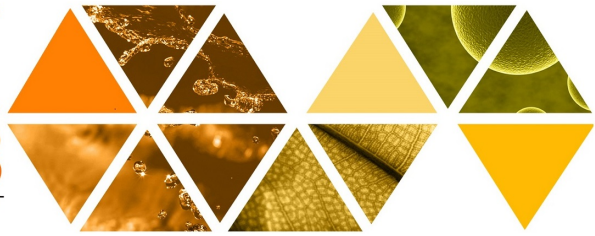




Australian Government
Australian Research Council

EI
2018
ENGAGEMENT
AND IMPACT



Engagement and Impact 2018

Flinders University

FLN18 (CAH) - Impact

Overview

Title

(Title of the impact study)

Rights of Appeal Reform

Unit of Assessment

18 - Law and Legal Studies

Additional FoR codes

(Identify up to two additional two-digit FoRs that relate to the overall content of the impact study.)

16 - Studies in Human Society

Socio-Economic Objective (SEO) Codes

(Choose from the list of two-digit SEO codes that are relevant to the impact study.)

94 - Law, Politics and Community Services

Australian and New Zealand Standard Industrial Classification (ANZSIC) Codes

(Choose from the list of two-digit ANZSIC codes that are relevant to the impact study.)

75 - Public Administration

Keywords

(List up to 10 keywords related to the impact described in Part A.)

Miscarriages of justice

Criminal law

Appeal rights

Wrongful conviction

Justice system

Law

Right of appeal

Human rights

Sensitivities

Commercially sensitive

No

Culturally sensitive

No

Sensitivities description

(Please describe any sensitivities in relation to the impact study that need to be considered, including any particular instructions for ARC staff or assessors, or for the impact study to be made publicly available after EI 2018.)

Aboriginal and Torres Strait Islander research flag

*(Is this impact study associated with Aboriginal and Torres Strait Islander content?
NOTE - institutions may identify impact studies where the impact, associated research and/or approach to impact relates to Aboriginal and Torres Strait Islander peoples, nations, communities, language, place, culture and knowledges and/or is undertaken with Aboriginal and Torres Strait Islander peoples, nations, and/or communities.)*

No

Science and Research Priorities

(Does this impact study fall within one or more of the Science and Research Priorities?)

No

Impact

Summary of the impact

(Briefly describe the specific impact in simple, clear English. This will enable the general community to understand the impact of the research.)

Miscarriages of justice research conducted by researchers at Flinders had a direct impact on the establishment of a new statutory right of appeal for criminal cases in South Australia in 2013 and in Tasmania in 2015.

The appeal right, which overturned the longstanding legal resistance to reopening settled cases after avenues of appeal had been exhausted, has been used several times in South Australia, resulting in three successful appeals against a wrongful conviction.

Beneficiaries

(List up to 10 beneficiaries related to the impact study)

Those previously barred from lodging a second appeal against a criminal conviction

Convicted defendants who have appealed, in particular those who have appealed successfully (notably Keogh, Drummond, and Stapleton)

South Australian public and those involved with the criminal justice system, as a result of improved integrity of the criminal justice system

Countries in which the impact occurred

(Search the list of countries and add as many as relate to the location of the impact)

Australia

Details of the impact

(Provide a narrative that clearly outlines the research impact. The narrative should explain the relationship between the associated research and the impact. It should also identify the contribution the research has made beyond academia, including:

- who or what has benefitted from the results of the research (this should identify relevant research end-users, or beneficiaries from industry, the community, government, wider public etc.)*
- the nature or type of impact and how the research made a social, economic, cultural, and/or environmental impact*
- the extent of the impact (with specific references to appropriate evidence, such as cost-benefit-analysis, quantity of those affected, reported benefits etc.)*
- the dates and time period in which the impact occurred.*

NOTE - the narrative must describe only impact that has occurred within the reference period, and must not make aspirational claims.)

Research led by Associate Professor Bibi Sangha and Dr Robert Moles from Flinders University had a direct impact on the justice system in South Australia (SA) and Tasmania.

It contributed to the establishment of a new statutory right of appeal for criminal cases in SA in 2013 and Tasmania in 2015, and represents the first substantive change to appeal rights in Australia in more than a century.

The research was initially sparked by the revelation that, from 1968–1995, the Chief Forensic Pathologist in South Australia, who gave evidence in hundreds of criminal trials and conducted thousands of autopsies, was never

properly qualified. This meant that many convictions were potentially based on inaccurate information.

From 2002, Assoc Prof Sangha and Dr Moles, working with experts such as forensic scientists and pathologists, identified a series of cases that had relied on incorrect 'expert' evidence leading to potentially wrongful convictions.

They made submissions to the courts to have these cases re-opened, but saw little success due to the longstanding legal principle that, once all avenues of appeal have been exhausted, a case is not easily reopened.

As the state courts could not help, the team submitted a number of petitions to the SA Attorney General from 2002–2006. In 2007, the High Court of Australia ruled in the Keogh Case that it was unable to accept fresh evidence, as that was the purview of the state courts.

The Honourable Michael Kirby, former justice of the High Court acknowledged the potential for miscarriage of justice at the time, and said he believed the law should be changed. The Flinders team worked to convince the SA Government to do just that.

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

In 2010, they published a book, "Forensic Investigations and Miscarriages of Justice," which highlighted the problem in the context of a broader theoretical framework. The book was launched at Parliament House by a sympathetic Member of the Legislative Assembly, Ms Ann Bressington. On the same day, she introduced a Private Member's Bill, to the Legislative Review Committee (LRC) of the Parliament of South Australia.

In 2011, the Australian Human Rights Commission submitted a report to the LRC, based on the submissions of the Flinders research team, agreeing with its assessment that the law as it stood could constitute a breach of Australia's human rights obligations that guaranteed a fair trial and the right to an effective appeal. The research team provided detailed written and oral submissions to the LRC.

In July 2012, the LRC issued a report recommending the establishment of a new statutory right of appeal, making reference to the submissions provided by the researchers. They also recommended the establishment of a Forensic Review Panel, similar to the review body recommended by the researchers, to assist appellants who could not afford the legal costs of a full appeal. That recommendation, however, was not taken up by the Attorney-General.

The SA Government presented a Bill to Parliament in November 2012, and it was debated in early 2013. During that debate, Ms Bressington explicitly acknowledged the contribution of the Flinders research team.

The Bill was adopted unanimously by the parliament and came into effect in May 2013 as the Statutes Amendment Appeals Act (SA) 2013. This added a new provision to the Criminal Law Consolidation Act 1935 (SA) for second or subsequent appeals in cases where there was "fresh and compelling" evidence which might give rise to a finding that there had been a "substantial miscarriage of justice". It was the first substantial amendment to appeal rights in Australia in more than 100 years.

The new right has been used in several cases in SA, resulting in three convictions that have been overturned in the cases of R v Keogh (2014), R v Drummond (2015), and R v Stapleton (2016).

In a May 2013 edition of The Australian Financial Review, the Honourable Michael Kirby outlined this team's findings, describing how the work had led to this legislative change.

"Sometimes in Australia, principle triumphs over complacency and mere pragmatism," he wrote. "I hope that other jurisdictions in Australia will take steps to enact legislation for the same purpose. Wrongful convictions and miscarriages of justice haunt the conscience of a civilised society."

Some jurisdictions took up the challenge. In 2015, the Flinders team was asked to brief the Tasmanian Parliament, and that same year, a similar South Australian Bill was introduced, with the Premier, Mr Will Hodgman, explicitly acknowledging in Parliament "the important work of Bibi Sangha and Bob Moles from Flinders University".

"It is something upon which we can rely here in Tasmania and which should provide some comfort to this Parliament ... bearing in mind that we are unashamedly transplanting the provisions of South Australia into our legislation here," he said.

The Attorney-General, the Leader of the Opposition, and other members of parliament explicitly thanked the research team. The Tasmanian Bill was passed unanimously in 2015.

That same year, then - Shadow Attorney-General of Western Australia (WA), Mr John Quigley, now the WA Attorney-General, publicly committed to implementing a similar new right of appeal in WA. He requested briefing papers from Assoc Prof Sangha and Dr Moles. Now that Mr Quigley has been appointed Attorney-General, he is proceeding to implement this reform.

Associated research

(Briefly describe the research that led to the impact presented for the UoA. The research must meet the definition of research in Section 1.9 of the EI 2018 Submission Guidelines. The description should include details of:

- *what was researched*
- *when the research occurred*
- *who conducted the research and what is the association with the institution)*

Research by Associate Professor Bibi Sangha and Dr Robert Moles analysed the absence of second and subsequent appeal rights in light of a number of potentially unsafe convictions in South Australia.

Research leading to the legislative change described in Part A was conducted from 2002–2016, and resulted in the publication of 2 co-authored books; 1 special edition referred journal; 3 book chapters; and 7 refereed journal articles.

The research was based on an examination of a number of criminal cases in light of theoretical principles concerning the rule of law as expounded by jurists and legal theorists. These principles were further elaborated on in the context of appeal rights in Australia, with a focus on South Australia. Significant faults in how the appeal rights had been interpreted were identified.

The research led the Flinders team to the view that the unfettered discretion of the Attorney-General in referring potential wrongful convictions back to the courts or, in exceptional circumstances, recommending a pardon, was a conflict of interest and a breach of international human rights obligations. Rule of law principles suggest that no legal official should have an unfettered discretion, and that all legal officials ought to be under a duty to provide reasons for their decisions and actions.

The clear remedy for these flaws was a statutory right to a second or subsequent appeal where new evidence comes to light suggesting that the original conviction was unsafe.

FoR of associated research

(Up to three two-digit FoRs that best describe the associated research)

18 - Law and Legal Studies

16 - Studies in Human Society

References (up to 10 references, 350 characters per reference)

(This section should include a list of up to 10 of the most relevant research outputs associated with the impact)

Bibi Sangha, Kent Roach and Robert Moles, *Forensic Investigations and Miscarriages of Justice: The Rhetoric Meets the Reality*, 2010, Irwin Law, Toronto, 450pp.

Bibi Sangha and Robert Moles, *Miscarriages of Justice: Criminal Appeals and the Rule of Law in Australia*, 2015, LexisNexis, NSW, 511pp.

Bibi Sangha and Robert Moles, Chapter 7 "Comparative Experience with Pediatric Pathology and Miscarriages of Justice: South Australia" in Roach (ed) *Pediatric Forensic Pathology and the Justice System: Independent Research Studies*, 2008, vol 2, pp 283-324, Ontario, Canada

Bibi Sangha, "The statutory right to second or subsequent criminal appeals in South Australia and Tasmania" (2015) 17 (2) *Flinders Law Journal* 471-514

Robert Moles, *Institutional Reform in the Context of Criminal Appeals in South Australia*, (2015) 17 *Flinders Law Journal*, 321-370

Sangha, Moles and Economides, "The New Statutory Right of appeal in South Australian Criminal Law: Problems Facing an Applicant – Unanticipated Interpretive Difficulties" (2014) 16 *Flinders Law Journal* 145-186

Bibi Sangha and Robert Moles, "MacCormick's Theory of Law, Miscarriages of Justice and the Statutory Basis for Appeals in Australian Criminal Cases" (2014) 37 (1) *University of New South Wales Law Journal* (Thematic issues on miscarriages of justice), 234-269

Bibi Sangha and Robert Moles, "Post-appeal Review Rights: Australia, Britain and Canada" (2012) 36 *Criminal Law Journal* 300-316

Bibi Sangha and Robert Moles, "Mercy or Right? Post-Appeal Petitions in Australia" (2012) 14 *Flinders Law Journal* 293-328

Bibi Sangha, "Extending the Scope of Post-Conviction Reviews in Criminal Cases" (2007) *Australian Bar Review* 90-113

Additional impact indicator information

Additional impact indicator information

(Provide information about any indicators not captured above that are relevant to the impact study, for example return on investment, jobs created, improvements in quality of life years (QALYs). Additional indicators should be quantitative in nature and include:

- name of indicator (100 characters)*
- data for indicator (200 characters)*
- brief description of indicator and how it is calculated (300 characters.)*