

## The right to a fair trial in the context of international human rights obligations

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In previous articles,<sup>1</sup> we have suggested that the criminal appeal provisions in Australia fail to comply with the requirements of the United Nations International Covenant on Civil and Political Rights (ICCPR) to which Australia is a signatory. If true, of course, that would amount to a very serious defect in Australia's domestic criminal procedures.

In the July edition of *Direct Link*, Danielle Noble of the Australian Human Rights Commission (HRC) stated in her opening paragraph that she was to consider "the extent to which the current procedures for appeal and review of criminal convictions in Australia meet the standards of a fair trial established under international law." In her conclusion she stated that "it is arguable that the three tier level of criminal appeal in Australia meets the structural requirements of the right to a fair trial under Art 14(5) of the ICCPR".<sup>2</sup>

Regrettably, there are flaws in that position which we would like to explain.

The article does mention the relationship between the Australian provisions for criminal appeals and the very limited specifications in the ICCPR which directly bear upon them. On the face of it, there appears to be some degree of compatibility. What the article does *not* explain is how the requirement for a fair trial relates to those appeal provisions. There is no discussion of how a manifestly unfair trial relates to those provisions. There is no mention of the important right in the ICCPR which also guarantees that any person whose rights are violated shall have an effective remedy.<sup>3</sup>

We suggest that the analysis should commence with an understanding of what is meant by the right to a fair trial. That will help us to identify the circumstances in which trials can be said to be unfair. Then we should analyse the consequential effects which arise from an unfair trial.

The *right* to a fair trial is set out in Pt II Art 9.14 of the ICCPR.

The *criteria* for what amounts to a fair trial are set out in Australia's domestic law in the decisions of the High Court.<sup>4</sup> 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.<sup>5</sup>

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?<sup>6</sup>

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.<sup>7</sup>

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....<sup>8</sup>

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.<sup>9</sup>

Suppose we have a case where a conviction has occurred following a trial which was unfair according to the principles laid down by the High Court. The person who was subject to that unfair trial is also the recipient of the guarantee contained in the ICCPR of the right to

a fair trial — a guarantee which according to the Covenant imposes obligations to comply with its provisions on all Australian citizens.<sup>10</sup> 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.<sup>11</sup>

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.”<sup>12</sup>

It is that position, correctly explained of course by Kirby J, which we say amounts to a breach of the Convention obligation to ensure a fair trial and where necessary to provide an effective 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.<sup>13</sup> 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 Attorney-General who is not entirely an independent arbiter in such matters.<sup>14</sup> The Attorney-General, it is said has no legal duty to act fairly, and indeed, has no legal duty at all.<sup>15</sup> 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.

In the recent case of *South Australia v Totani*, (*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”.<sup>16</sup> An important element of the judgment was the fact that “[j]udicial independence is an assumption which underlies Ch III of the Constitution ...”<sup>17</sup>

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.”<sup>18</sup> 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.”<sup>19</sup>

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 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”.<sup>20</sup> 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”.<sup>21</sup>

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 *Totani* 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”.<sup>22</sup> 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.

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.”<sup>23</sup> 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. This is a point which Noble acknowledged might be in conflict with the ICCPR.

The Chief Justice in *Totani* 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.<sup>24</sup>

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 Honourable 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.<sup>25</sup> 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.”<sup>26</sup> 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 proceedings in relation to the reliability of that conviction.<sup>27</sup> 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.”<sup>28</sup>

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.<sup>29</sup>

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.<sup>30</sup>

Noble 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.<sup>31</sup> 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.



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## Footnotes

1. Moles B “The Law on non-disclosure in Australia: All rights — no remedies” (2011) 8(8) *DL* 86-90; Sangha B, Moles B “Post-conviction reviews — Strategies for change” (2011) 8(9) *DL* 98–102.
2. Noble D “The right to a fair trial and avenues for criminal appeal in Australia” (2011) 8(9) *DL* 103–106.

3. Pt II Art 2. 3.1.
4. These have been set out in Sangha, Roach and Moles, *Forensic Investigations and Miscarriages of Justice* (2010) Irwin Law, Toronto and Federation Press, Australia, ch 5.
5. *Grey v R* (2001) 184 ALR 593; 75 ALJR 1708; [2001] HCA 65; BC200107041 at [46]; Gleeson CJ, Gummow and Callinan JJ.
6. *Mallard v R* (2005) 224 CLR 125; 222 ALR 236; [2005] HCA 68; BC200509688 at [23]–[24]; Gummow, Hayne, Callinan and Heydon JJ.
7. *M v R* (1994) 181 CLR 487; 126 ALR 325; 69 ALJR 83; BC9404665 at [9].
8. This citation from *Davies v R* (1937) 57 CLR 170 at 180; [1937] VLR 205; [1937] ALR 321; BC3700046 was referred to by Gleeson CJ in *Nudd v R* (2006) 225 ALR 161; 80 ALJR 614; [2006] HCA 9; BC200601022 at [4]. See also the discussion of this issue in *R v Stafford* [2009] QCA 407; BC200911705 at [149].
9. *R v Stafford* [2009] QCA 407; BC200911705. 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 Moles R N, *Losing Their Grip — the case of Henry Keogh* (2006) Elvis Press. The full text is available online at <http://netk.net.au>.
10. See Sangha/Moles note 1 at 98.
11. See Moles note 1 at 89.
12. *Forensic Investigations*, ch 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.”
13. On this see Sangha/Moles note 1 at 99–100.
14. Above 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.
15. 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; 201 LSJS 111; [1998] SASC 6858; BC9806968.
16. *South Australia v Totani* (2010) 242 CLR 1; 271 ALR 662; [2010] HCA 39; BC201008388 at [1] [*Totani*] citing Dixon, “Marshall and the Australian Constitution”, (1955) 29 ALJ 420 at 424–5.
17. *Totani* at [1].
18. *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; 206 ALR 315; [2004] HCA 31; BC200403588; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 552–3 [10] per Gummow, Hayne, Heydon and Kiefel JJ; 242 ALR 191; [2008] HCA 4; BC200800373; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 363 [81] per Gaudron J; 63 ALD 577; [2000] HCA 63; BC200007446.
19. *Totani* at [1].
20. *Totani* at [69] referring to *South Australia v Totani* (2009) 105 SASR 244 at 281 [157]; 259 ALR 673; [2009] SASC 301; BC200908742 per Bleby J.
21. *Totani* at [61] citing *Thomas v Mowbray* (2007) 233 CLR 307 at 342 [61] per Gummow and Crennan JJ; 237 ALR 194; [2007] HCA 33; BC200706044; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 351 [30] per Gleeson CJ and Heydon J; 219 ALR 403; [2005] HCA 44; BC200506315; *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193 per Dixon J; [1951] ALR 129; (1951) 24 ALJR 485; BC5100030.
22. *Totani* at [62].
23. *Totani* at [62].
24. As above. 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.”
25. Legislative Council — Wednesday, 22 June 2011, Page 3250, Criminal Cases Review Commission.
26. *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; 9 ALR 103; 1 Fam LR 11,133; BC7600041.
27. See the discussion of this in relation to the case of *R v Keogh* in Moles, note 1.
28. *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; 242 ALR 191; [2008] HCA 4; BC200800373.
29. *Totani* at [72].
30. Above at [73].
31. In effect, the prior appeal should be regarded as a “nullity”, see *Forensic Investigations*, ch 6.