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This page set up by [Dr Robert N Moles](#)

[Underlining, where it occurs, is for NetK editorial emphasis]

On 6 July 2020 Naomi Neilson reported in Lawyers' Weekly 'Nightmare of serious errors': How Australia's miscarriages of justice and wrongful convictions are crippling the criminal justice system

From taking the fall for a dingo, simply being the wrong person in the wrong place, or just hopping into bed with a shady lawyer, Australia's many miscarriages of justice are about as common and as harmful as the next flaw in the system. What's worse is anyone could be a victim of this fault and forced to spend years behind bars for a crime they themselves never committed. More so, not even the legal professionals of the highest and respectable statuses are immune from delivering this final and critical blow.

At the time of writing, Australia's most recent wrongful imprisonment case is that of a man in Canberra who spent 82 days behind bars until a court finally found him innocent. When Steven Lewis sought compensation of \$100,000, he received just \$1 from the state. This kind of case is one of many, with research estimating that at any one time, there are 330 people in the District and Supreme Court system that are at risk of wrongful convictions.

According to forensic scientist and criminologist Dr Xanthe Mallett, anyone "can be in the wrong place at the wrong time" and if the case is not investigated appropriately in the first instance, it is almost impossible to prove innocence in the next. Victims can spend years of their lives going through every level in the system, and still come up short.

Civil Liberties Australia (CLA) compared the criminal justice system's failure to completely eradicate these flaws to the urban transport system: "If [transport] was suffering four train crash deaths every three months, there would be a public outcry and the systems would shut down until all faults were found and the system is fixed."

"But these 'accidents' in courts do not seem to matter as much," says CLA chief executive officer Bill Rowlings on the comparison. "Authorities seem to think that courts are infallible and mistakes don't matter because they are only affecting 'a few'."

Dr Mallett, who moved into behavioural work in 2012 when she relocated to Australia from the UK, said she enjoys the interaction between the forensic science and the behavioural

science of criminology. She is also a really strong advocate for social justice and works for various groups, including the [Bridge of Hope Innocence Initiative](#).

When we spoke about miscarriages of justice, Dr Mallett said that bias – either unintended or not – could be one of the harsher penalties for victims of wrongful convictions. This can start right at the beginning, with your position on either the prosecution or the defence. At one time in her career, Dr Mallett was examining alleged child sexual abuse cases, but in the interest of a fair and just trial, some of her work was for the defence team.

“Some people think that you shouldn’t because these are the cases of alleged child sexual abuse, however, if somebody is innocent of that, they have the right to have an objective and expert opinion. I never wanted to know anything else about the case, all I wanted to compare was A and B. Whether you work for the defence or the prosecution, you are still working for the criminal justice system and your position should be the same,” Dr Mallett says.

“It is for the jury to decide if someone is guilty, it is not for me to decide.”

When Dr Mallett was writing a book back in 2014, some of the cases she included in that resonated with many in the UK. One of her earliest cases of interest, and the “poster child” for miscarriages of justice, is [Lindy Chamberlain-Creighton](#). The “dingo took my baby” line is about as familiar as the term “wrongful convictions” itself in Australia.

After quite some time defending herself, the Northern Territory coroner’s office concluded an inquest into the cause of death of baby Azaria Chamberlain near Uluru on a late August night in 1980. The office found that the baby was taken by a dingo – as Ms Chamberlain insisted – and not killed by her mother. Despite her early insistence, Ms Chamberlain was sentenced to life in prison and spent three years of it behind bars before her final release.

The Ms Chamberlain-Creighton’s conviction was largely based on the use of unreliable and improper forensic science during the trial. And this case is just one of many examples of major wrongful convictions following flawed and biased trials. Many have been sent to jail and many still remain there, hoping their innocence is finally noticed.

“I am really interested in how these areas in the criminal justice system happens and how they are repeated and sometimes how we are failing to learn from those,” says Dr Mallett.

“The more I worked in criminology, the [more it became clear].”

‘Power over freedom’ and other core themes of a miscarriage of justice

There are many core themes to a miscarriage of justice: financial disadvantages and lack of access; police officers getting tunnel vision due to either laziness or overzealous work; and experts making errors and sometimes refusing to admit to them. Then there are rarer instances, like dodgy lawyers, an ignorant system and a trial by media.

“As someone who has worked in the criminal justice system because I undertake forensic case work, it is really important to me that we look at some of these issues and start trying to address them, so that we can see less miscarriages of justice and wrongful convictions going forward,” Dr Mallett recently told *Lawyers Weekly*.

Dr Mallett wrote *Reasonable Doubt* to examine seven separate cases of miscarriages of justice – Wayne Butler, Kelvin Condren, [Henry Keogh](#), Khalid Baker, [Scott Austic](#), [Nicola Gobbo](#) and [Andrew Mallard](#). She now teaches truth, justice and criminology at University of Newcastle to inform the next generation of legal professionals in criminal law. Her book provides a deep-dive look into Australia’s flawed system and some of its victims.

“[All cases in the book] were really interesting cases. They were all really important stories to tell because each one spoke to various problems,” says Dr Mallett. “For each case that I chose, I could have chosen 100 others that would have had the same problems and that is what I found really frightening. I wanted to choose the cases that were not necessarily well known because the point is that this can happen to anybody.”

When I asked if Dr Mallett had narrowed down exactly which cases were more prone than others to attract a miscarriage of justice, she told me that miscarriages tend to happen in cross-racial situations and when eyewitnesses are too heavily relied on. Often, it can also be when experts get ahead of themselves and carried away with their “self-importance”.

“I don’t think there is just one type of case [that stands out], I think it is the individuals that interact with the case, be that police or experts,” Dr Mallett says. “The problem is when a person accused does not either know their rights or do not have those funds to seek out the best defence. They are particularly vulnerable, and they are disadvantaged groups.”

In Bibi Sangha and Robert Moles’ [Miscarriages of Justice: Criminal Appeals and the Rule of Law in Australia](#), the legal professionals criticise the High Court’s approach to the common law form appeal provisions, arguing that the construction of the “one appeal” ground rule is not in the words of the statute, as provisions merely provide an individual “may appear”. The court’s jurisdiction for this strict approach, they argue, is then grounded in a rationale that a potential miscarriage of justice can be remedied in petitions.

[In relation to this study](#), former justice of the High Court, the Honourable Michael Kirby, says the victims of miscarriages of justice “witness the power of the law over their freedom”. When they attempt to protest their innocence, Mr Kirby says they are reliant on a system of laws that are providing checks at many levels against “the nightmare of serious errors”. But yet “human justice is always prone to error and mistaken outcomes”.

Mr Kirby broke down some of the many reasons that a miscarriage could occur, from the trial judge making mistakes that misleads a jury to appeal judges being willing to excuse these mistakes as something that is simply harmless or immaterial. He adds: “An appeal bench may have been that overwhelmed with cases that the judges did not have the time to notice as basic a flaw in evidence. The facts may have made judges overdependent on lawyers which themselves lacked the time or imagination to consider enormous detail.”

Mr Kirby says that if a prisoner failed in their first level appeal, legal aid might have refused funding for counsel in the High Court of Australia, which then renders a prosecution on a hearing for an application for special leave difficult or impossible. In Australia’s High Court a discovery of compelling evidence may have been excluded from the tender, supposedly for constitutional reasons. Bereft of even a qualified right of appeal to the judicial bench, Mr Kirby says prisoners might then be dependent on the mercy of an executive bench.

“For a prisoner, convicted after a trial and complying with all the outward forms of criminal processes still to protest innocence despite all these hurdles might say something about the untrustworthiness of convicted criminals,” says Mr Kirby. “Or it might say something in the unquenchable sense of injustice that occasionally keeps flames of hope alive. It is to differentiate between untrustworthiness and innocence of a just system of the processes that provides [the system] with effective remedies and relief.”

From the top-down: Why every level of the justice system is vulnerable

Not everyone in the justice system is immune from irreversible mistakes that cost the life of an innocent prisoner, not least Mr Kirby. He said that where he could, he has attempted to uphold safeguards against wrongful convictions of the innocent and other miscarriages of justice. In some cases, as a judge, he said that where he felt he had the choice, he had favoured the exercise of that choice so as to diminish the risk of a wrongful conviction.

Mr Kirby did so by interpreting the provisions for reopening a suspected wrong conviction, elaborating a power under constitutional and state legislation to allow fresh grounds of an

appeal to be decided, and by favouring the reopening of perfected court orders. However, not all of this was a safeguard against one of his very own mistakes.

“In one case, I was brought face-to-face with a conclusion that my judicial officer resulted in an innocent person suffering a substantial miscarriage of justice and serving 12 years imprisonment because I failed to perceive a fatal flaw in the prosecution case,” Mr Kirby says.

The decision in question involved Andrew Mallard, a prisoner in Western Australia. In 1995, a jury found him guilty of the murder of a Perth woman, Pamela Lawrence, who had been bludgeoned to the head in broad daylight in her jewelry shop. She died hours later in the hospital, and Mr Mallard was sentenced to life in prison. He served 12 of those years.

Her death sparked a manhunt, and Mr Mallard became one of the initial suspects. He had been living on the streets after suffering a nervous breakdown and came to the attention of police when he was placed in Graylands Psychiatric Hospital after an attempted burglary, where he impersonated a police officer. He was arrested for murder after some interviews but said he was fed information by police to then report back to them as a confession.

Police would later admit that Mr Mallard was not responsible for the crime after a late cold case review of Ms Lawrence’s murder found shavings of blue paint recovered matched a knapsack of a convicted murderer. By the time it was discovered, it was too late.

Mr Mallard’s first appeal was unsuccessful and special leave to appeal to the High Court was refused in 1997. He claimed he was innocent, and the State Attorney-General at the time referred his petition to the Court of Criminal Appeal in Western Australia. However, that court unanimously dismissed his petition. He again sought special leave to the High Court, complaining that the appeal court failed to consider his case in whole.

“Having been rostered to Mr Mallard’s appeal and upon reading the final submission, the elements appeared familiar. A check disclosed that I had participated in the earlier refusal of special leave,” says Mr Kirby. “Scrutiny of the transcript of that application had disclosed that it had been substantially addressed to a complaint concerning the failure of admitting into evidence a polygraph test suggesting Mr Mallard’s innocence.”

In a fresh application for special leave, a completely different course of action was taken. A fastidious analysis of the evidence demonstrated Mr Mallard could not have been at the scene. By the end of the appeal, Mr Mallard was “almost certainly, actually innocent”.

“Andrew Mallard’s conviction was quashed,” says Mr Kirby. “A subsequent judicial inquiry cleared him of involvement in murder. The evidence had implicated a prisoner who had not previously been regarded as a suspect. Mr Mallard was awarded \$3.25 million for his wrongful conviction; however, no sum of money could wipe away the suffering on him, on his family and the community. Or the failure of the criminal justice system in his case.”

The failure on part of a High Court justice is just one major example of how a miscarriage of justice can occur in the criminal justice system, but there are many other facets which contribute. There are the experts – from criminologists to the representing lawyers – that might allow themselves to be carried away, and then there is the first level: the police.

“I work with the police a lot and the vast majority of officers I have worked with have been excellent,” clarifies Dr Mallett, adding: “Certainly, there are situations where there is an easy out and some police officers are a good example of that. They choose to take an easy option, when a bit more work would lead them on a different path. [Sometimes], they even have evidence that would be vital to the case and have decided not to review that.”

Dr Mallett says there is not a lot of lazy policework happening, and the vast majority want to do the right thing to catch the correct offender: “It’s just one bad apple can unfortunately taint the whole batch. We have to be careful to not think it is more widespread than it is – but to just be able to address it when there are obvious problems [in the system].”

Then there is the next level: the solicitors and barristers. According to Dr Mallett, it can be more common than people think that one side of the court will hide or fail to disclose any information that is necessary to the court. This could simply be because that side did not believe it relevant, or there could very well be more sinister reasons behind it.

“[A duty of disclosure] is integral and it comes down to who we are working for. Are these prosecutors keeping the evidence from being disclosed because they are trying to prove their case beyond reasonable doubt? Well, that’s not reasonable justice,” says Dr Mallett.

“What we should all be doing is trying to prosecute cases or defend them on the basis of the fact of fair trials. It is incredibly damaging and I think it happens more than people are aware. They think all of the information is heard and think it is a level playing field, when actually that is not the case. That is something that needs to be addressed and worked on because people need to be held to account.”

Lawyer X and the ramifications of a justice system turned on its head

On the topic of information not being properly disclosed to the court, an extreme and very unusual case is that of Nicola Gobbo – or, as media and police knew her, Lawyer X. She was one of the youngest female barristers in Melbourne and would go on to represent the who's who of the state's criminal underworld. This included the likes of Tony Mokbel and Carl Williams and Terry Hodson and, in one tricky case, Paul Dale.

Ms Gobbo was privy to highly sensitive, lawyer-client privilege information from her clients and rather than uphold her duties to her profession, she took this straight to police. Some of her victims include 360-odd people who have spent time or are still spending time in a cell because of her informing. Two have walked out, many are preparing their appeals.

“You cannot be a criminal barrister representing people and at the same time, be a police informer providing evidence against them,” Mr Dale tells Lawyers Weekly. “It just – it can't happen. That's why we now have the Royal Commission [into the Management of Police Informants], so we can unravel how the hell it was allowed to happen.”

In a covert, wired conversation organised by Victoria Police, Ms Gobbo collected “critical” information from Mr Dale, which she then used to link him to the burglary of a house that belonged to Mr Mokbel and the murders of Mr Hodson and his wife Christine. It is very important to note here that Mr Dale was speaking to Ms Gobbo in complete confidence.

“I couldn't go past Lawyer X. It just blew my mind, when all of that came to light,” says Dr Mallett, who writes about Ms Gobbo in her book. “I just thought this was such an unusual case because it isn't just one miscarriage of justice, this is a whole series of miscarriages of justice where the people who are suffering were maybe not very nice, but they weren't treated fairly by the criminal justice system. The fallout is going to go on for decades.”

She says it was phenomenal that it could have happened at all, and it blew her mind that – despite her informing in the 2000s – it only came to light in 2019 with the media. Whereas miscarriages of justice often only happen to one individual, Dr Mallett says this case turned itself on its head and some very dangerous people stand to receive appeals now.

“I feel torn because yes, they are dangerous people and yes, they have committed those crimes, but the founding principle is innocent until proven guilty, and proven guilty fairly. If we do not uphold that, then how can any of us have any faith in the justice system,” Dr Mallett says.

One of those dangerous people includes Mr Mokbel, a gangland leader who Ms Gobbo first targeted in the beginning. It all unraveled from there. The consequences will be major, and Dr Mallett says she would not be surprised if it meant criminal charges for the police.

“We do have to wait and see what happens with [Mr Mokbel’s] appeal but imagine that. It’s so significant but I think it’s an opportune moment to really shine a light on these cases and it really makes us question what the criminal justice system is there for and also what the importance of other people in these situations [is]. It will really force the hard questions to make sure there is transparency so this kind of thing can never happen again,” Dr Mallett says.

“The ramifications are going to be massive.

“For Victoria Police, for the criminal justice system. Some of these victims of the crimes and some of these dangerous people are going to be successful in their appeals.

“All of that sits with how Victoria Police handled Lawyer X as an informer.”

Where the criminal justice system should improve

Despite the difficulty in determining the innocence of a suspected guilty person, there are still some methods of preventing miscarriages of justice. Sometimes, in the case of Ms Gobbo, it is the media that can be a useful tool for lawyers to tell a side of a client’s story. What it ultimately comes down to, however, are transparency and accountability.

For example, there are still holes in taking ownership for decisions. The Director of Public Prosecutions can make a decision on whether to prosecute people or not, but there is no accountability, according to Dr Mallett. These same people can also choose to hide cases from public and systems, contributing to an allegedly unfair trial. Exhibit A: Witness J.

“They do not have to explain decisions to anybody, and you really have to think, how are they making these decisions? Who is making the decisions and where is accountability?” asks Dr Mallett. “Increasing oversight accountability is the best way forward to making sure that people are doing what they need to and are following the rules of disclosure.”

Then there is ensuring that bias does not come into play in decisions relating to innocence and assumed guilt. What these people are losing is time with their families, says Dr Mallett, and the worst punishment after that is contending with constant suspicion. Look at Ms Chamberlain-Creighton, for example, who is still copping a lot of the blame for her child.

“Even after all these years, people will look [at] those who have been wrongfully convicted with suspicion. You can give [the victims] all the compensation in the world that may make things easier, but you can never undo these wrongs and we have to stop them,” Dr Mallett says.

Then there are the lawyers and soon-to-be lawyers of these cases. Dr Mallett said every person has a choice to either do the right thing – and have that sometimes be harder – or to do the wrong thing, which is “better for us personally” in the short-term.

“When you’re a lawyer, you have an even stronger role in doing the right thing. They have the opportunity to be at the forefront of making some changes and making sure that some problems we are seeing do not happen in the future. Little steps can take us a long way,” Dr Mallett says.

<https://www.lawyersweekly.com.au/biglaw/28805-nightmare-of-serious-errors-how-australia-s-miscarriages-of-justice-and-wrongful-convictions-are-crippling-the-criminal-justice-system>