Editorial

A NEW RIGHT OF APPEAL AS A RESPONSE TO WRONGFUL CONVICTIONS: IS IT ENOUGH?

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A South Australian Reform

In May 2013, the South Australian Parliament enacted a new statutory right of appeal in criminal cases. This was followed in November 2015 by the enactment of a similar provision by the Tasmanian Parliament and in November 2019 by the Victorian Parliament. At the time of publication, a further Bill is before the Parliament of Western Australia.[1] In New South Wales, Queensland and in the Australian Capital Territory and the Northern Territory of Australia, no law reform has yet been initiated.

Two questions immediately arise. The first is whether the South Australian model should be enacted in other jurisdictions. In my opinion, so long as any further legislation copies that of South Australia, it would be a step in the right direction. The second question is whether the South Australian model is an adequate response to the problem of wrongful convictions in Australia. The answer to that question is "clearly not". In this editorial, I seek to make good these two propositions.

Before the adoption of the South Australian reform, appeal rights in criminal matters in Australia followed the "common form" of legislation that has been applied throughout Australia for over 100 years. Our legislation was copied from the *Criminal Appeal Act 1907* (GB), enacted to provide for criminal appeals in England and Wales. Such legislation was eventually adopted in the other jurisdictions of the United Kingdom. The English statute was, in turn, copied in many of the jurisdictions of the British Empire, including in each of the States and Territories of Australia.

The specific grounds of appeal provided in the English statute of 1907, and the troublesome "proviso" adopted there, were subject to a series of amendments enacted over the years designed to simplify the appeal provisions. In England and Wales, the template provisions obliged the Court of Criminal Appeal to determine whether the conviction was "unsafe".[2] In Australia, the ground of appeal in the common form legislation remained in force, substantially unamended, with the exception of the legislation adopted in Victoria which lifted the proviso into the main grounds of appeal.[3]

The point with which this editorial is concerned is not the *grounds* of appeal but the *right* to appeal itself. In the United Kingdom, as in Australia, the prevailing view was that the common form legislation afforded a convicted prisoner a right to only one appeal. In a number of cases judges held that, appeal being a creature of statute, there were no rights of appeal beyond those expressly granted by the statute. Moreover, they held that a proper examination of the common form statutory provision resulted in a conclusion that it gave rise to one right only to make an appeal.[4] Once that privilege was exercised, the power and jurisdiction of the court were exhausted. Occasionally, judges, including myself, expressed

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[1] The South Australian provisions appear in the *Statutes Amendment Appeals Act 2013* (SA) inserting s 353A in the *Criminal Law Consolidation Act 1935* (SA). That provision was repealed in 2017 and the provision was re-enacted as *Criminal Procedure Act 1921* (SA) s 159 <http://netk.net.au/AppealsHome.asp>; The Tasmanian provisions are available at <http://netk.net.au/TasmaniaHome.asp>; The Western Australian proposals are available at <http://netk.net.au/WAHome.asp>; The Victorian provisions are available at <http://netk.net.au/VictoriaHome.asp>.

[2] The amendments are set out in Bibi Sangha and Robert Moles, *Miscarriages of Justice: Criminal Appeals and the Rule of Law in Australia* (LexisNexis, 2015) 5.8.

[3] As explained in Sangha and Moles, n 2, 145.

[4] *Burrell v The Queen* (2008) 238 CLR 218; 186 A Crim R 354; [2008] HCA 34; *R v GAM (No 2)* (2004) 9 VR 640; 146 A Crim R 57; [2004] VSCA 117.

doubt that this was a correct construction of the statute.[5] The usual reason given for favouring a limitation to one appeal, which is not expressly spelt out in the statute, was that an appellate court "should not attempt to enlarge its jurisdiction beyond what Parliament has chosen to give".[6]

The problem with this interpretation of the legislation was that it was not essential to the language used by Parliament. This was facilitative and beneficial not restrictive. The Act simply stated that a person "may appeal". It then specified the grounds upon which such an appeal might be brought. The restriction on the number of appeals that might be initiated appeared to have had its origin in the judicial distaste for the expansion of the appellate rights for convicted prisoners. So much had been evident from the start, before and after the enactment of the *Criminal Appeal Act 1907* (GB). This judicial hostility continued despite the increasing evidence of the utility of the appeal right both in the United Kingdom and in its colonies.

Upon the basis of this restrictive interpretation of the availability of the right of appeal, the High Court of Australia held that it was unable to entertain a second application by a person claiming to have been wrongly convicted. In this respect, the High Court affirmed the approach adopted by intermediate courts to the effect that they did not enjoy a right to re-open an appeal or to hear a further appeal or application for that purpose.[7] Additionally, for constitutional reasons the High Court took the view that it could not admit fresh evidence in an "appeal", even though such evidence might tend to demonstrate that the applicant had been wrongly convicted.[8] This was an additional narrow view about the facility for re-opening criminal appeals with which I disagreed. I pointed out that, as a consequence, "Justice in such cases is truly blind. The only relief available was therefore from the Executive Government or the media – not from the Australian judiciary".[9] Such a position was clearly unsatisfactory.

The High Court of Australia does enjoy a statutory power to remit a matter before it to another court to consider admitting fresh evidence and then to refer the matter back to the High Court for final determination. That power still exists. However, it has seldom been exercised. It gives rise to its own complications.[10]

Defects of the Petition Procedure

The result of the foregoing is that the courts in Australia have taken the view that, if there is an exceptional case where a possible wrongful conviction may require the intervention of the courts, that possibility can be initiated only by the procedure of a petition to the Government. This was a further initiative adopted in the *Criminal Appeal Act 1907* (GB) for England and Wales. It allowed an applicant to apply to the Attorney-General for the reference of the question of a possible miscarriage to the appeal court, to be heard as an appeal. However, this exceptional procedure depended upon the affirmative action of the relevant Executive Government. Given that a manifestation of that government was usually the agency responsible for prosecuting, incarcerating and resisting the complaints of the accused, the defects of this procedure were clear, including to the prisoner.

One such defect was the possible existence of a conflict of interest and duty and the common professional hostility to the complaints of the prisoner. In *Von Einem v Griffin*, the South Australian Full Court stated that the power of statutory referral following a petition provided "no legal rights" to the applicant.[11] It also stated that the Attorney-General had a "complete discretion" in the matter.[12] In fact, it emphasised that

[5] See *Postiglione v The Queen* (1997) 189 CLR 295, 305 (Dawson and Gaudron JJ); 331, 343 (Kirby J); 94 A Crim R 397.

[6] *R v Edwards [No 2]* [1931] SASR 376, 380.

[7] *Grierson v The King* (1938) 60 CLR 431; Sangha and Moles, n 2, 70.

[8] *Mickelberg v The Queen* (1989) 167 CLR 259; 43 A Crim R 182.

[9] MD Kirby, "Black and White Lessons for the Australian Judiciary" (2002) 23 Adel L Rev 195, 206.

[10] The power is contained in the *Judiciary Act 1903* (Cth) s 44.

[11] *Von Einem v Griffin* (1998) 72 SASR 110.

[12] *Von Einem v Griffin* (1998) 72 SASR 110, [121].

the power did not have to be exercised at all.[13] It held that the decision process of the Attorney-General was not subject to judicial review.[14] Some of these dicta were written before recent authority clarified the ambit of judicial review in such matters.[15] The notion that an official, exercising powers derived under legislation enjoys an unfettered, subjective discretion may be inconsistent with the requirements of the rule of law,[16] which Dixon J described in *Australian Communist Party v Commonwealth* as a basic principle of Australian constitutionalism.[17] However, the net effect of the foregoing decisions has been that a person, claiming to be wrongly convicted, may end up in a blind alley. The prisoner is obliged to seek redress from the Attorney-General. Yet this may be the very office-holder who has ultimate responsibility for the agencies (such as forensic sciences, police, prosecutions and the courts) that the prisoner alleges to have been wanting if a miscarriage of justice is to be found and corrected.

It was in this context that those pressing for legislative reform in South Australia presented submissions to the Australian Human Rights Commission complaining about the situation that they faced.[18] The submission included the complaint that the Australian criminal appeal provisions did not properly protect the right to a "fair trial" or the right to an effective "appeal". For example, the right to appeal is included in the *International Covenant on Civil and Political Rights* (ICCPR) Art 14.5. Australia is a party to that *Covenant* and to the *Second Optional Protocol*. Under the latter, persons in Australia who are adversely affected, enjoy a right of communication to the Human Rights Committee of the United Nations. The *Covenant* requires that such rights be determined by competent "judicial" authorities, applying established legal rules in a "fair and public hearing". An "unfettered" executive discretion would not conform to the requirements of the *Covenant*. It is not a judicial decision. It takes place behind closed doors. These were the defects of the procedures provided by the *Criminal Appeal Act*. The same defects would extend to the special inquiry procedures available in New South Wales and the Australian Capital Territory.[19]

Recommendations of the South Australian Committee

The occasion for the 2013 South Australian reform was a Bill, introduced into the State Parliament, designed to establish a Criminal Cases Review Commission (CCRC) for that State. Such a body had earlier been established in the United Kingdom. So far, no Australian jurisdiction has established such a commission. This is so despite the demonstrated utility of the CCRC in the United Kingdom. In Britain, that body has been responsible for referring 440 cases to the courts, resulting in a like number of convictions being overturned. These figures include over 100 murder convictions. They extend to the convictions of four prisoners reviewed by the UK CCRC *post mortem* who had earlier been hanged pursuant to their sentences.[20]

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[13] *Von Einem v Griffin* (1998) 72 SASR 110, [150].

[14] *Von Einem v Griffin* (1998) 72 SASR 110, [151].

[15] *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478, 503–504 [70]; [2002] HCA 22. Compare *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342.

[16] Sangha and Moles, n 2, 53, citing R French, AC, Chief Justice, "The Rule of Law as a Many Coloured Dream Coat" (Singapore Academy of Law 20th Annual Lecture, 18 September 2013) 13.

[17] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193.

[18] The Submission is available at <http://netk.net.au/HumanRights/HREOCComplaint.pdf>.

[19] The provisions are set out in detail at Sangha and Moles, n 2, 3.5.

[20] The current figures are available at <https://ccrc.gov.uk/case-statistics/>. Three referrals by the CCRC led to the convictions being overturned. They were: *R v George Kelly* (hanged) and Charles Connolly (dec'd) [2003] EWCA Crim 2957 <http://netk.net.au/UK/KellyConnolly.asp>; *R v Mahmoud Mattan* (Hanged) [1998] EWCA Crim 676 <http://netk.net.au/UK/Mattan.asp>; *R v Derek Bentley* (Deceased) [1998] EWCA Crim 2516 <http://netk.net.au/UK/Bentley.asp>; In the case of Timothy Evans, the CCRC determined that a referral to the appeal court was not necessary. Mr Evans had already received a posthumous Free Pardon and the family had received financial compensation which it regarded as a sufficient determination of his innocence. The family were concerned that it had not expunged his conviction. The CCRC and the Divisional Court accepted that was correct. On judicial review the appeal court found that the determination of the CCRC was properly made: *Westlake v CCRC* [2004] EWHC 2779 (Admin) <http://netk.net.au/UK/EvansTimothy.asp>.

The proposal that a CCRC should be created for South Australia did not enjoy the support of the then Government of the State or of its Attorney-General. Nonetheless, upon receiving the Bill, the Parliament of South Australia referred it to a Legislative Review Committee. That Committee invited public submissions. By that stage, in November 2011, the Australian Human Rights Commission had completed its report on the compliance of the then criminal appeal model with Australia's obligations under the ICCPR. In the report of the Australian Human Rights Commission, it stated:

> The Commission is concerned that the current systems of criminal appeals in Australia, including in South Australia, may not adequately meet Australia's obligations under the ICCPR in relation to the procedural aspects of the right to a fair trial. More particularly, the Commission has concerns that the current system of criminal appeals does not provide an adequate process for a person who has been wrongfully convicted or who has been the subject of a gross miscarriage of justice to challenge their conviction.[21]

In the result, the South Australian Legislative Review Committee did not recommend the establishment of a CCRC for the State. However, it did make three important recommendations. These remain relevant to the situation in the other jurisdictions of Australia today.

The first recommendation was that a Forensic Review Panel should be established, which should have the capacity to review cases in which it was alleged that a wrongful conviction had resulted from incorrect or inadmissible forensic evidence. This Panel should have the capacity to refer such cases to the appeal court of the State for review. In effect this would amount to a kind of CCRC for the State; but restricted to miscarriages based on forensic evidence.

Under current legal arrangements in Australia, a special inquiry may be established under legislation applicable in New South Wales and the Australian Capital Territory. In the other jurisdictions, the Executive Government may establish a Royal Commission, including one addressed to forensic evidence. This is what occurred in the cases of Lindy and Michael Chamberlain in the Northern Territory and Edward Splatt in South Australia.[22] However, such inquiries are extremely costly. They consume much time and public resources. The Eastman inquiry in the Australian Capital Territory was said to have cost that jurisdiction approximately $12 million. The Splatt Royal Commission hearings lasted 196 hearing days. Its cost to South Australia was also formidable. If the model of a CCRC established in the United Kingdom were considered suitable for transplantation to Australia the creation of a national standing CCRC might be more cost effective. To establish a national body, each State and Territory of Australia would be expected to legislate to confer powers on such a body, permitting it to investigate cases and where necessary to cause them to be presented to the relevant appellate court for corrective orders. It is worth noting that New Zealand has implemented legislation establishing a body modelled on the CCRC operating in the United Kingdom.[23]

The second recommendation of the South Australian Legislative Review Committee was that there should be a specific inquiry into the use of forensic evidence in criminal trials in the State. This suggestion has now been taken up by the Attorney-General for Victoria.[24] She, in turn, was picking up concerns that had been expressed by CM Maxwell P, President of the Court of Appeal of Victoria.[25] He had expressed the view that there was little proof that several forensic techniques used in Australia, including gunshot analysis, footprint analysis, hair comparison and bite mark comparison, would reliably identify culprits. Maxwell P called on governments throughout Australia to oblige judges to consider the established reliability of forensic evidence before it was made available to juries.

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[21] Australian Human Rights Commission, Submission to the Legislative Review Committee of South Australia, *Inquiry into the Criminal Cases Review Commission Bill 2010*, 25 November 2011, 6.2 <http://netk.net.au/CCRC/AHRCSubmission.pdf>.

[22] Details of the Chamberlain inquiry are available at <http://netk.net.au/NTHome.asp>. Details of the Splatt inquiry are available at <http://netk.net.au/SplattHome.asp>.

[23] Details of the New Zealand provision are available here <http://netk.net.au/NewZealandHome.asp> and details of the UK CCRC are available here <http://netk.net.au/CCRCHome.asp>.

[24] "Attorney-General Calls for Inquiry over Fears Innocent People Being Jailed", *The Age*, 10 October 2019 <http://netk.net.au/Forensic/Forensic57.pdf>.

[25] CM Maxwell, "Preventing Miscarriages of Justice: The Reliability of Forensic Evidence and the Role of the Trial Judge as Gatekeeper" (2019) 93 ALJ 642.

These concerns were supported by a leading scientist at the Victorian Institute of Forensic Medicine.[26] The concerns also drew support from a report of the National Academy of Sciences in 2009 as well as a 2019 Update of that report which found that, of all of the forensic sciences now in use, DNA analysis was the only one which had the capacity for regular reliable validation of results. All others, it was concluded, involved elements of subjectivity that made the findings unreliable or certainly doubtful.[27]

In 2012, the National Institute of Science and Technology in the United States reported that latent fingerprint analysis gave rise to similar concerns as to reliability. In 2015, another major report in the United States on hair analysis, concluded that in over 90% of cases involving such analysis the evidence probably overstated the significance of microscopic hair comparisons. In a significant number of such cases, the accused had been sentenced to death. Given the practical impossibility of juries making reliable assessments of their own about the acceptability of most forms of forensic evidence, Maxwell P called for exploration of the ways by which judges, court rules and trial processes could protect the integrity of criminal trials involving forensic evidence.[28]

The third recommendation in South Australia was for the enactment of a right to a second or further appeal where fresh and compelling evidence was presented to the effect that there had been a substantial miscarriage of justice at the first trial. This was the recommendation that gave rise to the amendment to the South Australian law that was enacted by the State Parliament in May 2013.

Compelling Arguments for Reform

During the course of the parliamentary debate about the last-mentioned proposal, the Attorney-General conceded that it was inappropriate for such applications to be decided behind closed doors, as the petition procedure required. He stated that the public forum of the courts was the appropriate place where such issues should be resolved.[29] In the Legislative Council of South Australia, a statement that I had provided in support of the measure was read on to the record by the Hon. Anne Bressington MLC, the sponsor of the Bill. In that statement I sought to identify the reasons for the longstanding official hostility that might explain the widespread and powerful opposition to such a measure:[30]

> The desire of human minds for neatness and finality is only sometimes eclipsed by the desire of human minds for truth and justice. There will always be a disclination to reopen a conviction, particularly where it has been reached after a lengthy criminal trial and a verdict of guilty from a jury of citizens. Sometimes, however, that disinclination must be confronted and overcome with the help of better institutions and procedures than we have so far developed in Australia.

Tasmania and Victoria followed South Australia in enacting a similar law.[31] Western Australia now has such a law under consideration. However, progress towards this reform remains glacial. No initiative has been commenced in New South Wales, Queensland or either of the mainland Territories of Australia. It seems inherently unlikely that these jurisdictions are immune from the risk of miscarriage which the work of the CCRC has convincingly demonstrated in the United Kingdom and which repeated royal commissions and statutory reforms have suggested in Australia.

In the South Australian and Tasmanian Parliaments, the argument that proved most persuasive for the advocates of reform also gained unanimous support in the South Australian Review Committee. This pointed to the provisions enacted by all Australian Parliaments, notwithstanding an earlier *acquittal*, permitting a prosecutor to apply to the court for permission to commence a further prosecution based

[26] "Top CSI Scientist Says Police Ignoring Evidence Flaws, Jailing the Innocent", *The Age*, 3 September 2019 <http://netk.net.au/Forensic/Forensic53.pdf>.

[27] Links to this and the other reports referred to are available at <http://netk.net.au/ForensicHome.asp>.

[28] Maxwell, n 25, 652–654.

[29] *Statutes Amendment (Appeals) Bill*, House of Assembly, 7 February 2013 (The Hon J R Rau, Attorney-General) <http://netk.net.au/Appeals/Appeals6.asp>.

[30] Legislative Council, *Statutes Amendment (Appeals) Bill*, 19 March 2013 <http://netk.net.au/Parliament/LC16.asp>.

[31] The Act, and Parliamentary debates in Tasmania are available at <http://netk.net.au/TasmaniaHome.asp>. Those in Victoria are available at <http://netk.net.au/VictoriaHome.asp>.

on fresh and compelling evidence of guilt. The South Australian Committee reasoned that it would only be just and equitable to allow a person *convicted* of a serious crime to seek a like permission for reconsideration of the case where there was fresh and compelling evidence of a wrongful conviction. Why this argument has not so far attracted support in the remaining Australian jurisdictions can only be imagined. It shows the consequences to which politics, repeated "law and order" campaigns, and media hysteria have driven Australian criminal law and practice to the ethical bottom.

In the briefings that occurred before the debates in the South Australian and Tasmanian Parliaments, several hesitations were expressed concerning the number of prisoners who would be likely to invoke the new provision for a second or further appeal, agitating claims of little merit and involving much cost. These hesitations did not carry the day. The reforms were enacted in South Australia, Tasmania and Victoria and the asserted concerns have not materialised. The most probable explanation for this may have been the great difficulty that still faces a prisoner in gaining access to relevant materials and in securing effective professional advice and representation. In the absence of a CCRC including appropriate expertise and resources of its own or the establishment of effective innocence projects in Australia to assist prisoners who complain of a miscarriage of justice, the mere enactment of a statutory right to allow a further appeal may be of limited value. No one considering the problem of miscarriages in criminal trials in Australia can draw any satisfaction from that conclusion.

In the six years since the law on criminal appeals was amended in South Australia, there have been half a dozen cases that have given rise to applications for further appeal. Of those applications, three have been successful. These led to the convictions being overturned, two of them on the basis of established flaws in the forensic evidence admitted at trial.[32] None of these cases has resulted in the conduct of a re-trial, still less further convictions.

Of the three unsuccessful appeals in South Australia, one was granted special leave to appeal by the High Court and it was found that some of the forensic evidence given at the trial was unreliable. However, in the opinion of the High Court, the defects in the evidence were insufficient to warrant allowing the appeal and setting aside the conviction.[33] The utility of the reformed procedure is already demonstrated by the outcome in half of the cases decided. It is not undermined by a small number of cases where the application was refused, in some of them by majority or with apparent hesitation.

The most significant of the successful South Australian cases was that of Mr Keogh. He had already served over 20 years in prison for the murder of his fiancée which he had always denied. It had been alleged that he had drowned her in a domestic bath. Before the law on appeals was changed, there were a number of requests for referral of the case to the appellate court under the petition procedure then applicable. All of these requests were rejected by the relevant Minister. Following the reform of the law, Mr Keogh's application for leave to appeal was granted by the Full Court of the Supreme Court of South Australia. His conviction was set aside and he was released. Not until his appeal was lodged under the new procedure did the Director of Public Prosecutions of South Australia produce a forensic report of 2004 that had been obtained by the State Solicitor General some nine years earlier. As the Full Court noted, this forensic report was only released to the applicant's advisers on 5 December 2013.[34] The report proved to be a significant consideration in the Full Court's reasoning allowing Mr Keogh's appeal. No explanation has thus far been provided as to why the 2004 forensic report was not made available to the prisoner under the former petition procedure, having regard to the Crown's duty of disclosure of relevant material in its possession.[35] Nor was an explanation given as to why the relevant Minster, based on that report, refused to refer the matter to the Court under the then petition procedure.

[32] *R v Drummond (No2)* [2015] SASCFC 82 involved a forensic scientist mis-stating the probabilities in relation to possible DNA transfer during an attempted abduction.

[33] *Van Beelen v The Queen* (2017) 262 CLR 565; [2017] HCA 48 affirming the majority orders of the Full Court of the Supreme Court of South Australia *R v Van Beelen* (2018) 125 SASR 253 (Kourakis CJ dissenting); 260 A Crim R 48; [2016] SASCFC 71.

[34] *R v Keogh (No 2)* (2014) 121 SASR 307, [18]; 248 A Crim R 1; [2014] SASCFC 136.

[35] *Mallard v The Queen* (2005) 224 CLR 125, 148–157; 157 A Crim R 121; [2005] HCA 68.

The melancholy conclusion is that, but for the enactment by the Parliament of South Australia affording a right of second appeal, it is most likely that the report would never have seen the light of day. Mr Keogh would probably still be in prison for a conviction that he contested based on yet another instance of suspect forensic testimony.

A Review Commission as in UK, NZ and Canada?

Before and after the adoption of the 1907 *Criminal Appeal Act* in England and Wales, and the template procedures that were then copied throughout Australia and New Zealand, judges, Ministers, prosecutors and other officials strongly opposed the enlargement of the opportunities to permit fresh scrutiny of convictions and sentences said to have involved mistakes, miscarriages and injustice. It may well have been the so-called Irish cases in the 1960s–1990s in England that shocked the conscience of the legal profession, the judiciary and ultimately politicians.[36] This contributed to the disquiet that resulted in the creation in the United Kingdom of the CCRC. The experience of that body has more than justified its establishment. It resulted in the setting aside of large numbers of convictions in serious criminal cases. Now, in New Zealand, the British experience has resulted in the decision to establish a similar commission in that country.

Considering these moves, it is clear that, at the least, there is an urgent need for the enactment of a facility of a second or further appeal in those States and Territories of Australia that have not so far taken this step. This would be the minimum reform to bring Australia's response to miscarriages of justice into line with its obligations under international human rights law binding on it.

To do nothing and to persist with the flawed facility of seeking Executive consideration of a complaint behind closed doors constitutes a breach of Australia's obligations under the ICCPR. Ironically, the creation of a national or multi-jurisdictional CCRC could be a more cost-effective response than the continued investment in royal commissions and special inquiries that have marked the Australian scene so frequently in recent years. Doing nothing to improve our institutional arrangements is a stain on Australia's reputation as a country of equal justice.[37] It is a blight that is too often demonstrated by fresh evidence and argument. It is an intolerable burden on thoughtful judges, prosecutors and other lawyers who regard participation in a demonstrable miscarriage of justice as a nightmare. The provision of redress is urgent. The enactment of a right of a second or additional appeal is the least we should do. Reform is long overdue. And when a second appeal is enacted throughout Australia, we should turn our attention to creating a properly resourced and equipped CCRC. Protection against miscarriages of justice in criminal cases is no less important and necessary in Australia as it is in Britain and New Zealand.

On 16 December 2019, the Prime Minister of Canada, Rt Hon Justin Trudeau, announced the intention of his newly re-elected Government to propose to Parliament the establishment of a Criminal Case Review Commission for Canada. He said that it would "make it easier and faster for potentially wrongfully convicted people to have their applications reviewed."[38] In Australia, two of the states and both mainland territories have not yet even decided to permit a second criminal appeal by leave on compelling evidence. And no jurisdiction has yet resolved to establish a Review Commission. What is it about our country that always sees us limping behind [UK, NZ and Canada] where justice is at stake, whereas we can move with astonishing speed to diminish civil liberties, increase official powers and raise levels of incarceration, with no parliamentarian raising a murmur…

[36] *Mallard v The Queen* (2005) 224 CLR 125, 153 [73]; 157 A Crim R 121; [2005] HCA 68.

[37] *Mallard v The Queen* (2005) 224 CLR 125; 157 A Crim R 121; [2005] HCA 68. See at 142 [45] referring to SLR p 52/1996 noted (1997) 191 CLR 646.

[38] <https://pm.gc.ca/en/mandate-letters/minister-justice-and-attorney-general-canada-mandate-letter>.