sup> See the [Derek Bromley Homepage](#), and the [Petition to the Governor](#) of South Australia November 2011.

<sup>19</sup> The case of Terry Akritidis: *A state of Injustice* [chapter 9](#) p 132.

<sup>20</sup> The case of Gerald Warren: *A state of Injustice* [chapter 6](#) p 103.

## The Baby Deaths 1994

In 1994 the Coroner conducted an inquiry into three baby deaths.<sup>21</sup> Each died in separate incidents and were variously aged three months and nine months. Dr Manock said each had died of bronchopneumonia. The Coroner found that was not correct as there were no traces of bronchopneumonia. However, one of the babies had 15 fractured ribs, two serious fractures of the skull and a very serious fracture of the spine. The Coroner said that the autopsies had achieved *the opposite of their intended purpose* – they had closed off inquiries rather than opening them up. He said that Dr Manock claimed to have seen things which couldn't have been seen, such as signs of bronchopneumonia, because they didn't exist. He said that the answers given to some questions at the inquiry, by the pathologist, were '*spurious*'.<sup>22</sup> This means, 'not genuine', 'not being what it pretends to be', 'illegitimate'.<sup>23</sup> Obviously, a serious judgment about an expert witness giving evidence on oath.

## Henry Keogh 1994-5

Mr Keogh had been convicted of the murder of his fiancée by drowning her in the domestic bath at their home in Adelaide. It was said that he had come up to her whilst she was reclining in her bath. He suddenly gripped her legs pulling them up in the air and at the same time he pushed her head under the water. Dr Manock said there were bruise marks on her leg which were a distinctive sign of a grip – he said he couldn't think of anything else they could be. He knew she was conscious when she went under the water because there was no damage to the outer surface of her brain. He knew that she had drowned because there was haemolytic staining to the lining of the aorta, and no such staining to the lining of the pulmonary artery. It subsequently turned out that none of these things were correct or had any scientific support to them.

## **The avoidance of the problems with Dr Manock**

### Non-disclosure of the baby deaths report

The baby deaths inquiry overlapped with Keogh's trial. The Coroner said he was aware that Dr Manock was about to give evidence in the Keogh trial when he had completed his report on the baby deaths. He therefore decided to 'delay publishing the Findings' in the baby

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<sup>21</sup> The baby death details referred to here were set out in [LRC submission](#) p37.

<sup>22</sup> *A state of Injustice* [chapter 10](#) "Seeing Things – the Baby Deaths Inquest 1994".

<sup>23</sup> *Concise Oxford Dictionary*.



deaths, until the Keogh trial had been resolved.<sup>24</sup> They were released two days after Keogh was convicted. This was a serious error of judgment. That prosecutorial non-disclosure would require the verdict of the jury to be set aside. We did not have to wait for 20 years for the many other errors in the case to emerge. It is remarkable that the Baby Deaths Findings were not used in Mr Keogh's appeal.<sup>25</sup>

#### Dr Manock not qualified as a pathologist or as an expert

In the ABC 4 Corners program broadcast in October 2001 we had referred to the fact that when Dr Manock had been appointed to be the Chief Forensic Pathologist in South Australia in 1968, he had no formal qualifications as a forensic pathologist.<sup>26</sup> Sometime later an advertisement was placed in the British Medical Journal to appoint someone as the Senior Director of Forensic Pathology. Dr Manock, instead of applying for the job, brought legal action against the State of South Australia and the Institute of Medical and Veterinary Science (IMVS) for breach of contract.<sup>27</sup> He said that he took the advertisement to mean that he had been subjected to constructive dismissal because *he* had been appointed as the head of forensic pathology. The legal proceedings took place over 6 years. The Director of the IMVS said in his evidence that it was an 'awkward' situation:

I tried to encourage Dr Manock - to study - and obtain his membership of the Royal College of Pathologists of Australia - because we had a man who had no specialist qualifications in a specialist's job, and without that this would have been a severe embarrassment.<sup>28</sup>

He added, 'Dr Manock was unable to do certifying the cause of death because [of] his lack in histopathology.'<sup>29</sup> This sworn evidence was given on behalf of the Forensic Science Centre and the State of South Australia. That means that they must retain that position unless Dr Manock's status subsequently changes, He never studied or undertook any training. It is

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<sup>24</sup> [Affidavit of Michael Sykes](#), solicitor, 7 November 1996; *Losing Their Grip*, [chapter 7](#) p118.

<sup>25</sup> See the [Affidavit of Michael Sykes](#), solicitor, 7 November 1996, where it is reported that defence counsel said that he could not see how the Findings would assist Mr Keogh's appeal, and that he only had a chance to read them at an 'embryonic' level before Mr Keogh's appeal was heard three months later.

<sup>26</sup> [LRC submission](#) p28. *ABC 4 Corners "Expert Witness"*. ['LRC Submission' refers to the Sangha / Moles submission to the Legislative Review Committee of South Australia when looking at whether to establish a Criminal Cases Review Commission. The Bill, submissions and other materials [are available here](#).]

<sup>27</sup> *CH Manock v State of South Australia and the Institute of Medical and Veterinary Science*, 1978, South Australian Supreme Court 2355 of 1978.

<sup>28</sup> Dr Bonnin, trial transcript, pp 117-125, cited in *A state of Injustice* [chapter 5](#), p 83, [LRC submission](#) p28,

<sup>29</sup> *Ibid*.

therefore puzzling that he was allowed to give evidence in over 400 criminal cases<sup>30</sup> as an expert witness when not qualified to do so, and to conduct 10,000 autopsies when he was not qualified to certify cause of death.<sup>31</sup>

### Dr Manock's Fellowship of the College of Pathology

Although the civil litigation ended in favour of Dr Manock that did not make him any better qualified in forensic pathology. He had been made a Fellow of the Royal College of Pathologists of Australasia in 1971. The then head of the Forensic Science Centre in Adelaide was also Deputy President of the College of Pathology. As Dr Manock was preparing to give evidence in the Van Beelen case it was thought that it would look better if he could say that he was a Fellow of the College of Pathology. In order to provide him with his Fellowship, he was *exempted* from the five years of study and examinations. A spokesman for the Royal College of Pathology said of the oral-only examination, 'It would probably have been about 20 minutes, and he would've been asked questions related to forensic pathology.'<sup>32</sup>

Dr Manock was later appointed to be an examiner of the College of Pathology.<sup>33</sup> Yet, he never undertook any formal written examinations in pathology or histopathology. He never published anything after the mid-1960s.<sup>34</sup>

### The Mintabie Incident 1978

It has recently been revealed by production of an affidavit in the appeal of Derek Bromley that in about 1978, Dr Manock was called to conduct an autopsy on an aboriginal man at Mintabie in the Aboriginal lands.<sup>35</sup> He decided to proceed with the autopsy in the main street of Mintabie in full view of the local residents and miners who were present. In 2004 at the Medical Board hearing Dr James said that:

These are coroner's cases, and the present Coroner, who was the coroner of this case as I recall, is absolutely adamant that the body can't even be *moved* without his permission, and in the event of a suspicious death the

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<sup>30</sup> 5 June 2011, [Channel 9, 60 Minutes](#) 'Reasonable Doubt'.

<sup>31</sup> This was the figure given in the trial of Henry Keogh see [Losing Their Grip chap 4 'The Trials'](#).

<sup>32</sup> [LRC submission](#) p29, *A state of Injustice* [chapter 5](#), p 83, Dr Weedon, [ABC 4 Corners "Expert Witness"](#).

<sup>33</sup> [3 August 2006, Channel 7 Today Tonight](#) (Adelaide) 'Graham Archer: [the] examiner for the College was none other than disgraced forensic pathologist Dr Colin Manock.'

<sup>34</sup> *Losing Their Grip*, [chapter 11](#), p 195.

<sup>35</sup> The transcript and video of this program is available at the [Networked Knowledge media list](#) program no 88.

body remains under his control in terms of its being moved to the city mortuary and no pathologist is allowed to carry out a post-mortem examination unless the Coroner has specifically nominated that person, when and where they can conduct that post-mortem examination.<sup>36</sup>

It would be hard to believe that the Coroner had given permission for Dr Manock to conduct an autopsy in public. After Dr Manock had removed the bodily organs from the chest, he is said to have used a ladle to scoop up some of the body fluids and to have made an inappropriate remark. Dr James also added:

Every sample, be it blood or a piece of tissue or toxicology samples, or a brain for examination, or whatever, has to be approved by the State Coroner. You're not allowed to do anything with any part of that body unless the Coroner gives you permission to do so. That information, the pieces and fluids are collected, are all faxed immediately after the post-mortem to the Coroner, so that he can rule on whether he gives permission to do those tests or not.

It is hard to imagine that the Coroner had given authorization for the desecration of this unfortunate man's dead body as a form of entertainment in front of those known to him.

### The Medical Board Inquiry

In 2004 the Medical Board of South Australia held an inquiry into the work of Dr Manock in the Keogh case. He gave evidence to the Board which contradicted or undermined his evidence from the trial.<sup>37</sup> He changed his view as to whether it was a left hand or right hand grip – he changed his view as to unconsciousness being a sign of drowning – he accepted there was no scientific support for his differential staining theory as a sign of drowning, but this was only because 'the rest of the world hadn't caught up' to him.<sup>38</sup> He also accepted that one of the tissue slides showed no signs of bruising although he had said at the trial that all slides showed signs of bruising.

The 'recantations' subsequently formed the basis on which the appeal was allowed – but only 10 years later, in 2014. The Medical Board Finding was that he was not guilty of unprofessional conduct.<sup>39</sup> Yet in an internal memo a pathologist on the Board had stated that

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<sup>36</sup> See [Losing Their Grip chap 11](#), pp 191-2.

<sup>37</sup> These points are set out in *Losing Their Grip*, [chap 11](#), 'Getting Closer to the Truth'.

<sup>38</sup> Transcript Medical Board Hearing at p 339.

<sup>39</sup> 22 June 2005 [Report of the Medical Board](#) *Henry Keogh v Colin Henry Manock*.

the autopsy was sub-standard to the point of incompetence;<sup>40</sup> it failed to comply with standards which had been laid down in **1908**; the documentation was - *manifestly inadequate, even by the lowest of standards*. That memo was only disclosed in later judicial review proceedings.<sup>41</sup>

#### The Solicitor-General Inquiry 2004

The Solicitor-General obtained an independent expert opinion from the Director of the IMVS (a govt instrumentality<sup>42</sup>) in Adelaide. The opinion said that the forensic evidence does not support a homicide scenario and that the most likely explanation is a slip-and-fall accident.<sup>43</sup> The expert sought permission to do further very simple tests to determine whether the bruises were historical and not connected to the time of death. Unfortunately those tests were not done at that time. When undertaken nearly 10 years later, they did in fact confirm that a crucial bruise was historical and not related to the time of death. Three additional expert opinions have also agreed that the forensic evidence did not support a murder hypothesis. So, by 2004 there are the Coronial Findings from the Baby Deaths Inquiry known but not disclosed in time for trial – and the opinions from the Medical Board and the Solicitor General in 2004 which are not yet disclosed. The petition for referral to the appeal court was subsequently rejected without explanation and without further disclosure. The case would have to languish for another ten years before finding its way to the appeal court.

#### Mistress Gabrielle

It was also revealed that Dr Manock had in recent years married ‘Mistress Gabrielle’. She has been involved in a brothel in Adelaide specializing in sado-masochistic practices.<sup>44</sup> She claims to have been trained by one of the best medical minds in the country. The program reveals her medical room which appears to be similar to a hospital operating room. She claims that one of her most prized possessions is her ‘autopsy kit’.

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<sup>40</sup> 16 March 2005, internal memo from [Dr Mark Coleman to members of the Medical Board](#). The other medical specialists on the Board expressed their agreement with it, (emphasis added).

<sup>41</sup> [Keogh v The Medical Board Of South Australia & Anor](#) [2007] SASC 342.

<sup>42</sup> [R v Keogh \(No 3\)](#) [2014] SASCFC 137.

<sup>43</sup> [R v Keogh](#) [2014] SASCFC 20 p 5, ‘1.20 Report of Professor Vernon-Roberts to Mr Kourakis QC (as he then was) re causes of death dated 22.11.04, discovered 14.2.13’. [In legal terms the word ‘discovered’ means ‘disclosed’]. The former Solicitor-General is now the Chief Justice of South Australia.

<sup>44</sup> The transcript and video of this program is available at the [Networked Knowledge media list](#) program no 88.

## Overturning the Manock convictions and the issue of fraud

The former Governor of Western Australia, has stated that all 400 of Dr Manock's cases will need to be re-examined.<sup>45</sup> There is in fact a compelling argument to say that they should all be overturned. Normally where there is error at trial, the significance of the error is assessed in the context of the whole of the record of the trial. An error at trial may be determined to be not sufficient to overturn the verdict where it can be said that there is no reasonable likelihood that it could have influenced the jury's verdict, or where a conviction would otherwise have been inevitable. However, where fraud has occurred, the situation is different. It is said that fraud vitiates everything, and that no judgment of any court can stand in the face of fraud. This is because the court has a fundamental duty to protect the integrity of the court process. In the event of fraud or a fundamental failure of due process, the court will set aside the verdict irrespective of whether it may have influenced the outcome of the trial.<sup>46</sup>

Dr Manock has conducted over 10,000 autopsies.<sup>47</sup> They too will need to be re-examined.

### **The need for a new right of appeal**

The problem was that despite the extensive evidence of possible wrongful convictions, the legal system was non-responsive. The procedural rules meant it could not see what obvious to everyone else.

The Court of Appeal – will only allow one appeal<sup>48</sup>

The High Court will not admit fresh evidence

The petition referral procedure involves an 'unfettered discretion' and 'no legal rights'.<sup>49</sup>

In the following years we managed to persuade the Australian Human Rights Commission that the criminal appeal system, *throughout Australia*, failed to comply with Australia's

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<sup>45</sup> 24 June 2015, the Hon Malcolm McCusker, AC CVO QC, [Address to the Anglo-Australasian Lawyers Society](#) WA.

<sup>46</sup> See for example the case of the '[sleeping judge](#)' cases in NSW; [Cesan v The Queen; Mas Rivadavia v The Queen](#) [2008] HCA 52. We have included a chapter on fraud in each of our last two books.

<sup>47</sup> See *Losing Their Grip*, [chap 4](#), 'The Trials'.

<sup>48</sup> The various rules are discussed in Sangha / Moles "[Post-Appeal Review Rights](#)" (2012) 36 Crim LJ 300 and also in *Miscarriages* chap 3 'Re-opening criminal appeals' and chap 4 'Post-appeal petitions'.

<sup>49</sup> See Bibi Sangha and Robert Moles "[Mercy or Right](#)" 14 FLJ 292 and *Miscarriages* chap 4 'Post-appeal Petitions'.

international human rights obligations.<sup>50</sup> It had done so for over 30 years since the ICCPR was signed in 1980.

We put a Bill to the parliament of South Australia to establish a Criminal Cases Review Commission [CCRC]. That Bill was referred to the Legislative Review Committee which sought public submissions.<sup>51</sup>

We put in a lengthy submission concerning the significant number of cases, thought to be wrongful convictions, which will need to be reviewed. The committee recommended there be established:

- a new statutory right of appeal;
- a Forensic Review Panel to refer cases to the appeal court;
- an inquiry into the use of expert evidence in criminal trials.

The [Attorney-General of South Australia](#) eventually accepted that the petition procedure was inadequate, because it lacked transparency. He said ‘it is mysterious’, it happens ‘behind closed doors’ - in creating a new right of appeal we are bringing it to the public forum – the courts.

The [Statute Amendment Appeals Act](#) (SA) 2013 was passed and came into force on 5 May 2013. It created a right to a second or further appeal where there is ‘fresh and compelling’ evidence. The ground of appeal is that there is a ‘substantial miscarriage of justice’. The Attorney-General of Tasmania announced that Tasmania would follow the South Australian lead and enact similar legislation.<sup>52</sup> [She said](#) the petition procedure is ‘not the right process’ and ‘decisions should be made by the courts, not the executive government’. The Tasmanian Act came into force on 2 November 2015. [Our critique](#) of the new appeal right is that the requirement for fresh and compelling evidence is based upon a mistaken analogy with the double jeopardy provisions. It potentially excludes cases of wrongful conviction which may concern legal error but not fresh and compelling evidence. Indeed, the examples given by the appeal court in *Keogh No 2* mentioned judicial misdirection and wrongful prosecutorial submissions which can be established without the need for fresh evidence.

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<sup>50</sup> The [Australian Human Rights Commission Submission](#) at [2.6] and Miscarriages chap 6 ‘The right to a second or subsequent appeal.’

<sup>51</sup> The LRC Report, submissions and other documents are available at <http://netk.net.au/AppealsHome.asp>

<sup>52</sup> The draft Bill and media releases are available at <http://netk.net.au/TasmaniaHome.asp>

## **A review of 400 convictions and 10,000 autopsies.**

One of the major outstanding problems is that the South Australian pathologist had completed 10,000 autopsies and, as he said, contributed to over 400 criminal convictions.<sup>53</sup> If he was not qualified to certify cause of death, as his employer stated - or he was 'not an expert' as the High Court stated, then we have a problem which exceeds any we have come across on our previous studies of Australian, British and Canadian cases. Merely implementing a new statutory right of appeal and then refusing legal aid and leaving it to the DPP's office to stem the flow by furious opposition to every attempt to exercise the new appeal right – must backfire eventually.

## **The Keogh Appeal 2014**

The DPP did oppose the admission of every item of evidence put forward by the appellant in the Keogh appeal. He was unsuccessful on every count. He even opposed the admission of the expert report which the prosecution had itself obtained in 2004 – again unsuccessfully. The judges on the appeal said that despite fairly vigorous cross-examination of the expert witnesses, the DPP hardly made any progress. The progress made on the appeal had been muted by the public statement by the DPP that he would proceed with a further prosecution in the Keogh case – despite the fact that Keogh has served 20 years and the four experts are agreed that the forensic evidence indicates that this was an accident not a crime.

The appeal court has said that the evidence of the four expert witnesses was 'compelling' and that the evidence of the pathologist and his deputy in support of a murder hypothesis amounted to no more than unwarranted and unsubstantiated speculation.<sup>54</sup>

The procedural rules in Australia have meant that the system has effectively blocked all attempts to secure a hearing on the merits in any of these cases for around 15 years. The Keogh case has now been finalised which means that the discussion of the issues in relation to his case are no longer sub-judice.<sup>55</sup>

## **Further appeals coming forward**

Three more cases are being prepared for appeal – the appeal of [Frits Van Beelen](#) has already been determined and is now subject to appeal to the High Court. Those of [David Szach](#) and

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<sup>53</sup> 5 June 2011, Channel Nine, 60 Minutes, '[Reasonable Doubt](#)'.

<sup>54</sup> [R v Keogh \(No 2\)](#) [2014] SASFC 136.

<sup>55</sup> The nolle prosequi was entered in November 2014.

[Derek Bromley](#) are being prepared with Bromley's already filed. The psychiatric evidence has been heard on the appeal and the forensic evidence will be heard on 20 March 2017.

### **The broader context**

We published [Miscarriages of Justice: Criminal Appeals and the Rule of Law](#), a book for legal practitioners published by LexisNexis in August 2015. We explain in some detail the serious problems which were recognized by the appeal court in the case of Henry Keogh.<sup>56</sup> Senior legal officials had incontrovertible evidence of those problems for over 10 years (some would say 20 years) but chose to conceal them.<sup>57</sup> Compelling evidence that Keogh's conviction was a wrongful conviction emerged just two days after Mr Keogh was convicted.<sup>58</sup> The commencement of the process to retry Mr Keogh was contrary to fundamental legal principles and never had any prospect of success.<sup>59</sup> The unavailability of an individual witness<sup>60</sup>, due to ill-health, as claimed by the DPP could never have overcome the basic procedural and substantive obstacles.

In our previous book [Forensic Investigations and Miscarriages of Justice](#) which was published in Toronto in 2010, we looked at the experiences of wrongful convictions in Australia, Britain and Canada.

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<sup>56</sup> Bibi Sangha, Robert Moles, *Miscarriages of Justice: Criminal Appeals and the Rule of Law*, [Miscarriages] 2015, LexisNexis, chap 10 'The South Australian Cases'.

<sup>57</sup> For example, the report of Dr Vernon-Roberts, submitted to the Solicitor-General of South Australia, Mr Kourakis QC, in 2004 but not disclosed until December 2013: 'Professor Vernon-Roberts' report of 2004 was released to the applicant's advisors on 5 December 2013', *R v Keogh (No 2)* [2014] SASFC at 136. It would be important to know if the content of that report was disclosed to the Attorney-General at that time.

<sup>58</sup> This was when the Coroner of South Australia released [his report on the Baby Deaths](#), a report which had been completed before Mr Keogh's trial was concluded, but concealed until after the trial concluded. It was a serious prosecutorial non-disclosure. See [affidavit of Michael Sykes](#), solicitor, 7 November 1996.

<sup>59</sup> [R v Keogh \(No 2\) 2014 SASFC 136](#) stated that the forensic evidence in the case as to the 'mechanism of murder' was no more than 'unsustainable', 'subjective', 'prejudicial' speculation which was not probative of any issues at trial. That recognition, 'fundamentally changed the evidential landscape'. It is clear that a retrial cannot be held on a basis which is fundamentally different to that of the earlier trial. See *Miscarriages* at [11.5.2] 'Restriction on presenting a different case at trial', discussing *R v Taufahema* (2007) 228 CLR. Also, a verdict of a jury, inconsistent with uncontroverted expert evidence is necessarily an unreasonable jury verdict, see *R v Klamo* (2008) 18 VR 644 at [45] citing *R v Matheson* [1958] 1 WLR 474 at 478 discussed in *Miscarriages* at [9.6].

<sup>60</sup> The witness was said to have been Dr Colin Manock: 'The DPP said in a statement he reviewed the case after witness Dr Colin Manock fell ill and believed "it was not appropriate to proceed without the witness giving evidence and being cross-examined"', [ABC News 14 November 2015](#). As to the extensive problems with Dr Manock's evidence, see *Miscarriages* at [10.15]. After those findings by the Court of Appeal (and the earlier findings referred to in this report), he could never (and should never) have been produced as an expert witness.



## The UK CCRC

In terms of institutional responses, it was clear that the UK with its [Criminal Cases Review Commission](#) had a positive approach. It had been set up as a result of the exposure of the wrongful convictions in the [IRA bombing cases](#) – the Birmingham Six and the Guildford Four amongst others. Over roughly the same time that we have been examining cases of miscarriages of justice in Australia, the last 15 years or so, references from the CCRC based in Birmingham have led to the overturning of more than 400 criminal convictions, around 100 of those being murder convictions. Four cases have involved people who had been hanged: [Derek Bentley](#) 1952 / 1998 – [Mahmoud Mattan](#) 1952 / 1998 – [George Kelly](#) 1949 / 2003– [Timothy Evans](#) 1950 / pardon 1966 compensation 2003 (not a CCRC referral).

Lord Igor Judge (Lord Chief Justice of England and Wales) at the AIJA Sydney conference, said the possible conviction of an innocent person would represent a *catastrophic* failure of the legal system. The UK cases of [Treadaway](#) (1996) and [Twitchell](#) (1999) exposed systemic abuse of suspects by police amounting to torture which involved ‘bagging (suffocating) the suspect’. As a result, the entire West Midlands Major Crime Squad had to be disbanded.

Is the British legal system held up as a disgrace? No it isn't. People travel from all around the world to visit the CCRC and to learn about their procedures. We have visited with them on several occasions and have had many discussions with their commissioners and staff.<sup>61</sup>

## The Canadian Judicial Inquiries

Canada has had eight major judicial inquiries, which are rather like the Australian Royal Commissions, except that they are set up *after* a serious criminal conviction has been recognized. They all involve international comparative studies. Their reports make interesting reading. They cover a wide range of issues dealing with ‘tunnel vision’, ‘noble cause corruption’, and the misuse of scientific and other expert evidence.<sup>62</sup> We could learn much from them.

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<sup>61</sup> David Jessel, a leading investigative reporter in the UK was appointed as one of the first Commissioners. He said some years ago that the Henry Keogh case had all the classic signs of a miscarriage of justice, see 18 July 2010, [ABC Background Briefing ‘Reasonable Doubt’](#), Hagar Cohen.

<sup>62</sup> The Royal Commission on the Donald Marshall Jr. Prosecution (1989); The Commission on Proceedings Involving Guy Paul Morin (1998); The Inquiry Regarding Thomas Sophonow; The Lamer Commission of Inquiry Pertaining to the Cases of Ronald Dalton, Gregory Parsons and Randy Druken (2006); Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell (2007); Report of the Inquiry into the Wrongful Conviction of David Milgaard (2008); Report of the Inquiry into Pediatric Forensic Pathology (2008).

The most recent of those, the [Goudge Commission of Inquiry](#), looked at the work of pediatric forensic pathologist [Dr Charles Smith](#) in Toronto. Counsel assisting, Professor Kent Roach, became the joint author with us of our previous [Forensic Investigations](#) book. With Bibi Sangha, we were asked to [provide a report](#) on issues arising from the [Baby Deaths Inquiry](#) in South Australia.

The Goudge Inquiry found that Dr Smith was lacking in qualifications, experience and expertise, and that he not infrequently fabricated, withheld or otherwise acted improperly in his evidence in criminal trials and parental custody hearings. Amongst the most tragic of the convictions overturned was that of [Bill Mullins Johnson](#), who spent some 12 years in prison after being convicted of the rape and murder of his four-year-old niece Valin. It turned out she had not been either raped or murdered. Smith had misinterpreted post-mortem changes for ante-mortem injuries. He said at the inquiry that he woke up every day and asked himself the question, ‘will this be the day that I am killed, because that is what they do to people like me in prison’.

The Chief Coroner and Deputy Coroner for Ontario who had improperly protected Smith’s reputation [resigned in disgrace](#) and undertook never to practice again.

Did the discovery of this and the many other ‘catastrophic’ cases leave the Toronto forensic services with an indistinguishable legacy of shame? No, it didn’t. They now boast a new \$1 billion forensic services facility which is the envy of the world. It has new educational training programs and innovative partnerships with universities.<sup>63</sup> However, it should be added that their recent [Motherisk program](#) has now been closed down and is the subject of a further judicial inquiry.

### **New Mechanisms for Post-Appeal review and compensation**

I venture to suggest that it will not be much longer before we eventually have a Royal Commission to help us get to the real causes of these terrible miscarriages of justice.

Clearly it is important to develop proper systems to cope with the identification, analysis and responses to miscarriages of justice. It has been reported in the media, for example, that Keogh may not be able to obtain compensation because he has not secured an acquittal or been found ‘not guilty’. ‘There is no avenue within SA law for a former prisoner to seek

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<sup>63</sup> 28 October 2013, [Toronto Star](#), ‘Ontario’s forensic pathologists better equipped in “search for truth”.’ Bibi Sangha and Bob Moles visited the Centre in October 2015.

financial compensation.’<sup>64</sup> The President of the SA Law Society was quoted as saying that ‘*ex gratia* payments were the only avenue for former prisoners seeking compensation.’ That is not correct. A *nolle prosequi* is a termination of the proceedings in favour of the accused.<sup>65</sup> That is a sufficient basis for a person to pursue damages for malicious prosecution which is the normal basis for an action in these circumstances. That may involve establishing a lack of reasonable and probable cause in pursuing the prosecution.<sup>66</sup> In the matter of [Roseanne Beckett](#), after having obtained a nolle prosequi, she was recently awarded \$2.3m in damages which were increased to \$4m to take account of interest on those damages.<sup>67</sup>

Keogh’s circumstances and length of sentence would lead to a substantially greater award - if successful. The prospect of the State of South Australia defending such an action in light of its statement some 40 years earlier, on oath, that the pathologist was not qualified to certify cause of death, and the many subsequent non-disclosures by state officials, would certainly lead to some very interesting litigation – and most interesting material for court reporters. But don’t get too excited – there is always the prospect of a settlement subject to a confidentiality agreement – and then that would then be our turn to speculate.

### **Principles we should bear in mind**

Liberty is one of mankind's most important rights. To deprive a man of his liberty is very serious. In one sense the right to liberty is priceless.

*Spautz v Butterworth* cited in *R v Beckett* at [686-690]

The fact that a man has been imprisoned on the basis of evidence which is false to the knowledge of Police Officers [and we might add, to forensic experts and prosecutors], whose duty it is to uphold the law, is an unspeakable outrage.

*Beckett* at [691-696] citing Thomas Royal Commission at (482).

The fabrication or manufacture of evidence against any citizen with a view to charging that person with an extremely serious offence ... amounts in itself to an extremely grave criminal

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<sup>64</sup> 14 November 2015, Sean Fewster, The Advertiser, ‘Keogh case shock: Free for now, but no pay day’.

<sup>65</sup> *Beckett v NSW* [2013] HCA 17.

<sup>66</sup> The action for malicious prosecution is discussed in *Miscarriages* at 11.7.1.

<sup>67</sup> 10 November 2015, ABC, ‘Roseanne Beckett: Woman who wrongfully served 10 years in jail awarded \$4m in malicious prosecution case’

offence. Such conduct is calculated to undermine the rule of law and is inimical to the administration of criminal justice.

Conduct of police that seeks to undermine the rule of law by orchestrating the basis for criminal proceedings by fabricating evidence constitutes a species of criminality at the extreme end of the spectrum of official corruption.

*State of New South Wales & Or v Landini* at [528].

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