Why we need a Criminal Cases Review Commission

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The background

In November 2010 a Bill to establish a Criminal Cases Review Commission (CCRC) was introduced into the South Australian Parliament. The Bill was timed to coincide with the publication of the book *Forensic Investigations and Miscarriages of Justice — The Rhetoric Meets the Reality* by Sangha, Roach and Moles,[1] which explained in some detail the workings of the CCRC based in Birmingham, dealing with cases from England, Wales and Northern Ireland.[2]

Since 1997, 72 murder convictions, 37 rape convictions and 320 convictions of all types have been overturned there.[3] It is important to bear in mind that all these cases had previously been the subject of an appeal which failed. Indeed, normally, the CCRC will only look at cases where a previous appeal has been unsuccessful.

It is an independent non-departmental statutory body which was initially established with eleven Commissioners and a staff of around 100. The former investigative journalist, David Jessel, who had produced a number of television programs which led to convictions being overturned, was appointed as one of the first Commissioners. When the Commission refers a case to the Court of Criminal Appeal, it is obliged to hear the appeal. The CCRC produces written reasons for its decisions. If a person feels that a failure to refer their case is unfair, they can bring an application for judicial review of the decision.[4] Once a case is referred, the appeal is then in the hands of the appellant's lawyers.

Some of the cases which have been overturned following CCRC referrals are far more marginal than the cases which we have researched in Australia.[5] Yet, despite the record, there are some in the UK who take the view that the CCRC is too timid in its inquiries and referrals. Michael Naughton, Director of the Innocence Project (UK) has been a vocal critic and claims that lack of interest in the issue of "factual innocence" is a problem.[6] David Jessel has stated that this claim is "nonsense" and that it is the output of a "naive academic cottage industry and a twee semantic debate".[7] What cannot be doubted is the fact that in the UK, the issue of miscarriages of justice is hotly debated, and stirs up passions which manifest in street marches and protests.[8]

By contrast, Australia has no CCRC, and very little public discussion of these issues. Once an appeal has been heard, there is thereafter no *legal* right to any further review of the case, even where compelling evidence of innocence emerges.[9] We say that this position is based upon a misapplication of legal principles and is contrary to the provisions of the United Nations International Covenant on Civil and Political Rights (ICCPR).[10]

A parliamentary inquiry is to consider the South Australian CCRC Bill. The Terms of Reference state that it will consider alternatives to the current petition procedure; whether there should be a move to establish a national CCRC; and any other related matter. So what sort of cases do we have which demonstrate the need for a CCRC?

The South Australian cases

In South Australia there are approximately a dozen cases which we have researched, each of which comes within the criteria laid down by the High Court as constituting a miscarriage of justice. It is important to bear in mind that the appeal court is not seeking to determine guilt or innocence, but merely whether a substantial or significant error has occurred at trial. If it has and there is a *possibility* that the jury would have been influenced by it, then the conviction *must* be set aside.[11]

In the early 1970s, Mr Van Beelen was convicted of the murder of a young girl on a beach near Adelaide.[12] Timing of death in this case was crucial, because Van Beelen had only been at the beach for 30 minutes around 4pm. On the basis of an examination of the stomach contents of the dead girl, the pathologist said it was "virtually certain" that the young girl was dead by 4.30pm. Some articles were published soon after which demonstrated that such claims were not scientifically based. In fact, in another case a few years later the same pathologist was asked:

> Counsel: And would you agree that estimates of time of death on the basis of stomach contents are very unreliable.
> Pathologist: I do agree with that.

It is clear that one could not be "virtually certain" on the basis of a method which is "very unreliable".

Stephen Truscott's conviction in Ontario in 1959 had been based upon similar evidence.[13] It was overturned in August 2007 because the court accepted that such evidence was not reliable. Truscott was awarded $6.5 million in compensation.

In 1979, David Szach had been convicted of the murder of criminal lawyer Derrance Stevenson.[14] After being shot, Stevenson's body was placed in a freezer where it was found the following day. The pathologist calculated a time of death which coincided with witness statements which placed Szach at the scene around that time. At the trial, the prosecutor said, "... the objective and scientific evidence means that he was dead by 6.40, *and the accused was there*." Professor Bernard Knight, a world-leading authority on the issue of timing death based upon post mortem cooling,[15] said of the calculations in this case, "... all I can say is that in my opinion his reliance upon very speculative and tenuous calculations is ill founded and that the degree of accuracy he offers cannot be substantiated."[16] He said in relation to another aspect of the calculations, "this to me appears to be a figure snatched from the air without any scientific validation."

In the case of Gerald Warren, a young aboriginal boy found dead on a dirt track just outside Port Augusta, the pathologist had initially stated that he died after having fallen from a moving vehicle whilst intoxicated.[17] Subsequently two men were convicted of his murder on the basis that they had beaten him with a metal rod, and driven their vehicle backwards and forwards over his body. During the trial, when questioned about whether Warren had fallen from the vehicle or had the vehicle driven over him, the pathologist stated, "the forces involved in either scenario are very similar." The pathologist also stated that certain injuries may have been caused by being beaten with a metal rod with a thread on the end (as it appeared at trial) or perhaps by the corduroy fabric of his trousers coming into contact with his hand and face (as was initially suggested). It was his view that either scenario would leave similar injuries.

Mrs Emily Perry had been convicted of the attempted murder of her husband by poisoning him with arsenic.[18] In overturning the conviction in the High Court, Murphy J said that the prosecution's evidence fell far short of the proper standard. He said that the investigation and interpretation of data should be presented to the court by people who are *substantially* and not merely *nominally* experts. He went on to say that some of the evidence in the case "revealed an appalling departure from acceptable standards of forensic science..." adding, "the evidence was not fit to be taken into consideration".

The case of Derek Bromley involved a person who had been found dead in the river Torrens in Adelaide.[19] It was accepted that his body had been immersed in water for five days. At trial, the pathologist gave evidence concerning a number of injuries to the body which he variously described as resulting from blows, kicks, fists, contact with rough ground and possible karate chops. The injuries were said to have occurred shortly before death which was said to have been caused by drowning, after the victim had been beaten and thrown in the water. Professor Plueckhahn, an expert forensic pathologist, with special expertise of drowning cases stated, after having reviewed the evidence in this case, "[i]t is my firm opinion that there is no scientific basis in the post mortem findings for an unequivocal diagnosis of death from drowning."[20] In addition, it is clear that where a body has been immersed in water for two days or more, it is not possible to distinguish between post mortem and ante mortem injuries and to identify particular causes of injuries.

We have previously discussed the details relating to the case of Henry Keogh and the Baby Deaths cases which are also important in this context.[21]

The procedural confusions

The problem with getting any review of such cases is that the Attorney-General's department (at least in South Australia and New South Wales) does not appear to apply the principles laid down by the High Court for the setting aside of such convictions.

In the Bromley case, it was said that it would not be referred back to the court because, "[t]he Attorney-General's advice is that none of the arguments made in the petition casts any doubt upon the veracity of the verdict."[22] Yet none of the High Court cases setting out the basis upon which an appeal might be allowed requires the court of appeal to be satisfied that the verdict is "true". In fact, there are many cases where the High Court disavows any notion of usurping the function of the jury.[23] As we saw earlier, the key issue is whether the evidence "contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force."[24] We might also ask how an Attorney-General could be satisfied that the verdict of the jury was true, if the evidence upon which it was based was unreliable?

Similar problems have occurred in New South Wales in relation to the "sleeping judge" cases. In the case of *R v Duncan and Perre*,[25] the Attorney-General of NSW stated in his letter rejecting the petition, that "it was generally accepted that Judge Dodd had been asleep during portions of the trial."[26] However, he went on to say that the *consequences* of that sleeping were not established so as to give rise to a doubt about the guilt of Duncan and Perre. Curiously, the Attorney-General continued to add that the trial transcript in this case made no reference to the judge being asleep or inattentive. That observation might have been useful to support an

outright denial of the judge being asleep, which was not the case here. To accept that the judge was asleep at times (as the Attorney-General did) and then to add that there were no references to that in the transcript merely goes to show that evidence extrinsic to the transcript is necessary to establish a more complete understanding of the situation.

However, extrinsic evidence in relation to adverse consequences of a judge being asleep may well be unobtainable. As the Chief Justice of the High Court pointed out in *Cesan v The R (Cesan)*,[27] (another Judge Dodd case) affidavits in support of the applicants stated that the solicitor at trial said something to the effect, "[l]ook mate it doesn't really matter, it happens with this judge."[28] Counsel was reported to have said there was nothing they could do about it[29] and the judge's associate was said to have "shrugged her shoulders".[30] Then, in a comment which could have done little to increase confidence in the NSW judiciary, the solicitor was said to have added, "that 85% of all the judges that her son could have had would have been much worse."[31] Plainly, it is not a good situation where it is suggested that a judge who is awake would be a worse proposition than one who is asleep.

It is correct to note that the majority in *Cesan* did take a consequentialist approach to the issue of sleeping judges. However, the Chief Justice stated that the fact that the judge was asleep was sufficient *in itself* to set the conviction aside. We take the view that the Chief Justice was correct.

He had much to say about maintaining public confidence in the judicial process and that the appearance of sleeping judges in serious criminal trials would not be consistent with that.[32] We would also add that there are important instrumental reasons why the effects-based approach is inimical to justice. If applicants have to provide *evidence* to prove that adverse consequences arose from the judge being asleep at the trial, how are they to do that?

Plainly, the most serious adverse consequences arise from the effect which the appearance of a sleeping judge would have upon the jury. However, in all Australian jurisdictions, it would be a criminal offence to discuss or solicit information from any jury member about their deliberations. It is also an offence to publish any information arising from such deliberations. As the Chief Justice noted in *Cesan*, the duty of counsel at trial would be to make some objection during the proceedings where the judge was asleep. However, he also pointed out that one cannot infer that a failure to do that meant either that the juge was not asleep, or that any such incidents which occurred were insignificant. He said that the most likely explanation was that in fact the lawyers at the trial took the defeatist view that they might as well press on because there was nothing that they could do about it.[33]

The case of *The Application of Robert Minniti*[34] (another Judge Dodd case) involved an application to a single judge for a referral to the Court of Appeal under the NSW procedure.[35] There the judge determined, *after a detailed examination of the transcript*, that no adverse effects arose in that case. However, that assessment was also problematic because, as the judge stated, she was dealing with the application in an *administrative* capacity rather than a *judicial* capacity.[36]

As mentioned previously, there may be constitutional problems where administrative procedures block access to effective court processes.[37] In addition, the ICCPR states that challenges to lawful detention should be heard by a *court*.[38] A judge or an attorney-general acting administratively may therefore not be appropriate. In a number of these cases, the procedures undertaken suggest that they are being completed as if they were a final determination of an appeal rather than as a preliminary threshold test to establish if there is an arguable case.

There are clearly many confusions which underpin both the procedural and substantive issues relating to post-conviction reviews in Australia. The development of a CCRC which is independent of the executive and the judiciary, which operates in accordance with clearly defined procedures and principles, decisions of which are judicially reviewable, and which has a right of access to publicly held materials (including police and prosecutions) would do much to boost public confidence in the attainment of justice in Australia, and the development of confidence in our legal institutions.[39]

NB: On 25 October 2011 the Australian Human Rights Commission informed the authors of this article that they would be making a submission to the South Australian Parliamentary Committee on the CCRC Bill. They felt that this would be the best means by which to address the human rights issues which we have raised in the earlier articles and with them.

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Footnotes

1. Sangha B Roach K and Moles B *Forensic Investigations and Miscarriages of Justice — The Rhetoric Meets the Reality* Irwin Law, Toronto and Federation Press Australia (2010) The CCRC is discussed in detail in Ch 10. Details of the book and abstracts of the 450 cases referred to are available at http://netk.net.au with copies of the Bill and the parliamentary reports.
2. There is a separate CCRC for Scotland. Our discussion here is based upon the work of the Birmingham CCRC.
3. Rose D "If they didn't do it, who did?" *Mail Online* 1 October 2011.
4. See for example, *Boyle v CCRC* [2007] EWHC 8; *Dowsett v CCRC* [2007] EWHC 1923; *M Boston and W Boston v CCRC* [2006] EWHC 1966.
5. Sangha B, Moles B "Post-conviction reviews in Australia — A Degree of Intellectual Isolation" (2011) 9(1) *DL* 2.
6. Naughton M "Why "safety in law" may fail the innocent — the case of Neil Hurley" *The Guardian* 11 February 2010.
7. Jessel D "Innocence or safety: Why the wrongly convicted are better served by safety" *The Guardian* 15 December 2009.
8. Kasprzak E "Birmingham Six anniversary marked by 'injustice' march" *BBC News* 9 June 2011.
9. Sangha B, Moles B, "Post-conviction reviews — Strategies for change" (2011) 8(9) *DL* 98–102.
10. Above and Sangha B, Moles B, "The Right to a Fair Trial in the Context of International Human Rights Obligations" (2011) 8(10) *DL* 112–115.
11. See, Sangha B, Moles B, "The Law on Non-Disclosure in Australia: All Rights — No Remedies?" (2011) 8(8) *DL* 86–90 and above n 10.
12. The details referred to here are set out in Moles R *A state of Injustice* (Lothian Books) 2004 Ch 5.
13. *Re Truscott* 2007 ONCA 575.
14. The details referred to here are set out in *A state of Injustice* Ch 6.
15. Henssge C Knight B Krompecher T Madea B and Nokes L *The Estimation of the Time Since Death in the Early Postmortem Period* (2002) Edward Arnold.
16. This and the following comment are from the report of Professor Bernard Knight, CBE, MD, MRCP, RCPath, DMJ (Path) Barrister, Professor of Forensic Pathology, Home Office Pathologist, Wales Institute of Forensic Medicine, 14 July 1994 to Dr Byron Collins, consultant forensic pathologist. The report is available at http://netk.net.au.
17. Above at n 14.
18. The details referred to here are set out in *A state of Injustice* Ch 7.
19. The details referred to here are set out in *Petition of Derek John Bromley To His Excellency Rear Admiral Kevin Scarce AC CSC RANR Governor of South Australia*, November 2010 available at http://netk.net.au.
20. Above "Antecedents" at [14].
21. Above n 12.
22. 15 September 2011 letter from the Governor of South Australia, http://netk.net.au/Bromley/PetitionLetter.jpg.
23. See *Forensic Investigations* above n 1 Ch 5 at 152–154.
24. *M v R* (1994) 181 CLR 487; 126 ALR 325; (1995) 19 Crim LJ 95; BC9404665 at [9].
25. *R v Duncan and Perre* [2004] NSWCCA 431; BC200408419.
26. 25 March 2011 letter from Attorney-General NSW, http://netk.net.au/Dodd/Duncan.pdf.
27. *Cesan v R; Mas Rivadavia v R* (2008) 236 CLR 358; 250 ALR 192; [2008] HCA 52; BC200809727.
28. Above at [25].
29. Above at [26].
30. Above at [27].
31. Above at [29].
32. See for example *Cesan* at [71]–[73] where French CJ referred to "the indispensable requirement of public confidence" citing the UK House of Lords in *Lawal v Northern Spirit Ltd* [2004] 1 All ER 187; [2003] ICR 856; [2003] IRLR 538; [2003] UKHL 35.
33. *Cesan* at [95].
34. *Application of Minniti, Re* [2011] NSWSC 835; BC201105778.
35. "The applicant seeks an order under s 79(1)(b) of the Crimes (Appeal and Review) Act 2001 (the Act) referring the case to the Court of Criminal Appeal to be dealt with as an appeal under the Criminal Appeal Act 1912" *Minniti* at [4].
36. "The inquiry is not a judicial act, but an administrative function" *Minniti* at [4] citing *Varley v Attorney General (NSW)* (1987) 8 NSWLR 30 at 48–50; 24 A Crim R 413; *Eastman v Director of Public Prosecutions (ACT)* (2003) 214 CLR 318; 198 ALR 1; [2003] HCA 28; BC200302601 at [124].
37. Above n 10 discussing *South Australia v Totani* (2010) 242 CLR 1; 271 ALR 662; [2010] HCA 39; BC201008388.
38. Above n 12 at 89.
39. Submissions to the South Australian Legislative Review Committee can be made up to 25 November 2011.