The law on non-disclosure in Australia: All rights — no remedies?

Dr Bob Moles[1] *NETWORKED KNOWLEDGE*

The recent work of Sangha, Roach and Moles has pointed to a wide range of deficiencies in the conduct of criminal trials. Justice Cromwell of the Canadian Supreme Court has summarised it thus:

> In their study of miscarriages of justice in Britain, Canada and Australia, Professors Sangha, Roach and Moles identify recurring problems common to the experience of those jurisdictions. These include the use of preliminary tests as conclusive evidence, the failure to identify or disclose procedural errors in the use of scientific methods or tests, misinterpretation or misunderstanding of the significance of findings and experts going beyond their area of expertise or not explaining their findings or controversies and uncertainties in the science in a clear, impartial manner. They also note that experts have sometimes misunderstood their obligation of impartiality, have failed to apply the basic research methods of science and that judges and lawyers have failed to be sufficiently sceptical of both the science and the witnesses purporting to rely on it.[2]

At the heart of these difficulties is the central significance of the issue of non-disclosure.[3]

The duty of disclosure

Australian law states that every citizen is entitled to the presumption of innocence, until convicted of a serious crime following the verdict of a jury (sometimes a judge) after a fair trial held according to law. If the trial ceases to be fair, the verdict of guilty, and the criminal conviction that follows, is intrinsically flawed and must be set aside, allowing for a possible retrial of the matter.[4] 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.[5] The duty of disclosure includes the obligation to make enquiry to ascertain whether discoverable matter exists and to ensure its preservation.[6]

This obviously includes material which goes to the credit of prosecution witnesses. It may include for example, a previous inconsistent statement, or *any other matter* which is adverse to the character of a prosecution witness.[7]

R v Cooley (*Cooley*) is important in this context. It involved an adverse finding by a medical board in relation to a prosecution witness. Subsequently, that information was not used at trial. After the trial the medical board finding was overturned. By the time of Cooley's appeal, the integrity of the witness had been restored.

When the appeal court looked back to the state of knowledge at the time of the trial, it was clear that the findings of the medical board could not constitute either "new" or "fresh" evidence as is usually required for a successful appeal:

> That material was in existence and available to Cooley by reasonable diligence; indeed the proposition that it was in the public domain is not challenged *the question is always whether or not what occurred has resulted in a miscarriage of justice* … .[8]

As the court said, even an innocent failure to disclose relevant material may nonetheless constitute a miscarriage of justice.[9]

If, after conviction, the Crown discloses that it had in its possession or available to it documentary material which had been requested, but which had been innocently denied by the Crown, that is a situation which could lead to a miscarriage of justice.[10]

In *Cooley* it was said:

> … if material was available to the Crown, on the basis that it was known to the police, for example, the accused was entitled to it, whether or not its existence was known to prosecuting counsel: *R v Ward* (1993) 93 Cr App R 1. I accept these submissions.[11]

In such a case, it is not necessary for the appellate court to determine whether there was any *fault* on the part of the prosecutor. Indeed, in *Mallard v R (Mallard)*, the court said that once it was known that certain evidence had been in the possession of investigating police before, and during the trial, and had not then been disclosed to the appellant, it did not matter whether any of it had actually been in the possession of the Director of Public Prosecutions.[12]

The issue in *Grey v R (Grey)* was that a Crown witness had in a previous case been provided by the police with a reference (a "letter of comfort") although

they knew that he had been engaged in earlier questionable activities.[13] The witness was presented by the Crown in that case as a reliable witness. The High Court said that "this was a disingenuous basis upon which to present [the witness]". Because of this conduct, the accused had been prevented from opening up "a fertile ground of cross-examination".[14] As a result, there had been a miscarriage of justice and the conviction was quashed. It was not the sort of miscarriage to which the fresh evidence rule applied. As the court said, it may be "one thing to say that the defence knew or could have found out about various aspects of the unsavoury behaviour on the part of [the witness], but it was an altogether different thing to say that it knew of the special relationship between [that witness] and the police".[15]

The central question is whether in the absence of material evidence the accused received a fair trial, understood as a trial resulting in a verdict "worthy of confidence"; the fruits of the investigation are the "property of the *public* to be used to ensure that justice is done".[16] The fundamental issue is whether the exculpatory evidence which was not presented to the jury led to a conclusion that the trial cannot enjoy public confidence.[17] In *Antoun v R* Kirby J said:

> At stake is something greater even than the interests of the parties to the case. At stake is the integrity of our system of law and justice.[18]

He went on to say that it might always be possible to say that a prosecution witness was willing to divulge the information, but was simply not asked. However, the defence lawyer should not be put in the position of having to try and find out in front of the jury if such material exists. As Kirby J said, if the defence is unaware of what evidence is available, it should not be required to "fossick for information" of this kind and to which it was entitled.[19]

In *Grey*, Kirby J stated that to treat that type of disclosure issue as one amenable to the rules governing fresh or new evidence following a criminal trial is effectively to convert the prosecutor's duty to disclose into an accused's obligation to find out.[20] 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?[21]

The point of appellate review is not to discover whether there was misconduct by the prosecution. It is to determine whether the non-disclosed material was relevant to the credibility and reliability of the prosecution witnesses or the prosecution case.

In *Mallard*, the specific issue was non-disclosure to the defence. However, the High Court has made it clear that the fundamental question is whether there has been non-disclosure "to the jury". For example, there may have been in existence facts or evidence which were either ignored or overlooked by the defence. In this respect, it is important to bear in mind that where a miscarriage of justice is said to arise from a failure of process, it is the *process* that is judged, not the performance of the participants in the process. Where the conduct of counsel is said to give rise to a miscarriage of justice, it is what was done or omitted that is of significance, rather than *why* that occurred.[22]

In *Mallard*, Kirby J cited *Berger v United States*[23] in stating that the role of the prosecutor is:

> the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.[24]

Grey referred to two types of defect in a trial. One was where there had been a significant denial of procedural fairness. The other was where there had been a sufficiently serious breach of the presuppositions of the trial. This was a reference to a trial which had miscarried to such an extent as hardly to be a trial at all, or where an irregularity has occurred which is such a departure from the essential requirements of the law that it goes to the root of the proceedings. It is then no part of the function of a court of criminal appeal to hold that the accused is "so obviously guilty that the requirement of a fair trial according to law can be dispensed with".[25]

The proviso not applicable

The proviso is the statutory provision which allows the appellate court to disregard minor errors at trial. As Kirby J pointed out, "the proviso has no application to such a case":

> It is not the purpose of the proviso to substitute for trial by jury, in effect, trial 'with the Court of Criminal Appeal as the tribunal of fact'.[26]

He went on in *Grey* to say that a conclusion of "not guilty" does not have to be a conclusion that a jury would necessarily have reached; perhaps it does not represent the most probable verdict of a reasonable jury; it just needs to be a definite possibility. He said that *Grey* was deprived of such a conclusion because he did not have access to information that, forensically, would have strengthened his attack on the credit of the prosecution witnesses:

> The prosecution should gain no such advantage from its conceded default in [failing to disclose] this important information to the defence.[27]

The non-presentation of evidence which has significant forensic value is sufficient to *exclude* the application of the proviso. The Court of Criminal Appeal is

obliged to consider the cumulative effect of non disclosed relevant evidence that was in the hands of the police (or forensic experts) and thus available to the prosecution.

However, the proviso, where it applies, does bring with it a shift in the onus of proof. Once a miscarriage of justice is demonstrated, it is *the prosecution* that bears the burden of persuasion that the accused had not lost "a chance which was fairly open to him of being acquitted" or "a real chance of acquittal".[28]

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.[29] It involved a greater range of non-disclosure issues than any of the other cases we have reviewed in Australia, Britain or Canada. It also represents the most fundamental challenge to the way in which the Australian legal 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 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, then and since.[30]

The Keogh case involved an alleged homicidal drowning in a domestic bath. 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.[31] 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.

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 that he then accepted that the principle he had relied upon at trial had not been a valid one.[32]

Similarly with the principle essential to the diagnosis of drowning. Variously 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:

> 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.[33]

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. One said that it "didn't come up in conversation" with the prosecutor. The other said that he did not think the test result was relevant.[34]

A further significant non-disclosure was of the *Cooley* type. 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 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 it was subsequently found not to exist. The Coroner 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".[35]

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.[36] As we mentioned earlier, Kirby J stated that the fruits of an investigation are the

"property of the *public* to be used to ensure that justice is done".[37] Clearly that view was not taken in this case.

The principles discussed earlier make it clear that each one of the non-disclosures we have mentioned in Keogh's case justifies the quashing of the conviction. In combination, they present an overwhelming case for his conviction to be set aside.

No remedies

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

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.[38] They attempted to bring the matter to the High Court, but found that the High Court cannot accept fresh evidence in such a case.[39] 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.[40]

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.[41]

It is arguable that this situation is in breach of the UN Covenant on Civil and Political Rights to which Australia is a signatory. The various provisions state that a person has a right to a fair trial, to challenge the legality of their imprisonment by a process which is timely and effective and which enables them to have their challenge heard in court proceedings. The only court proceedings in relation to substantive matters in the Keogh case took place before much of the non-disclosed material was revealed.

A situation such as this could not have occurred in Britain where they have the Criminal Cases Review Commission which 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.

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.[42]

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. Yet, despite ten years of proceedings in various courts and tribunals he is told that he has no legal right to be heard. So, although the non-disclosure 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 of little effect.

In effect, we have rights but no remedies.

Dr Bob Moles,
Co-developer and legal researcher,
Networked Knowledge,
Email:bobmoles@iprimus.com.au.

Footnotes

1. Dr Bob Moles (with Sangha B and Roach K) is joint author of *Forensic Investigations and Miscarriages of Justice* (2010) Irwin Law, Toronto and Federation Press, Australia.
2. The Honourable Thomas A. Cromwell, Judge of the Supreme Court of Canada, The Macfadyen Lecture "The Challenges of Scientific Evidence" 2 March 2011 Edinburgh, The Scottish Council of Law Reporting in reference to *Forensic Investigations and Miscarriages of Justice*.
3. Our discussion of the non-disclosure issue is adapted from the extended discussion of the Australian law on miscarriages of justice in *Forensic Investigations* Ch 5.
4. *Grey v R* (2001) 75 ALJR 1708; 184 ALR 593; [2001] HCA 65; BC200107041 at [53]; Kirby J.
5. *Grey v R* (2001) 75 ALJR 1708; 184 ALR 593; [2001] HCA 65; BC200107041 at [46]; Gleeson CJ, Gummow and Callinan JJ referring to the consideration of this matter by the Court of Criminal Appeal of New South Wales in *R v Grey* (2000) 111 A Crim R 314 at 322; [2000] NSWCCA 46; BC200000659 noted that there it was observed that Rule 66 of the New South Wales Bar Association provided: "A prosecutor must disclose to the opponent as soon as practicable all material available to the prosecutor or of which the prosecutor becomes aware which constitutes evidence relevant to the guilt or innocence of the accused, unless such disclosure, or full disclosure, would seriously threaten the integrity of the administration of justice in those proceedings or the safety of any person."
6. *Cooley v Western Australia* (2005) 155 A Crim R 528; [2005] WASCA 160; BC200506047 at [57].
7. Above at [65]; Roberts-Smith JA.
8. Above at [53]; Roberts-Smith JA (emphasis added).
9. *Button v R* (2002) 25 WAR 382; [2002] WASCA 35; BC200200464 at [58]; Malcolm CJ citing *Clarkson v Director of Public*

Prosecutions [1990] VR 745 at 755; BC8900452 and *R v Apostilides* (1984) 154 CLR 563; 53 ALR 445; BC8400498.

10. *Button v R* (2002) 25 WAR 382; [2002] WASCA 35; BC200200464 at [14]; Malcolm CJ citing his judgment in *Bradshaw v R*, unreported; CCA SCt of WA; Library No 970228; 13 May 1997 [11–12].
11. Above at [58].
12. *Mallard v R* (2005) 224 CLR 125; 222 ALR 236; [2005] HCA 68; BC200509688 Gummow, Hayne, Callinan and Heydon JJ at [16].
13. Above n 3 at [55].
14. Above at [16–18]; Gleeson CJ, Gummow and Callinan JJ.
15. Above at [23].
16. Above n 11, [71] Kirby J discussing the provisions of the Canadian Charter of Rights and Freedoms, (emphasis added).
17. Above, Kirby J In *Antoun v R* (2006) 80 ALJR 497; 224 ALR 51; [2006] HCA 2; BC200600326 at [28] Kirby J said that "the manifest observance of fair procedures is necessary to satisfy the requirements not only of fairness to the accused but also of justice before the public so that they may be satisfied, by attendance or from the record, that the process has followed lines observing basic rules of fairness".
18. *Antoun v R* (2006) 80 ALJR 497; 224 ALR 51; [2006] HCA 2; BC200600326 at [47].
19. *Mallard v R* (2005) 224 CLR 125; 222 ALR 236; [2005] HCA 68; BC200509688 at [66]; Kirby J citing Grey.
20. *Grey v R* (2001) 75 ALJR 1708; 184 ALR 593; [2001] HCA 65; BC200107041 at [50]; Kirby J.
21. Above n 18 at [23–4]; Gummow, Hayne, Callinan and Heydon JJ.
22. *Nudd v R* (2006) 80 ALJR 614; 225 ALR 161; [2006] HCA 9; BC200601022 at [8]; Gleeson CJ.
23. *Berger v United States* (1935) 295 US 78 at 88; 79 L Ed 629; 55 S Ct 629.
24. Above n 18 at [70].
25. Above.
26. Above n 19 at [56]; Kirby J; A similar point was made in *Cesan v R; Mas Rivadavia v R* (2008) 236 CLR 358; 250 ALR 192; [2008] HCA 52; BC200809727; French CJ.
27. Above at [72].
28. Above at [25]; Gleeson CJ, Gummow and Callinan JJ citing *R v Storey* (1978) 140 CLR 364 at 376; 22 ALR 47; 52 ALJR 737; BC7800075.
29. See *Losing Their Grip — the case of Henry Keogh* (2006) Elvis Press, Adelaide. The full text of this book is available online at http://netk.net.au/.
30. See, for example *Medical Board of SA v Manock* (2008) 255 LSJS 181; [2008] SADC 62; *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 as determining whether their non-disclosures might have caused a miscarriage of justice.
31. See *Losing Their Grip* at pp 217–221 "which hand".
32. *Medical Board of SA v Manock* (2008) 255 LSJS 181; [2008] SADC 62.
33. Transcript, Medical Board hearing, at p 339; *Losing Their Grip* p 197–8; "differential staining".
34. This was the principal issue in *Keogh v James* (2009) 264 LSJS 461; [2009] SASC 258; BC200907805; *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".
35. 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/.
36. *Losing Their Grip*, Ch 7 p 118; 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."
37. *Mallard v R* (2005) 224 CLR 125; 222 ALR 236; [2005] HCA 68; BC200509688, Kirby J (emphasis added) discussing the provisions of the Canadian Charter of Rights and Freedoms.
38. *R v Keogh* (2007) 249 LSJS 315; 175 A Crim R 153; [2007] SASC 226; BC200704818, 22 June 2007 CCA, Doyle CJ, Bleby and Sulan JJ rejecting application. See generally Forensic Investigations p 138.
39. *Forensic Investigations* p 138 discussing *Mickelberg v R* (1989) 167 CLR 259; 86 ALR 321; 43 A Crim R 182; [1989] HCA 35 at [2] per Mason CJ.
40. The statutory provision is s 369 of the Criminal Law Consolidation Act (SA). In *Von Einem v Griffin* (1998) 72 SASR 110; 201 LSJS 111; [1998] SASC 6858; BC9806968 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 two years.
41. *Von Einem v Griffin* (1998) 72 SASR 110; 201 LSJS 111; [1998] SASC 6858; BC9806968 at [136] Lander J.
42. See *Forensic Investigations*, Ch 3 Britain, Ch 4 Canada; also Ch 10 on the Criminal Cases Review Commission.