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Australia's criminal appeal procedures – in breach of international human rights obligations – and unconstitutional

In this paper¹ we will make reference to:

- The law on miscarriages of justice in Australia;
- the challenge of the case of Henry Keogh in South Australia;
- the fact that there are no *legal* remedies in Australia for a miscarriage of justice;²
- this constitutes a breach of international obligations (under the UN ICCPR)
- this is unconstitutional according to Australia's domestic law.

The law on miscarriages of justice

The criteria for what amounts to a fair trial are set out in Australia's domestic law in the decisions of the High Court.³ They make it clear that a trial may be unfair in three important respects.

1. Non-disclosure: Where there has been a significant non-disclosure at trial, which could possibly have affected the jury's verdict, the conviction *must* be set aside.

In order for there to be a fair trial the prosecution is obliged to disclose to the defence all material that is available to it which is relevant or possibly relevant to any issue in the case.⁴

An essential question is whether, if the jury had known about the additional material, it would have cast doubt on the essential features of the prosecution case. Or, to put that another way, was the body of evidence which was not presented to the jury potentially significant?⁵

¹ This paper is derived from the following articles: Bob Moles "The Law on non-disclosure in Australia: all rights – no remedies" (2011) 8(8) DL 86-90; [Moles] - Bibi Sangha, Bob Moles "Post-conviction reviews – Strategies for change" (2011) 8(9) DL 98-102 [Sangha / Moles]; Bibi Sangha, Bob Moles "The Right to a Fair Trial in the context of International Human Rights Obligations" (2011) 8(10) DL.

² It is important to note that a 'miscarriage of justice' does not arise until after the regular system of appeals has been concluded and has failed to identify or rectify the error.

³ These have been set out in Sangha, Roach and Moles, *Forensic Investigations and Miscarriages of Justice* (2010) Irwin Law, Toronto and Federation Press, Australia, chap 5.

⁴ *Grey v. The Queen* [2001] HCA 65 at [46]; Gleeson C.J., Gummow and Callinan JJ.

⁵ *Mallard v. The Queen* [2005] HCA 68 at [23-4]; Gummow, Hayne, Callinan and Heydon JJ. As we pointed out in *Forensic Investigations* chap 5 p 150 the 'proviso' which allows the court to overlook minor errors is not available in such situations.

2. Misleading evidence: Where significant evidence has been led at trial which has subsequently proved to be non-probative, then if it could possibly have affected the jury's verdict, the conviction *must* be set aside.

If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the Court of Criminal Appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence.⁶

3. Procedural irregularities: Where the basic conditions of a fair trial are absent, the conviction *must* be set aside.

For [the court] will set aside a conviction whenever it appears unjust or unsafe to allow the verdict to stand because some failure has occurred in observing the conditions which, in the court's view, are essential to a satisfactory trial....⁷

In *R v Stafford*, the appeal court accepted that it was a procedural error for the prosecution to have put a scenario to the jury which was not fairly open on the evidence, as that evidence was subsequently accepted by the Court of Appeal.⁸

The Challenge of Henry Keogh's case

In terms of non-disclosures, Henry Keogh's conviction for murder will soon become one of Australia's leading cases on the topic. It involves a greater range of non-disclosure issues than any of the other cases we have reviewed in Australia, Britain or Canada.⁹ It also represents the most fundamental challenge to the way in which the Australian criminal justice system deals (or fails to deal) with the challenges thrown up by potential miscarriages of justice.

Normally in an appeal there will be various claims and counter-claims about the evidence given at trial and what subsequently becomes known about that evidence. The competing

⁶ *M. v The Queen* [1994] HCA 63 at [9].

⁷ This citation from *Davies and Cody v. The King* (1937) 57 CLR 170 at 180 was referred to by Gleeson C.J. in *Nudd v. The Queen* [2006] HCA 9 at [4]. See also the discussion of this issue in *R. v. Stafford* [2009] QCA 407 at [149].

⁸ *R. v. Stafford* [2009] QCA 407. This was one of the few cases in Australia to have resulted from a second reference under the petition procedure. In the South Australian case of *R v Keogh* the prosecution put a scenario to the jury which was not fairly open on the evidence as it now stands. See Robert N Moles *Losing Their Grip – the case of Henry Keogh* (2006) Elvis Press; the full text is available online at <http://netk.net.au>

⁹ A 'non-probative' issue can often be construed as a 'non-disclosure' issue in that the factors which produced the unreliability in the evidence were not disclosed at trial.

claims will then have to be settled by the appeal court. The interesting aspect of the Keogh case is that key contentions about the unsatisfactory nature of the evidence at trial have already been resolved by sworn evidence in other proceedings. Various complaints were brought before the Medical Board and the Medical Tribunal in South Australia, and it was there that the various medical witnesses who had given evidence at trial provided new insights into the state of their knowledge, at trial and since.¹⁰ The interesting procedural issue is that the non-disclosures by the key witnesses at the trial did not take place until long after Keogh had unsuccessfully appealed his conviction.

The Keogh case involved an alleged homicidal drowning in a domestic bath. Major deficiencies in the Crown case have been revealed since the trial and the appeal. No court has yet considered them in terms of the safety of the conviction.

1. At trial the chief pathologist said that someone (presumably Keogh) approached the woman (Keogh's fiancée) whilst she was in the bath and suddenly grabbed her left leg with his *right* hand, pulling the legs up, and pushing her head under the water with the left hand. The pathologist said that he could infer this to be the case because he had seen marks on the left leg of the deceased which he thought to be grip-marks. When he was asked about this later at the Medical Board proceedings he said that it had always been his opinion that the marks to the leg had been caused by a *left* hand.¹¹ This might well have affected the jury's assessment of the situation at trial, because they had been told that the left hand was holding the head under the water. This involves both 'non-disclosure' and 'non-probative' issues.

2. It was important to the scenario put forward by the pathologist to show that the deceased had been conscious when her head entered the water, so as to rule out a slip-and-fall scenario leading to unconsciousness and accidental drowning. At trial, the pathologist stated that he could infer this to be the case because he had seen no damage to the outer surface of the brain at autopsy. Later, at the Medical Tribunal, he said he accepted that the principle he had relied upon at trial had not been a valid one.¹² Had he said this at the trial his evidence in this

¹⁰ See, for example *Medical Board of South Australia v Manock* [2009] SAMPCT 2; *Henry Keogh v Colin Manock*, Medical Board of South Australia decision 22 June 2005; *Henry Keogh v Ross James* in Medical Board of South Australia 16 August 2007. The results of the various proceedings and appeals is that neither pathologist was found to have engaged in unprofessional conduct. However, this is not the same issue as determining whether their non-disclosures might have caused a miscarriage of justice.

¹¹ See *Losing Their Grip* at pp 217-221 "which hand".

¹² *Medical Board of South Australia v Manock* [2009] SAMPCT 2.

respect would have been inadmissible. It is clearly a ‘non-disclosure’ and a ‘non-probative’ issue.

However, since then, the pathologist has stated that this finding can be supported by other evidence or findings not mentioned at trial or in his autopsy report. Even if this were to be the case, it could not be taken into consideration in any appeal, as a conviction cannot be maintained on the basis of evidence not put to the jury at the trial.¹³

3. Similarly with the principle essential to the diagnosis of drowning. Various referred to as the ‘aortic staining’ or ‘differential staining’ principle. At trial it was said to be a ‘classical’ sign of drowning. Later, in the Medical Board, it was acknowledged by the pathologist that he was not aware of any support for the principle in the scientific literature in the context of the diagnosis of drowning. This means that his evidence in this respect would have been inadmissible at trial.¹⁴ It is clearly a ‘non-disclosure’ and a ‘non-probative’ issue:

Mr Borick: You’ve heard me put to Dr James the list of textbooks written over the last three decades and you’ve heard me say to Dr James that there is absolutely no reference in any of the texts to staining of the aorta being - whether associated with the pulmonary artery or not - associated with diagnosis of drowning?

Dr Manock: That’s quite correct.

Mr Borick: You were aware of that when you decided to come to your diagnosis?

Dr Manock: Yes.

Mr Borick: That, in other words, the rest of the world thought differently to you?

Dr Manock: No, the rest of the world hadn’t caught up.¹⁵

4. In addition, both the chief and the deputy pathologist admitted at the Medical Board that they had not disclosed the potentially exculpatory result of a forensic test; a slide taken from one of the marks on the leg which did not show any evidence of bruising. At trial the jury had been told that all the slides showed evidence of bruising. One pathologist said that the issue

¹³ *Osland v The Queen* [1998] HCA 75.

¹⁴ For the rules relating to the admissibility of expert opinion evidence see *Forensic Investigations* chap 2.

¹⁵ Transcript, Medical Board hearing, at p 339; *Losing Their Grip* p197-8; “differential staining”. Of course, this would mean that the evidence should not have been admitted at trial because it does not accord with the conditions for the admissibility of expert opinion evidence. The same could be said of many other aspects of the evidence in this case. See *Forensic Investigations* Ch 2.

did not come up in conversation with the prosecutor. The other said that he did not think the test result was relevant.¹⁶ This is clearly a ‘non-disclosure’ leading to a ‘non-probative’ issue.

5. Prior to the Keogh trial the Coroner of South Australia had conducted an inquiry into three baby deaths. The autopsies had been completed by the chief pathologist who was to give evidence in the Keogh trial. At the conclusion of the baby deaths inquiry the Coroner, in his Findings, made some fundamental criticisms of the work done by the pathologist. The Coroner said the pathologist must have seen things which could not have been seen (such as signs of bronchopneumonia) because he found it did not exist. The Coroner also said that the autopsies had achieved the opposite of their intended purpose – they had closed off inquiries rather than opening them up. He even said that the answers given to some questions at the inquiry, by the pathologist, were “spurious”.¹⁷

However, the Coroner then did a most remarkable thing. He decided that because the trial of Henry Keogh was under way, he would withhold his Findings, until the matters in the Keogh trial had been resolved. He subsequently published his Findings two days after Keogh had been found guilty.¹⁸ Clearly this is a non-disclosure issue.

The principles discussed earlier make it clear that each one of the issues we have mentioned in Keogh’s case justifies (on its own) the quashing of the conviction. In combination, they present an overwhelming case for the conviction to be set aside.

No legal remedies

However, the real challenge presented by the Keogh case is how to implement the rights which have been declared by the High Court.

¹⁶ This was the principal issue in *Keogh v James* [2009] SASC 258; *Losing Their Grip* Ch 11 p 212ff; “The ‘thumb bruise’.” Clearly these views are at odds with the legal principles applying to expert witnesses and the various ethical guidelines, see *Forensic Investigations* Ch 2 “Prosecutors and Expert Witnesses”.

¹⁷ See Robert N. Moles, *A state of Injustice* (2004) Ch 10 “Seeing Things – the Baby Deaths Inquest 1994”. The full text of this book is available online at <http://netk.net.au>

¹⁸ *Losing Their Grip*, Ch 7 p118; Michael Sykes (solicitor) produced an affidavit in court at Keogh’s second appeal which stated “The Coroner said he was sensitive to the fact that Mr Keogh’s trial was proceeding at the time he was ready to publish his Findings. He knew that Dr Manock was a principal Crown witness. So as to avoid a mistrial he decided, of his own volition, to delay publishing the Findings until after the trial had concluded.”

Keogh's lawyers attempted to re-open the appeal, but found that the Court of Appeal is not entitled to re-open an appeal after an unsuccessful appeal.¹⁹ They attempted to bring the matter to the High Court, but found that the High Court cannot accept the fresh evidence in such a case.²⁰ They have petitioned the Governor and Attorney-General under the relevant statutory provision (common to all Australian states) but find that it provides no *legal* rights to the applicant either to have his case referred back to the Court of Appeal, or even to a fair hearing of his application.²¹

In summary, in Australia, once a person has been convicted and has had an unsuccessful appeal, there is thereafter no *legal* right to any further consideration of his case, no matter how compelling the evidence which emerges that he is in fact wrongfully convicted. It is said that decisions by an Attorney-General, without reasons, on such matters are not subject to judicial review.²²

A situation such as this could not have occurred in Britain where they have the Criminal Cases Review Commission (CCRC) which has led to the overturning of more than 300 convictions in its first 10 years. Decisions of the CCRC are supported by written reasons and are judicially reviewable. In addition, appeals are available to the European Court of Human Rights. The Court of Criminal Appeal also retains a residual right to re-open an appeal so as to avoid a miscarriage of justice.²³

This situation could not occur in Canada, where decisions by the Federal Attorney-General on such a petition are supported by written reasons and are judicially reviewable. Canada also has a Charter of Rights.²⁴

¹⁹ *R v Keogh* [2007] SASC 226, 22 June 2007 CCA, Doyle CJ, Bleby and Sulan JJ rejecting the application. See generally *Forensic Investigations* p 138.

²⁰ *Forensic Investigations* p 138 discussing *Mickelberg v The Queen* [1989] HCA 35 at [2] per Mason CJ.

²¹ The statutory provision is s 369 of the Criminal Law Consolidation Act (SA). In *Von Einem v Griffin and Anor* (1998) 72 SASR 110 at [120] Lander J. stated: "Section 369 does not create legal rights. A petition for mercy directed to the Governor does not give rise to any legal rights in favour of the petitioner. The petition assumes all legal rights have been exhausted." We note that in New South Wales an application can be made directly to the Chief Justice for judicial reference under the NSW Crimes Act 2001. Keogh's third petition took 4 years before being turned down. His fourth petition is still being considered after more than two years.

²² *Von Einem v Griffin and Anor* (1998) 72 SASR 110 at [136] Lander J.

²³ *R v Christopher Walsh* [2007] NICA 4.

²⁴ See *Forensic Investigations*, Ch 3 Britain, Ch 4 Canada; also Ch 10 on the Criminal Cases Review Commission.

Henry Keogh can demonstrate by sworn evidence (given subsequent to his trial and other court proceedings relating to his conviction) by key witnesses at his trial, that the evidence upon which he was convicted was in important respects either incorrect or unreliable. They involve issues which, as we have seen, are not amenable to the proviso; those which are entirely central to the diagnosis of the cause of death and the supposed scenario giving rise to it. Yet, despite ten years of proceedings in various courts and tribunals Henry Keogh is told that he has no legal right to be heard. So, although the principles enunciated in the earlier part of this paper are comparable to those of Britain and Canada, the procedural shortcomings within Australia mean that they are without legal effect. Australia is the only common-law jurisdiction we are aware of which has such rights - but no remedies.

A breach of international human rights obligations

Where a conviction has occurred in Australia following a trial which was unfair - the person who was subject to that unfair trial is also the recipient of the guarantee contained in the United Nations International Covenant on Civil and Political Rights (ICCPR) of the right to a fair trial.²⁵ The ICCPR which also guarantees that any person whose rights are violated shall have an effective remedy.²⁶

The Covenant also imposes obligations to comply with its provisions on all Australian citizens.²⁷ The preamble states that each individual has a responsibility to strive for the promotion and observance of the rights recognized in the Covenant.

Article 2 states that each State Party will take the necessary steps to adopt such legislative or other measures as may be necessary to give effect to the Covenant rights.

Article 50 states that the provisions extend to all parts of federal States without any limitations or exceptions.

The United Nations Human Rights Committee has made it clear that prisoners enjoy all the rights in the ICCPR and that Australian law has held that a statute of the Commonwealth or of a State is to

²⁵ Part II Article 9.14.

²⁶ Part II Article 2. 3.1.

²⁷ Sangha / Moles note 1 at 98.

be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law.²⁸

It follows that a breach of the obligation to provide a fair trial must impose obligations upon legal officials to act to remedy the effects of any unfair trial which has occurred. But, as we have pointed out, in Australia, the judges of the Court of Appeal and the High Court state that for procedural reasons they are powerless to act.²⁹

In *Forensic Investigations* Sangha, Roach and Moles said:

The inability to re-open an appeal in combination with the principle that the High Court considers that it is unable to hear fresh evidence, means that there are significant obstacles in the way of achieving justice. As Kirby J. has pointed out: “The rule [prohibiting the High Court from receiving fresh evidence] means that where new evidence turns up after a trial and hearing before the Court of Criminal Appeal are concluded, whatever the reason and however justifiable the delay, the High Court, even in a regular appeal to it still underway, can do nothing. Justice in such cases, is truly blind. The only relief available is from the Executive Government or the media -- not from the Australian judiciary.”³⁰

It is that position, correctly explained of course by Justice Kirby, which we say amounts to a breach of the Covenant obligation to ensure a fair trial and where necessary to provide a remedy for an unfair trial. In the circumstance Kirby J. refers to, the person is told that in Australia there is no legal right to any review of the case, despite the compelling evidence that there has been a miscarriage of justice. The only avenue open to such a person is to petition under the statutory procedure for the case to be referred back to the Supreme Court.³¹ But here, the problems compound themselves.

As we have pointed out, Australian law says that the statutory petition procedure does not provide any *legal* right to an applicant either to a referral to the court or even to a fair reading of the petition. The whole thing is subject to the arbitrary and non-reviewable discretion of the

²⁸ *Kartinyeri v Commonwealth* (1998) 195 CLR 337 per Gummow and Hayne JJ. [97] citing *Polites v The Commonwealth* (1945) 70 CLR 60 at 68-69, 77, 80-81; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287. The website of the Australian Human Rights Commission is at www.hreoc.gov.au

²⁹ Moles note 1 at 89.

³⁰ *Forensic Investigations*, chap 5, p 141 citing Kirby J, “Black and White Lessons for the Australian Judiciary” (2002) 23 *Adelaide Law Review*, 195-213 at 206. See also *Sinanovic’s Application* (2001) 180 ALR 448 at 451 per Kirby J. “By authority of this court [High Court of Australia] such fresh evidence, even if it were to show a grave factual error, indeed, even punishment of an innocent person, cannot be received by this court exercising its appellate jurisdiction ... [the prisoner] would be compelled to seek relief from the Executive.”

³¹ On this see Sangha / Moles note 1 at 99-100.

Attorney-General who is not entirely an independent arbiter in such matters.³² The Attorney-General, it is said has no legal duty to act fairly, and indeed, has no legal duty at all.³³ The best that can be said of a situation such as this is that the Attorney-General has some administrative responsibility in the matter.

If that position is correct, then we would suggest that as well as the failure of duty under the ICCPR to provide an effective remedy, it is also unconstitutional under Australia's domestic law.

A breach of domestic constitutional obligations

In the recent case of *South Australia v Totani* the High Court spoke about the need for courts and judges to be able to decide cases independently of the executive government. As French CJ said, "[t]hat is part of Australia's common law heritage, which is antecedent to the Constitution and supplies principles for its interpretation and operation".³⁴ An important element of the judgment was the fact that "[j]udicial independence is an assumption which underlies Ch III of the Constitution ...".³⁵

He said, "[i]t is a requirement of the Constitution that judicial independence be maintained in reality and appearance for the courts created by the Commonwealth and for the courts of the States and Territories."³⁶ Importantly for our present purposes he added, "[o]bservance of that requirement is never more important than when decisions affecting personal liberty and liability to criminal penalties are to be made."³⁷

He referred to the Full Court judgment of Bleby J in *Totani* where he said that the "unacceptable grafting of non-judicial powers onto the judicial process in such a way that the

³² Sangha / Moles note 1 at 99. Where there has been an unfair trial in a murder case, responsibility for the unfairness might well be attributable to the Director of Public Prosecutions, the Coroner or the state pathologists who gave incorrect or misleading evidence at the trial. Administratively (at least in South Australia) each of them, through their departments, is ultimately accountable to the Attorney-General's office. Adverse findings against them might well have implications for the Attorney-General.

³³ See the discussion of this at Sangha / Moles note 1 at 99-100, based upon the judgment of Lander J in *Von Einem v Griffin* (1998) 72 SASR 110 at 20-21.

³⁴ *South Australia v Totani* [2010] HCA 39 at [1] [*Totani*] citing Dixon, "Marshall and the Australian Constitution", (1955) 29 *Australian Law Journal* 420 at 424-425.

³⁵ *Totani* at [1].

³⁶ *Totani* at [1] citing *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 163 [29] per McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ; [2004] HCA 31; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 552-553 [10] per Gummow, Hayne, Heydon and Kiefel JJ; [2008] HCA 4; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 363 [81] per Gaudron J; [2000] HCA 63.

³⁷ *Totani* at [1].

outcome is controlled, to a significant and unacceptable extent, by an arm of the Executive Government ... destroys the court's integrity as a repository of federal jurisdiction".³⁸ We say that this is equally applicable to the position claimed by the Attorney-General under the statutory petition procedure.

The Chief Justice then said that the understanding of what constitutes "courts of law" may be expressed in terms of assumptions underlying various provisions of the constitution in relation to the courts of the States. There must be the universal application throughout the Commonwealth of the rule of law; an assumption "upon which the Constitution depends for its efficacy".³⁹

Where there has been an unfair trial in Australia, clearly there has been a significant departure from the rule of law. When the incarcerated person is subsequently informed by state officials (the 'expert' witnesses) of the fact that they had given erroneous evidence at the trial, that person is also told that he has no right to complain to any court, because his appeal took place before being informed of those defects. We say that also represents a significant denial of due process and of natural justice which are both important elements of the rule of law. We say that the Australian appeal rights and their relationship to the ICCPR must be understood within this context of Australia's domestic law and its constitutional requirements.

The Chief Justice in *Tolani* said that another important assumption is that the courts of the States must continue to present the defining characteristics of courts especially "the characteristics of independence, impartiality, fairness and adherence to the open-court principle". All of which are undermined when a decision of the court has been procured by the use of evidence which was incomplete or misleading. It is further undermined when an attorney-general, acting in an administrative capacity as a government official (rather than as a law officer guided by legal principles) refuses to allow the courts to act to correct the matter.

³⁸ *Totani* at [69] referring to *South Australia v Totani* (2009) 105 SASR 244 at 281 [157] per Bleby J.

³⁹ *Totani* at [61] citing *Thomas v Mowbray* (2007) 233 CLR 307 at 342 [61] per Gummow and Crennan JJ; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 351 [30] per Gleeson CJ and Heydon J; [2005] HCA 44; *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193 per Dixon J; [1951] HCA 5.

Importantly for our purposes, the chief justice said that “[a]t the heart of judicial independence, although not exhaustive of the concept, is decisional independence from influences external to proceedings in the court, including, but not limited to, the influence of the executive government and its authorities.”⁴⁰ Yet, it is said, the courts are powerless to deal with a manifest miscarriage of justice unless the state attorney-general gives them permission to do so. It is further said that upon a refusal to give such permission, there is no requirement to give reasons for the refusal.

The Chief Justice in *Tolani* stated, “[d]ecisional independence is a necessary condition of impartiality. Procedural fairness effected by impartiality and the natural justice hearing rule lies at the heart of the judicial process.”⁴¹ The linking of ‘procedural fairness’ with ‘natural justice’ in this way is precisely what has been denied to people in the situation we refer to. The person has never had the chance to confront the case against them. In effect, guilt is maintained by public officials who act administratively and ignore the legal guidance laid down by the High Court.

In the parliamentary debate on the proposal to establish a Criminal Cases Review Commission for South Australia, the government representative in the Legislative Assembly, the Hon. R.P. Wortley said (in reference to the NSW case of Janine Balding) that alleged miscarriages of justice should not be reviewed because it may upset the families involved.⁴² It is difficult to understand how they could be comforted by the conviction of an innocent person.

The Chief Justice added that, “[t]he open-court principle, which provides, among other things, a visible assurance of independence and impartiality, is also an ‘essential aspect’ of the characteristics of all courts, including the courts of the States.”⁴³ Clearly the “open-court principle” is absent where important admissions, made by senior officials on oath concerning deficiencies in their evidence in a serious criminal trial is unable to be heard in any court

⁴⁰ *Totani* at [62].

⁴¹ *Totani* at [62]. The footnote adds: “For a recent discussion of the natural justice hearing rule in this context, see *International Finance Trust Co Ltd* (2009) 240 CLR 319 at 379-384 [139]-[150] per Heydon J.”

⁴² Legislative Council - Wednesday, 22 June 2011, Page 3250, Criminal Cases Review Commission.

⁴³ *Totani* at [62] citing *Russell v Russell* (1976) 134 CLR 495 at 520 per Gibbs J; see also at 505 per Barwick CJ, 532 per Stephen J; [1976] HCA 23.

proceedings in relation to the reliability of that conviction.⁴⁴ The Chief Justice pointed out, “[f]orms of external control of courts ‘appropriate to the exercise of authority by public officials and administrators’ are inconsistent with that [open-court] requirement.”⁴⁵

The fundamental importance of that to our judicial system was underlined when the Chief Justice said, “[t]he requirement [the open-court principle] is not a judicially generated imposition. It derives from historically based assumptions about courts which were extant at the time of Federation.”⁴⁶

In many of these cases, much is made about the public distaste of the acts concerned or of the people involved with them. As we have seen this was evidently so with the Janine Balding case in NSW and the Henry Keogh case in South Australia. On this too, the Chief Justice had some salutary words for us to reflect upon:

The rule of law, upon which the Constitution is based, does not vary in its application to any individual or group according to the measure of public or official condemnation, however justified, of that individual or that group. The requirements of judicial independence and impartiality are no less rigorous in the case of the criminal or anti-social defendant than they are in the case of the law-abiding person of impeccable character.⁴⁷

The Australian Human Rights Commission may well be right in asserting that the ICCPR only requires that one appeal be allowed from a conviction. We would say that ‘due process’, ‘natural justice’ and the ‘rule of law’ must understand that to mean one appeal *after* the state officials have put all of the cards on the table.⁴⁸ Otherwise, people who are entitled to have their convictions set aside according to the substantive law, will be required to serve out their sentences, because of the denial of an effective remedy for the breach of their right to a fair trial.

We would say that would amount to arbitrary detention or cruel and unusual punishment which also offends against the ICCPR provisions. But that discussion we must leave to another occasion.

⁴⁴ See the discussion of this in relation to the case of *R v Keogh* in Moles, note 1.

⁴⁵ *Totani* at [72] citing *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 553 [10] per Gummow, Hayne, Heydon and Kiefel JJ.

⁴⁶ *Totani* at [72].

⁴⁷ *Totani* at [73].

⁴⁸ In effect, the prior appeal should be regarded as a ‘nullity’, see *Forensic Investigations*, chap 6.

