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This page set up by [Dr Robert N Moles](#)

On 30 December 2013 [Andrew L. Urban](#) reported in The Australian, “Sue Neill-Fraser: when justice loses appeal”.

A murder conviction which eminent lawyers and legal experts say is quite possibly a gross miscarriage of justice has exposed serious deficiencies in Australia’s criminal justice system. Not only are the restrictive and limited appeal provisions in contravention of Australia’s international human rights obligations, but innocent people can be jailed for long terms – with no further right of appeal.

“The criminal trial and the criminal appeal system is not operating correctly,” says Dr Robert Moles, former Associate Professor of Law, who has investigated alleged miscarriages of justice for 14 years, and is a joint author of *Forensic Investigations and Miscarriages of Justice*, (Irwin Law, Toronto, 2010).

“The Australian Human Rights Commission has declared that the rules which govern criminal appeals do not comply with international human rights obligations. Those rules state that once a person has been convicted and has had an unsuccessful appeal, they have no legal right to any further review of their case. This is so, even where totally compelling evidence emerges to show that they are innocent or have been wrongly convicted,” says Dr Moles.

“In contrast, the UK has a Criminal Cases Review Commission (CCRC) which has led to the overturning of some 350 convictions over the last 15 years. Australia has had a few fairly notorious cases which have exposed the existence of serious and systemic errors. They range from the cases of Edward Splatt (South Australia) and Lindy Chamberlain (Northern Territory) over 30 years ago, to the more recent cases of Gordon Wood and Jeffrey Gilham (New South Wales), Graham Stafford (Queensland) and Andrew Mallard (Western Australia).”

But it is the current Sue Neill-Fraser case that has attracted the attention of Chester Porter QC, the former Counsel Assisting the Morling Royal Commission into the Lindy Chamberlain case, as well as the Chamberlains’ lawyer Stuart Tipple.

In 2010, then 56 year old Neill-Fraser was convicted and jailed for 23 years for the murder of her partner of 18 years, Bob Chappell, on board their yacht, *Four Winds*, on Australia Day 2009, in Hobart's Sandy Bay. However, since Chappell's disappearance, no body has been found, no murder weapon produced in evidence and there were no witnesses; Neill-Fraser has strenuously denied her guilt.

Melbourne filmmaker Eve Ash spent four years making an investigative documentary, *Shadow of Doubt* (nominated as Best Feature Documentary in the 2014 AFI / AACTA Awards), which has galvanised interest and outrage with its revelations. After reviewing the case in detail, speaking at a public screening of the film in Sydney, Porter said: "As far as I'm concerned, and I do claim to be somewhat of an expert on miscarriages of justice in the criminal area, there is no doubt in my mind that this case calls for an inquiry. There are very substantial doubts about this case. I can put it this way: it would not have been at all surprising if the jury had acquitted this lady because the evidence was so weak against her. "But with the additional evidence that is now available, it is hard to see how any conviction could stand."

Tipple also spoke at the screening: "I see many parallels with this case to the Chamberlain case," he said.

Robert Richter QC is so concerned he wrote personally to the Tasmanian Attorney General, Brian Wightman, urging him to order a commission of inquiry – supported by documents that undermine the safety of the conviction. No inquiry is forthcoming.

Referring to such difficulties, Tipple said: "I also had the problem of asking the Attorney General in the NT to review the case. I was able to show him that the foetal blood spray was sound deadener, amongst a number of other things, and all I got was a letter saying that he had reviewed it after nearly 6 months of sitting on it and there was nothing cogent that required any review. So I see many parallels. It deeply disturbs me."

After viewing *Shadow of Doubt*, Bill Rowlings OAM, CEO, Civil Liberties Australia, was moved to remark: "Police filter the truth. Forensic science is abused. The prosecutor invents a murder weapon, and the judge agrees. A miscarriage of justice so blatant you won't believe it possible in 21st century Australia."

A basic problem with Australian criminal appeals is that the appeal courts have interpreted the legislation to mean that only one appeal is allowed. If, after an unsuccessful appeal, compelling evidence emerged to show there was a wrongful conviction there is no legal right

to any further appeal. But as Graham Zelik, CBE, QC, Chair of the CCRC in the UK has said: “There is no principle of finality. If it is thought that a mistake may have been made, the public interest demands that it be put right ... the principle of finality has no place in the criminal law, not in our system.”

Yet in the 30-plus years since the infamous conviction and subsequent exoneration of Lindy Chamberlain, only South Australia and only this year (May 2013), has introduced legislation allowing a further right of appeal. (This was triggered by a submission to the South Australian Parliament by Dr Moles and Bibi Sangha [of Flinders University] which argued for a CCRC). The parliamentary committee which examined the issue recommended the establishment of a forensic review panel and an inquiry into the use of expert evidence in criminal trials, both of which have been rejected by the South Australian government.

The watered down result is “a step in the right direction,” says Dr Moles, but the Australian Human Rights Commission said it was concerned that “the current systems of criminal appeals in Australia, including in South Australia, may not adequately meet Australia’s obligations under the ICCPR* in relation to the procedural aspects of the right to a fair trial. More particularly, the Commission has concerns that the current system of criminal appeals does not provide an adequate process for a person who has been wrongfully convicted or who has been the subject of a gross miscarriage of justice to challenge their conviction.”

* International Covenant on Civil and Political Rights

It is questionable whether South Australia enjoys a slightly safer criminal justice system than the rest of Australia, given that the Legal Services Commission has refused all legal aid funding for such appeals. The first case under the new right of appeal in South Australia, that of Henry Keogh, has been set down for hearing in February 2014.

Some background, from Dr Moles: “On 25 March 1992 Graham Stafford was convicted on the verdict of a jury of the murder of a young woman. For eighteen years Stafford has protested his innocence. In 1993 and again in 1998 the High Court of Australia found there was nothing wrong with the legal process which led to his conviction. On 24 December 2009 the Queensland Court of Appeal (QCA) set aside Stafford’s conviction. The QCA considered further evidence which undermined the prosecution case put to the jury at the trial and found that Stafford had been denied a fair trial.

“The effect of the decision of the QCA was that the proper administration of criminal justice depends on the fairness of the trial process.”

“The legal profession and the judges in South Australia have taken a very different view. The view they hold is that any deficiencies in the trial process are of no consequence if in their assessment an accused person was properly convicted.”

Nearly 20 years ago in South Australia, Henry Keogh was convicted of the murder of a young woman. Since then, Keogh has protested his innocence. Like Stafford, the High Court in 1997 without knowing any of the new facts, refused to review the case which led to his conviction. Unlike Stafford, however, Keogh has never been provided with an opportunity to place the new facts before any Court – he has never had an opportunity to establish that he was denied a fair trial.

But over the past 10 years there has emerged a cascade of evidence that Keogh’s conviction was based on often dodgy science and misleading evidence which was claimed by the lawyers in his earlier petitions to amount to fraud.

Now, after her appeal to Tasmania’s Court of Criminal Appeal was inexplicably denied and leave to appeal to the High Court was refused (on technical grounds), Neill-Fraser – as those in similar circumstances around Australia – has only one option: a wrongly convicted person must obtain a referral to the courts from an Attorney-General or else serve out the rest of the sentence and remain a convicted criminal.

“For a person sentenced to life imprisonment,” notes Dr. Moles, “the torment will not end at the end of the non-parole period set by the court. On an application for parole the person will be asked about how they feel about what they were convicted for. If the person responds by saying, “I didn’t do it” that will be taken to show a lack of contrition and a failure to accept responsibility for their crime. The parole will be refused. Life imprisonment in their case will mean “life”.

Neill-Fraser will be eligible for parole in 9 years from now (13 years after being taken into custody in 2009); but if she maintains her innocence – showing no contrition for a crime she denies – parole may well be refused and she’ll be in jail until 2032.

Neill-Fraser’s case is not unique. In 2008, Gordon Wood was convicted of the murder of his girlfriend by throwing her off The Gap in Sydney. After the trial it took Wood’s new legal team a painstaking three years to research the errors at his trial for presentation to the appeal court. In his appeal judgment the Chief Justice was scathing about every aspect of the evidence given at the trial.

The scientific evidence was found to be inadmissible on the appeal because it didn't address the situation before the court.

In his submissions the prosecutor suggested that the woman may have been thrown by a "shot put throw". The judge said this proposition "was extraordinary and should never have been made". The submission was entirely unsupported by any evidence and was "an invention of the prosecutor". As the judge said, in this and other critical matters, the prosecutor argued for conclusions based on his own speculative propositions.

Similarly, in the Neill-Fraser trial, the prosecution speculated that Neill-Fraser hit Chappell on the head with a heavy wrench – once or maybe twice. No wrench was produced in evidence. Indeed, no body was found, hence no wounds to match the speculation. What would an appeals judge say about that? And what would he say about the trial judge's summation to the jury in which he mentions the wrench eight times?

Dr Moles is adamant: "It is clear that there is not a scintilla of evidence which implicates Ms Neill-Fraser in the murder of her partner. It is equally clear that there is no evidence to show that he has in fact been murdered."

As Dr Moles points out, it is the same faulty evidence and procedures which convicted Splatt and Chamberlain have been used recently to convict Mallard (Western Australia), Stafford (Queensland), as well as Wood and Gilham (New South Wales). "There are a significant number of cases yet to be resolved in South Australia and no doubt pressure will continue to build until the case of Ms Neill-Fraser has been properly resolved."

"Clearly," says Dr Moles, "there needs to be a national CCRC. Investigators, prosecutors and expert witnesses in all states and territories must be required to adhere to their professional ethics and their own codes of conduct."

A copy of this article has been provided via Andrew Urban's website "[Pursue Democracy](#)"