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QUIET REVOLUTIONARIES

TURNING MORE THAN 100 YEARS OF
ESTABLISHED LAW ON ITS HEAD

*Quiet revolutionaries at Flinders University made history in 2013
with the establishment of a new statutory right of appeal for criminal cases.*

Flinders University's Associate Professor Bibi Sangha and Adjunct Principal Researcher Dr Bob Moles' tireless crusade against miscarriages of justice has turned more than 100 years of established law on its head, giving hope to those jailed for crimes they didn't commit.

This new right has already resulted in three convictions being overturned, but it was a movement that the legal establishment in Australia fought every step of the way.

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'Miscarriages of justice are going to upset a lot of powerful people,' says Dr Moles. 'The trials are costly and long, and then someone comes along and suggests that the conviction may be wrongful. Well, there are a lot of people who don't want to hear that.'

The case that started it all was that of Henry Keogh, a banker jailed erroneously for 25 years in 1994 for the murder of his fiancée. Keogh spent 21 years behind bars before walking free in 2015.

New evidence had saved Keogh, but that evidence would not have been heard without Associate Professor Sangha and Dr Moles' long fight to allow old cases to be re-opened.

Less than a decade ago, appeals to re-open old cases were almost never allowed, under a long-established legal principle in Australia.

'Whenever you took a case back to court that had already gone to its normal appeal, the court would not easily re-open it,' says Associate Professor Sangha. 'And it did not matter how compelling the fresh evidence was.'

This meant that there were cases slipping through the cracks.

When the researchers took the Keogh case to the High Court in 2007, the judges acknowledged the potential for a miscarriage of justice, and noted that the law could be changed.

But their hands were tied by the existing law.

Associate Professor Sangha and Dr Moles began their work in 2002, collaborating with experts such as forensic scientists and pathologists to identify cases that had relied on potentially incorrect 'expert' evidence, leading to wrongful convictions.

'Clearly, being sent to prison for something you haven't done is a nightmare to the individual, and utterly abhorrent in a free society,' says Dr Moles.

Though, at the time, he and Associate Professor Sangha were met with deep reluctance to change the status quo.

'Strangely, the principle of double jeopardy – the longstanding legal principle that no one can be charged twice for the same crime – became our ally,' Dr Moles explains.

In light of several cases where evidence that might have resulted in a conviction was not heard in the original trial, the principle of double jeopardy was being re-examined in Australia at the time. The law was changed so that, in some cases where there was fresh, compelling evidence, a retrial could be ordered.

'So, the argument we made was that if the prosecution can have a second go, why can't the convicted person?' says Dr Moles.

The careful language and demanding tests used in cases of double jeopardy provided a path that could overcome the arguments against allowing a free-for-all in appeals.

From 2007, the researchers ran an extensive media campaign to explain the problem to the Australian public, and began further research into miscarriages of justice, engaging with other jurisdictions with similar experiences.

In November 2012, the South Australian Government presented a Bill, which was adopted unanimously by the parliament and came into effect in May 2013, allowing for appeals where there was 'fresh and compelling' evidence that might give rise to a finding that there had been a 'substantial miscarriage of justice'.

Similar legislation has since been enacted in Tasmania, and is due to be introduced in Western Australia in late 2018.

As former Justice of the High Court the Hon Michael Kirby AC CMG noted: 'Sometimes in Australia, principle triumphs over complacency and mere pragmatism.'

THE CASE OVERTURNED

Henry Keogh's 25-year prison term for the 1994 murder of his 29-year-old fiancée, Anna-Jane Cheney, was overturned in December 2014 when expert evidence in the appeal showed that the death had been accidental. Keogh's appeal related to 'false and misleading' evidence given by South Australia's former chief forensic pathologist Dr Colin Manock.