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

On 18 October 2019 the Legal Affairs section of The Australian reported ‘Cases raise serious issues about forensics and fundamentals of justice’

BIBI SANGHA, BOB MOLES, COMMENT

It is now clear [David Eastman](#) in the ACT and [Henry Keogh](#) in South Australia both spent over 20 years in prison for crimes they did not commit.

Both murder convictions were based upon fundamentally flawed forensic evidence given by witnesses not properly qualified in the relevant fields of expertise.

Over the years prosecutors (and others) had known about the concerns but had not disclosed them, as they ought to have done.

In addition, in recent weeks, [the president of the Court of Appeal](#) in Victoria acknowledged earlier [reports emanating from the US](#) which established that all of the forensic sciences (apart from DNA) used in criminal trials had not been properly validated.

He was supported on this by [a senior forensic scientist at the Victorian Institute of Forensic Medicine](#). The Victorian Attorney-General is now [calling on all of her counterparts](#) around Australia to support a national review of the issues. Any review might well consider the problems exposed by the royal commissions into the cases of [Edward Splatt](#) and [Lindy Chamberlain](#) in the 1980s.

Each of the two murder prosecutions had used more than 20 experts at the trials. In each case, all the experts made errors in the evidence submitted to the courts. Curiously, all the errors favoured the prosecution's case.

That is a 100 per cent failure rate in two of the most high-profile cases of their day.

It is clear the experts had not colluded — as many of them had not met. But they did know which side to support — and the future benefits which might flow from their assistance.

[The Splatt commission](#) recommended the establishment of a National Institute of Forensic Science to operate independently of police. When this was subsequently established, every state and federal police commissioner was appointed to its board. [[The National Institute of](#)

[Forensic Science](#) is a directorate within the Australian and New Zealand Policing Advisory Agency (ANZPAA NIFS)].

The national review might also consider that in South Australia the state provided sworn evidence in civil proceedings in the mid-1970s involving [the chief forensic pathologist there](#).

It was to the effect he was [not qualified to certify cause of death](#) nor to give expert evidence in court. Yet the state [continued to use him for the next 20 years](#) to conduct more than 10,000 autopsies and to help secure more than 400 criminal convictions.

[The current position of the South Australian Attorney-General](#) is we do not need an inquiry. She says the problem cases can be dealt with on a case-by-case basis "as they arise". There is, of course, no proper process by which the "arising" can take place.

Perhaps the national review might consider [how to get cases like those of Eastman and Keogh back to the courts](#) after the deficiencies have been discovered.

Eastman was fortunate that his case occurred in the ACT, which is one of only two jurisdictions (including NSW) that have a special procedure allowing for an inquiry to review his claim to be wrongfully convicted. He only obtained his review after struggling for years through 11 previously unsuccessful attempts.

Keogh was fortunate that, after 13 years of procedural wrangling, we were able to persuade the Human Rights Commission and the parliament of South Australia that the existing appeal procedures in all states and territories [were in breach of international human rights obligations](#).

They failed to protect the right to a fair trial and the right to an effective appeal.

[That led to a new right of appeal \(subsequently adopted in Tasmania\)](#) which led to Keogh's case ultimately finding its way back to the courts.

There is no doubt that if either the Eastman or Keogh cases had occurred in jurisdictions other than those mentioned there would have been very little chance of getting them reviewed. That would have likely meant the rest of their lives spent in prison.

The head sentence for murder is life imprisonment. A non-parole period is merely a recommendation by the trial judge which may be considered upon its expiry.

If, at that stage, the convicted person refuses to acknowledge guilt, they may be deemed to be recalcitrant, and unwilling to accept responsibility.

In those circumstances parole will most likely be denied. In South Australia, [Derek Bromley](#) is now 13 years past the expiry of his non-parole period because he maintains he is innocent of the crime for which he was convicted.

[The UK has had a review commission](#) which has overturned more than 400 criminal convictions during the time Eastman and Keogh spent in jail.

In Australia, the states spent many millions of dollars trying to prevent those cases from being reviewed. Surely that money would have been better spent trying to prevent such wrongful convictions in the first place — and to ensuring we have proper review mechanisms to deal with those that do occur?

Bibi Sangha is an associate professor and Bob Moles is an adjunct principal researcher at Flinders University.