

## WRONGFUL CONVICTIONS, APPEALS, AND THE FINALITY PRINCIPLE: THE NEED FOR A CRIMINAL CASES REVIEW COMMISSION

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*Just as in the law, we can love truth, like all other good things, unwisely; pursue it too keenly; and be willing to pay for it too high a price, so we can also love finality too much.*<sup>1</sup>

### I INTRODUCTION

There is a ‘searing injustice and consequential social injury ... when the law turns upon itself and convicts an innocent person’.<sup>2</sup> The presumption of innocence and many other principles of evidence law and criminal procedure operate to minimise the risk of this injustice.<sup>3</sup> However, the risk of error is not totally precluded – the criminal standard of proof demands a high probability of guilt, but not absolute certainty<sup>4</sup> – and innocent defendants are convicted.

Following conviction the defendant is presumed guilty, not innocent, and will face many obstacles in overturning the conviction. The law has a strong preference for treating the trial court’s verdict as final.<sup>5</sup> If convictions were subject to endless reassessment, the jury’s role would be undermined, the criminal justice system would lose efficiency, and victims and society would be denied closure. On appeal the defendant carries a heavy burden in seeking to establish innocence. Post-appeal, the burden is heavier still, and by this stage the

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1 *Burrell v The Queen* (2008) 238 CLR 218, 236 [72] (citations omitted) (Kirby J).

2 *Van der Meer v The Queen* (1988) 82 ALR 10, 31 (Deane J).

3 *Eastman v DPP (ACT)* (2003) 214 CLR 318, 358 [114] (Heydon J) (*‘Eastman’*).

4 ‘[A]bsolute mathematical or metaphysical certainty is not essential, and in the course of judicial investigations would be usually unattainable.’: *Briginshaw v Briginshaw* (1938) 60 CLR 336, 360 (Dixon J), quoting Thomas Starkie, *A Practical Treatise of the Law of Evidence* (V & R Stevens and G S Norton, 4<sup>th</sup> ed, 1853) 817.

5 See below Part III.

defendant – in prison, with depleted resources – will be in a severely weakened state.<sup>6</sup>

In this article I argue that New South Wales ('NSW') criminal procedure applies the finality principle too heavily.<sup>7</sup> The task of correcting wrongful convictions is made too difficult. Corrections occasionally occur against the odds, but it is likely that many wrongful convictions never come to light because of unduly restrictive post-appeal mechanisms. A Criminal Cases Review Commission ('CCRC') should be established for NSW with the powers and resources to investigate potential wrongful convictions and, where they appear unsafe, refer them back to the New South Wales Court of Criminal Appeal ('NSWCCA').<sup>8</sup> An English CCRC has been in operation since 1997, operating effectively alongside established institutions of the criminal justice system and without undue disruption of the finality principle.<sup>9</sup>

## II THE INCIDENCE OF WRONGFUL CONVICTIONS

The state's obligation to do more to correct wrongful convictions is in proportion to the rate at which they are currently allowed to occur. But our knowledge of the frequency of wrongful convictions is inevitably limited. The criminal standard of proof is demanding, but absolute certainty is unachievable and not required. '[S]ome risk of convicting the innocent must be run',<sup>10</sup> and occasionally innocent defendants are freed many years after their convictions and failed appeals.<sup>11</sup> The systemic constraint on correction<sup>12</sup> and the immense

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6 See below Part IV.

7 The criticisms apply with equal or greater force to other Australian jurisdictions.

8 See also Lynne Weathered, 'The Criminal Cases Review Commission: Considerations for Australia' (2012) 58 *Criminal Law Quarterly* 245.

9 The English Commission covers England, Wales, and Northern Ireland. There are similar Commissions in Scotland and Norway, however, I will focus on the English Commission because it is the oldest, covers the largest jurisdiction, has generated the greatest commentary, and operates in a system most resembling that of Australia. The English Commission is discussed below Part V. See also Ulf Stridbeck and Svein Magnussen, 'Opening Potentially Wrongful Convictions – Look to Norway' (2012) 58 *Criminal Law Quarterly* 267; Fiona Leverick and James Chalmers, 'The Scottish Criminal Cases Review Commission and Its Referrals to the Appeal Court: The First Ten Years' (2010) 8 *Criminal Law Review* 608.

10 Glanville Williams, *The Proof of Guilt: A Study of the English Criminal Trial* (Stevens & Sons, 3<sup>rd</sup> ed, 1963) 190. Chief Justice Gleeson and Hayne J came close to acknowledging this in *R v Carroll* (2002) 213 CLR 635, 644 [24]: '[T]o punish the guilty, some who are innocent will suffer the very real detriments of being charged and tried [and convicted] for an offence they did not commit'.

11 See, eg, Lynne Weathered, 'Invisible Innocence: It Happens Here Too' (2011) 32 *Griffith Review* 189. The first systematic study of wrongful convictions was the book: Edwin M Borchard, *Convicting the Innocent: Sixty-Five Actual Errors of Criminal Justice* (Yale University Press, 1932). For an overview of the research, see Richard A Leo, 'Rethinking the Study of Miscarriages of Justice: Developing a Criminology of Wrongful Conviction' (2005) 21 *Journal of Contemporary Criminal Justice* 201; Samuel R Gross, 'How Many False Convictions Are There? How Many Exonerations Are There?' (Public Law and Legal Theory Research Paper No 316, University of Michigan Law School, March 2013).

12 See Parts III and IV below.

struggle that is frequently involved in gaining exoneration<sup>13</sup> suggest that many others may remain hidden. There is no way of counting all the wrongful convictions that occur. (If they were so easy to identify, they would not have occurred in the first place.)<sup>14</sup> Can we nevertheless obtain some kind of estimate of the rate of wrongful conviction from those occasional cases that do come to light? This is particularly difficult in Australia because wrongful convictions are not treated in any systematic fashion and there is no comprehensive authenticated data.<sup>15</sup> However, some guidance may be obtained from empirical data out of England and the United States ('US').

In the United Kingdom a series of high-profile miscarriages of justice relating to Irish Republican Army terrorist bombings on mainland Britain were uncovered in the late 1980s and 1990s.<sup>16</sup> These prompted the Royal Commission on Criminal Justice, headed by Viscount W G Runciman, whose report in 1993 gave rise,<sup>17</sup> among other things, to the CCRC. The CCRC was established by the *Criminal Appeal Act 1995* (UK) c 35 ('CAA'), and commenced operation in 1997. Since then, the Commission has referred more than 500 cases to the Court of Appeal Criminal Division ('CACD'), resulting in over 350 convictions and sentences being quashed.<sup>18</sup> In the US, awareness of the problem of wrongful convictions grew through the 20<sup>th</sup> century,<sup>19</sup> culminating in the remarkable work of the innocence projects. There have been 312 DNA exoneration, the first in 1989.<sup>20</sup>

For present purposes, these figures raise three issues. First, there is the question of definition. The figures above relate to convictions overturned through the work of the English CCRC and the US innocence projects. Should these be viewed as *wrongful convictions*? Second, assuming we do have a figure for the

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13 See, eg, Weathered, 'Invisible Innocence', above n 11; the average time served by Innocence Project exonerees is 13.5 years: Innocence Project, *DNA Exonerations Nationwide* <[http://www.innocenceproject.org/Content/DNA\\_Exonerations\\_Nationwide.php](http://www.innocenceproject.org/Content/DNA_Exonerations_Nationwide.php)>.

14 See, eg, Richard Eggleston, 'What Is Wrong with the Adversarial System?' (1975) 49 *Australian Law Journal* 428, 431.

15 Wikipedia has an Australian list which includes the well-known cases, but it is accompanied by warnings regarding neutrality and completeness and the basis for the list is unclear: *List of Miscarriage of Justice Cases* (23 February 2014) Wikipedia <[http://en.wikipedia.org/wiki/List\\_of\\_miscarriage\\_of\\_justice\\_cases](http://en.wikipedia.org/wiki/List_of_miscarriage_of_justice_cases)>. See also Robert N Moles and Bibi Sangha, *Miscarriages of Justice*, Networked Knowledge <<http://netk.net.au/researchprojectshome.asp>>. The Moles and Sangha list is not confined to wrongful convictions. There are cases which may be viewed as exoneration, eg, Lindy Chamberlain and Andrew Mallard. Others are cases where the defendants are still in prison, although the strength of the prosecution case and its manner of presentation may be open to question, eg, Kathryn Folbigg: see, eg, Emma Cunliffe, *Murder, Medicine and Motherhood* (Hart Publishing, 2011). And others appear quite anomalous, eg, Madeleine McCann, or at most representative of some broader social injustice, eg, Ned Kelly.

16 See, eg, David Kyle, 'Correcting Miscarriages of Justice: The Role of the Criminal Cases Review Commission' (2004) 52 *Drake Law Review* 657, 657–9.

17 Royal Commission on Criminal Justice, *Report*, Cm 2263 (1993) 182 ('*Runciman Royal Commission Report*').

18 CCRC, *Case Library* (10 February 2014) UK Ministry of Justice <<http://www.justice.gov.uk/about/criminal-cases-review-commission/case-library>>.

19 See Leo, above n 11; Gross, above n 11.

20 Innocence Project, above n 13.

number of identified wrongful convictions, what does this imply about the rate of wrongful convictions? And finally, if we do manage to derive a figure for the rate of wrongful convictions from foreign data, how relevant is this for Australia?

### A Legal Innocence and Factual Innocence

Should English convictions quashed following a CCRC referral and innocence projects' DNA exonerations in the US be viewed as 'wrongful convictions'? This raises a question of definition which, surprisingly perhaps, is far from straightforward.<sup>21</sup> In this article, which focuses on post-appeal mechanisms, I restrict the term to erroneous convictions which have not been corrected by the routine safeguard of the regular appeal.<sup>22</sup> A more difficult question is whether the term should be used to cover the convictions of the factually innocent, the legally innocent, or both.

The CACD, having received a referral from the CCRC, will quash the conviction if it finds it unsafe or unsatisfactory.<sup>23</sup> This means that the CACD considers the defendant legally innocent, not necessarily factually innocent. A common ground of appeal is that inadmissible evidence was admitted at trial. With the removal of this evidence, it may appear that guilt cannot be proven beyond reasonable doubt. But this does not mean that innocence has been proven. The remaining admissible evidence may still render the defendant's guilt quite probable, just not probable enough. Further, in some cases the inadmissibility of the evidence may have nothing to do with its probative value. 'A conviction may be unsafe even where there is no doubt about guilt'.<sup>24</sup>

The innocence projects in the US seek evidence establishing factual innocence, not just legal innocence. Further, they seek to establish factual innocence to a high level of certainty. The difference in focus from the English CCRC has a procedural basis. Unlike the English system, claims of actual innocence play an important role in the US appeals system. As Lissa Griffin notes, 'the United Kingdom defines the problem as "righting miscarriages of justice," and the United States defines it as "correcting factually erroneous convictions."' <sup>25</sup> Fortunately, DNA profiling technology can provide strong proof of factual innocence. If biological material believed to be that of the perpetrator is available, and a DNA profile from that material does not match the DNA profile of the defendant, this provides practical certainty that the defendant is not the perpetrator. The strength of DNA profiling evidence in such cases is quite

21 See, eg, Hannah Quirk, 'Identifying Miscarriages of Justice: Why Innocence in the UK Is Not the Answer' (2007) 70 *Modern Law Review* 759, 761.

22 See Patrick O'Connor, 'The Court of Appeal: Re-trials and Tribulations' [1990] *Criminal Law Review* 615, 616, cited in Quirk, above n 21, 761.

23 *Criminal Appeal Act 1968* (UK) c 19, s 2(1)(a).

24 *R v Davis* [2001] 1 Cr App R 8, 132 [56].

25 Lissa Griffin, 'Correcting Injustice: Studying How the United Kingdom and the United States Review Claims of Innocence' (2009) 41 *University of Toledo Law Review* 107, 144.

exceptional.<sup>26</sup> Generally it is just as difficult achieving certainty about innocence as it is about guilt. For this reason, innocence projects generally limit themselves to cases where DNA may be available.<sup>27</sup>

The question this raises is whether the term ‘wrongful conviction’ should apply to the CCRC’s legally innocent, the innocence projects’ factually innocent or both. It is unnecessary to provide a once-and-for-all answer to this question. Arguably the core meaning of a wrongful conviction concerns the factually innocent. It is this kind of wrongful conviction that constitutes a searing injustice.<sup>28</sup> A conviction arising from legal or procedural error also constitutes an injustice, but it is an injustice of a different type and degree than the conviction of the factually innocent. But this is not to say the term ‘wrongful conviction’ should be reserved for conviction of the factually innocent. ‘Legal innocence’ and ‘factual innocence’ do not correspond exactly, but many legal safeguards protect the factually innocent. Evidence is often inadmissible for reasons that limit its probative value.<sup>29</sup> And while the presumption of innocence may provide cover for factually guilty defendants, it also protects the factually innocent who are unable to demonstrate their innocence.

It may be appropriate, if possible, for a discussion of wrongful convictions to focus on the factually innocent. But where this is not possible, it would be counterproductive to deny that convictions of the legally innocent are also wrongful.

## B Generating Frequency Figures

The 311 DNA exonerations of the innocence projects and the 351 convictions and sentences quashed following CCRC referrals reveal a terrible injustice. Hundreds of people have suffered unwarranted punishment. But put in the context of the massive amount of work achieved by the criminal justice system, these figures do not look so bad. Three hundred and eleven exonerations is not a huge number against the millions of convictions from US courts over the period of the innocence projects’ operation.<sup>30</sup> Twenty or 30 successful CCRC referrals a year is not many against well over 1 million convictions a year, including more

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26 Other decisive evidence may include a plausible confession of another person and, in a disappearance homicide case, the reappearance of the ‘victim’.

27 See Innocence Project, *Mission Statement* <<http://www.innocenceproject.org/about/Mission-Statement.php>>; Innocence Project, *About Us*, Griffith University <<http://www.griffith.edu.au/criminology-law/innocence-project/about-us>>.

28 *Van der Meer v The Queen* (1988) 82 ALR 10, 31 (Deane J).

29 There is an explicit reference to probative value or reliability in many exclusionary principles: eg, *Evidence Act 1995* (NSW) ss 65, 85, 97, 98, 101, 126B, 135, 137. These concepts are implicit in many other exclusionary principles: eg, ss 18, 66, 66A, 69, 79, 103, 114.

30 There were about 1.6 million state and federal prisoners at the end of 2011: E Ann Carson and William J Sabol, ‘Prisoners in 2011’ (Report, NCJ 239808, Bureau of Justice Statistics (US), December 2012) 1.

than 300 000 for indictable offences.<sup>31</sup> From this perspective, the wrongful conviction rate looks tiny – a small fraction of one per cent.<sup>32</sup>

However, this reasoning is faulty, and provides false reassurance. The numerator – the number of corrections – is drawn from a far narrower set of cases than the denominator – all convictions, skewing the error rate sharply downwards. Consider first the English figures. The English CCRC is a highly effective post-appeal mechanism for addressing wrongful convictions, but this is not to say that it manages to identify all wrongful convictions. The Commission only refers a very small percentage of applications and, as Richard Nobles and David Schiff note, given the rewards in the corrections system for accepting one's guilt, it is hard to believe that the 90 per cent or so of applicants that are rejected are all making false claims of innocence.<sup>33</sup> The Commission has finite resources, is subject to other vagaries of empirical proof and, despite its excellent work, it appears likely that many wrongful convictions remain hidden.<sup>34</sup> Many wrongfully convicted defendants may not apply in the first place.<sup>35</sup>

The innocence project figures have the advantage of focusing on the factually innocent, but in other respects, the US data is far more selective and potentially misleading. The innocence projects, given their relatively limited resources, tend to focus on defendants convicted for the most serious offences – most of them rape and homicide – with many resulting in the death penalty.<sup>36</sup> And among those, the DNA exonerations are limited to the relatively rare cases in which identity is in issue, and where the perpetrator is believed to have left biological material which remains available for DNA profiling.<sup>37</sup>

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- 31 Ministry of Justice (UK), 'Criminal Justice Statistics: Quarterly Update to September 2012' (Report, 21 February 2013) 40.
- 32 See, eg, *Kansas v Marsh*, 548 US 163, 197–8 (Scalia J) (2006), quoting Joshua Marquis, 'The Innocent and the Shammed', *The New York Times* (New York), 26 January 2006, A23.
- 33 Richard Nobles and David Schiff, 'After Ten Years: An Investment in Justice?' in Michael Naughton (ed), *The Criminal Cases Review Commission: Hope for the Innocent?* (Palgrave Macmillan, 2009) 151, 154. Nobles and Schiff indicate four per cent of applications are referred. The figure has since gone down. The latest annual report cites a 'long term referral rate of 3.47%' and for 2012–13 it was only 1.6 per cent: CCRC, *Annual Report and Accounts 2012/13* (Stationery Office, 2013) 11. However, many of the applications are rejected purely on the basis that the defendant has not yet attempted a first appeal. Taking account of that, the report suggests that the 'long-term referral rate can be expressed as approximately 7.5 %': at 12.
- 34 Legal representation appears to be a significant factor in making a successful application. Only about a third of applicants are legally represented. Those who are legally represented more than triple their chances of a referral: Jacqueline Hodgson and Juliet Horne, *The Extent and Impact of Legal Representation on Applications to the Criminal Cases Review Commission (CCRC): A Report Prepared for the Legal Services Commission* (Warwick School of Law, 2008) 8–9.
- 35 Demonstrating the untapped demand, the application rate increased by 64 per cent in 2012–13, due apparently to the Commission's efforts to make itself more accessible, including an 'Easy Read' application form: CCRC, *Annual Report and Accounts 2012/13*, above n 33; CCRC, *Easy Read Form* <<http://www.justice.gov.uk/downloads/forms/ccrc/ccrc-easyread-applic-form.PDF>>.
- 36 Gross notes that the exoneration rate from death sentences is 140 times greater than from felony convictions generally: Gross, above n 11, 8.
- 37 On the relative rarity of such cases, see below n 171.

US commentators have sought to arrive at more defensible estimates of the rate of wrongful conviction by constructing sets of convictions where the accuracy of all can be tested. Michael Risinger constructed a set of capital rape–murder convictions over the period 1982–89 in which the perpetrator left trace material available for testing.<sup>38</sup> These gave Risinger 10.5 exonerations out of 319 convictions, which is a rate of 3.3 per cent.<sup>39</sup> He viewed the number of exonerations as an underestimate on the basis that tests would not have been requested in every case where material was available, and suggested a higher bound of five per cent.<sup>40</sup> Samuel Gross discusses various estimates based upon another set of cases – boxes of old rape and homicide files from 1973 to 1987 discovered by the Virginia Department of Forensic Science (‘DFS’), many containing biological trace material available for DNA testing.<sup>41</sup> The material generated workable tests in 250 cases, resulting in eight exonerations so far, and giving a wrongful conviction rate of 3.2 per cent.<sup>42</sup>

The methodology of the Risinger and DFS studies appears fairly robust despite the inevitable limitations of the data. Moreover, the estimates from the two studies are roughly comparable. They provide reason to believe that we could expect at least three per cent of convictions in the US in the 1970s and 1980s for rape and murder to be factually incorrect and left uncorrected following all regular appeals.

### C Relevance of the Data for Modern-Day Australia

If the three per cent figure has application to higher court convictions in Australia we would expect about 350 convictions a year to be factually wrong and left uncorrected by appeal,<sup>43</sup> with about 90 of these from NSW.<sup>44</sup> While there are no official statistics, as discussed in Part IV below, it appears, at most, that only one or two convictions are corrected, post-appeal, each year in NSW.

Of course, a number of objections may be raised to the suggestion that the three per cent figure can be extrapolated from serious US convictions from the

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38 D Michael Risinger, ‘Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate’ (2007) 97 *Journal of Criminal Law and Criminology* 761, 769–80.

39 Ibid 778.

40 Ibid 779.

41 Gross, above n 11, 13.

42 Ibid 14. Further cases are under investigation. An independent study of the results suggested that ‘[i]n 38 convictions (15 per cent of convictions with determinate results), all of the available evidence supports exonerations’: John Roman et al, ‘Post-conviction DNA Testing and Wrongful Conviction’ (Research Report, Urban Institute, June 2012) 29. However, another commentator suggested that this is an overstatement: Gross, above n 11, 15, citing Frank Green, ‘Richmond DNA Cases Show Not All Reports Prove Innocence’, *Richmond Times-Dispatch* (Virginia), 24 June 2012.

43 From a total of 12 158 convictions: Australian Bureau of Statistics, 45130DO001\_201112 *Criminal Courts, Australia, 2011–12* (14 February 2013) Table 1 <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4513.02011-12?OpenDocument>>.

44 From a total of 2983 convictions: Australian Bureau of Statistics, 45130DO006\_201112 *Criminal Courts, Australia, 2011–12* (14 February 2013) Table 6 <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4513.02011-12?OpenDocument>>.

1970s and 1980s to contemporary Australian higher courts.<sup>45</sup> As Risinger himself notes, we should ‘eschew speaking in terms of any global rate of wrongful conviction’;<sup>46</sup> ‘the universe of criminal convictions is almost certainly heavily substructured in regard to factual innocence rates’.<sup>47</sup> The error rate is almost certain to vary between types of offences, between jurisdictions, and over time. Perhaps there is reason to believe that the error rate is, in each of these three respects, lower for contemporary Australian higher courts. The recognised causes of wrongful convictions<sup>48</sup> – false confessions, police tunnel vision, eyewitness error, lying witnesses, biased experts, prosecutorial misconduct and inadequate defence representation – may well have less force in the Australian criminal justice system of today. But even if this is the case, it appears doubtful that the figure for Australia would be lower by orders of magnitude. There is no space in this article for an extended comparative analysis to justify this claim, but the claim is relatively modest, and I provide a brief outline of the reasoning here.

The first question to consider is whether the three per cent figure might be elevated having regard to the class of case generating the figure. Both the DFS and Risinger studies involved very serious cases. Such cases might place greater pressure on the police and prosecution for a result, increasing the risk of error through matters such as a coerced false confession and prosecutorial misconduct.<sup>49</sup> On the other hand, more senior, competent and reliable investigators and prosecutors would tend to be used on such cases.<sup>50</sup> The greater attention that such cases bring might curb the temptation to bend any

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45 See also the debate between Risinger and Ron Allen and Larry Laudan: Risinger, ‘Innocents Convicted’, above n 38; Ronald J Allen and Larry Laudan, ‘Deadly Dilemmas’ (2008) 41 *Texas Tech Law Review* 65; D Michael Risinger, ‘Tragic Consequences of *Deadly Dilemmas*: A Reply to Allen and Laudan’ (2010) 40 *Seton Hall Law Review* 991.

46 Risinger, ‘Innocents Convicted’, above n 38, 785.

47 Ibid 783.

48 Kent Roach refers to a ‘remarkable consensus about the common causes of wrongful convictions’: Kent Roach, ‘Wrongful Convictions: Adversarial and Inquisitorial Themes’ (2010) 35 *North Carolina Journal of International Law and Commercial Regulation* 387, 393. See also Hugo Adam Bedau and Michael L Radelet, ‘Miscarriages of Justice in Potentially Capital Cases’ (1987) 40 *Stanford Law Review* 21, 56–7; Lynne Weathered, ‘Investigating Innocence: The Emerging Role of Innocence Projects in the Correction of Wrongful Conviction in Australia’ (2003) 12 *Griffith Law Review* 64, 69–77; C Ronald Huff, ‘Wrongful Convictions: The American Experience’ (2004) 46 *Canadian Journal of Criminology and Criminal Justice* 107, 109–14; Steven A Krieger, ‘Why Our Justice System Convicts Innocent People, and the Challenges Faced by Innocence Projects Trying to Exonerate Them’ (2011) 14 *New Criminal Law Review* 333, 339–59. For a more critical assessment of the commonly identified causes, see Jon B Gould, *Preventing Wrongful Convictions Project*, School of Public Affairs, American University <<http://www.american.edu/spa/djls/prevent/>>.

49 See, eg, Andrew Ashworth, ‘Crime, Community and Creeping Consequentialism’ [1996] *Criminal Law Review* 220, 226; Steven P Grossman, ‘Hot Crimes: A Study in Excess’ (2011) 45 *Creighton Law Review* 33.

50 The NSW Prosecution Guidelines make it clear that more serious decisions are supervised by more senior staff, eg, whether to call a prison informer, and whether to withhold disclosable information on public policy grounds: Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales* (2003) 8, 25, 31.



rules. And one might expect some recognition within the system that the more serious the charges, the more harmful an erroneous conviction, calling for greater measures to avert this outcome.<sup>51</sup>

Second, it may be questioned whether the three per cent figure, from 1970s and 1980s cases, maintains any relevance in the second decade of the 21<sup>st</sup> century. As a CCRC Commissioner commented in a related context, there have been ‘very considerable strides in criminal justice, criminal procedure and criminal law over recent years ... [T]he likely problems ... which [historical wrongful convictions] have exemplified have long since been attended to’.<sup>52</sup> In particular it may be argued that since these errors in historical cases have been revealed through DNA profiling, they are errors that would not be made nowadays since DNA profiling would routinely be applied to such cases. Unfortunately, however, the technology still leaves considerable scope for error, as demonstrated by the fact that the innocence projects continue to exonerate defendants convicted in the 1990s and the 2000s.<sup>53</sup> And the positive impact of improvements in investigative technologies and practices may be counterbalanced, to some extent, by ‘law and order’ pro-police, pro-prosecution and pro-victim/complainant reforms which may make it more difficult for a defendant to avoid conviction, whether guilty or innocent.<sup>54</sup>

The final basis on which the applicability of the three per cent figure may be challenged is national exceptionalism; the US may have a problem with wrongful convictions, but Australia is different.<sup>55</sup> The South Australian Attorney-General, dismissing the need for a CCRC, declared that ‘South Australia is not Texas. This State is not awash with wrongful convictions and the falsely imprisoned.’<sup>56</sup> It is true that Australia may have certain advantages.

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- 51 On one view, the criminal standard of proof is variable and actually increases with the seriousness of the offence: Erik Lillquist, ‘Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability’ (2002) 36 *UC Davis Law Review* 85. Courts are less likely to reverse persuasive burdens for more serious offences: David Hamer, ‘The Presumption of Innocence and Reverse Burdens: A Balancing Act’ (2007) 66 *Cambridge Law Journal* 142, 150.
- 52 Home Affairs Committee, *The Work of the Criminal Cases Review Commission*, House of Commons Paper No 1635–i, Session 2005–06 (2006) 14, quoted in Stephanie Roberts and Lynne Weathered, ‘Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Projects and the Criminal Cases Review Commission’ (2009) 29 *Oxford Journal of Legal Studies* 43, 68. See also Graham Zellik, ‘The Criminal Cases Review Commission and the Court of Appeal: The Commission’s Perspective’ [2005] *Criminal Law Review* 937, 949.
- 53 See Innocence Project, *Browse the Profiles* <<http://www.innocenceproject.org/know/Browse-Profiles.php>>. Krieger’s quite recent list of causes of wrongful conviction includes limited availability of DNA testing and inaccuracy in DNA testing: Krieger, above n 48, 345–9.
- 54 See, eg, Ashworth, above n 49.
- 55 Compare Gary Edmond’s discussion of Australian exceptionalism in its resistance to considering the demonstrations in the US and other jurisdictions of a lack of validation of many types of forensic evidence: Gary Edmond, ‘What Lawyers Should Know about the Forensic “Sciences”’ (2014) forthcoming *Adelaide Law Review*. Kent Roach draws a broader contrast between common law adversarial and civil law inquisitorial approaches to criminal justice, and concludes that both have strengths and weaknesses where it comes to wrongful convictions: Roach, above n 48.
- 56 South Australia, *Parliamentary Debates*, House of Assembly, 28 November 2012, 3953 (J R Rau), repeated by South Australia, *Parliamentary Debates*, Legislative Council, 19 February 2013, 3167 (G E Gago).

The US criminal justice system is more politicised,<sup>57</sup> and adversarial,<sup>58</sup> increasing the risk of wrongful conviction through a failure of prosecution disclosure, prosecutorial or judicial bias, or political pressure to obtain a conviction. Australia may also have stronger safeguards in place with regard to some areas of police investigation, for example, mandatory recording of police interview.<sup>59</sup> As against this, however, US Constitutional safeguards for suspects are stronger, providing greater protection against unlawful searches and infringements of the right to silence.<sup>60</sup> And, while invalid forensic evidence contributes towards wrongful convictions in the US,<sup>61</sup> it may be a greater problem in Australia which lacks the *Daubert*<sup>62</sup> requirement of reliability.<sup>63</sup>

The various comparisons drawn above are admittedly swift and speculative. But they would throw doubt upon any peremptory attempt to reject the three per cent wrongful conviction figure as totally irrelevant to contemporary Australian convictions. Understanding of the Australian position will be furthered by a consideration of the scope for factual correction at the criminal appeal.

### III THE LIMITED CAPACITY OF THE APPEAL AS A MEANS OF CORRECTING WRONGFUL CONVICTIONS

An objection to my argument as developed so far may run as follows. Given the impossibility of attaining absolute certainty about criminal guilt and the many imperfections in criminal process, erroneous convictions appear

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57 On elected judges, see, eg, Brandice Canes-Wrone, Tom S Clark and Jee-Kwang Park, 'Judicial Independence and Retention Elections' (2012) 28 *Journal of Law, Economics, and Organization* 211.

58 See, eg, Herbert M Kritzer, 'American Adversarialism' (2004) 38 *Law & Society Review* 349.

59 See, eg, *Criminal Procedure Act 1986* (NSW) s 281. See also John Weeden, 'The Criminal Cases Review Commission (CCRC) of England, Wales, and Northern Ireland' (2013) 80 *University of Cincinnati Law Review* 1415, 1425, referring to the equivalent provision in England as a feature that 'reduce[s] the risk of miscarriages of justice'. On the US position, see Saul M Kassir et al, 'Police-Induced Confessions: Risk Factors and Recommendations' (2010) 34(3) *Law and Human Behavior* 3, 25–7.

60 See, eg, Keith A Findley, 'Judicial Gatekeeping of Suspect Evidence: Due Process and Evidentiary Rules in the Age of Innocence' (2013) 47 *Georgia Law Review* 723. Of course, the US's exclusionary rule has been criticised for excluding highly probative evidence: see, eg, Patrick Tinsley, N Stephan Kinsella and Walter Block, 'In Defense of Evidence and against the Exclusionary Rule: A Libertarian Approach' (2004) 32 *Southern University Law Review* 63.

61 Eg, many problems with forensic science were identified in the NAS report: Committee on Identifying the Needs of the Forensic Science Community, *Strengthening Forensic Science in the United States: A Path Forward* (National Academies Press, 2009), discussed in Edmond, above n 55.

62 *Daubert v Merrell Dow Pharmaceuticals Inc*, 509 US 579 (1993). Admittedly, even in *Daubert* jurisdictions, the reliability requirement appears to be weakly applied, particularly in criminal cases: Peter J Neufeld, 'The (Near) Irrelevance of *Daubert* to Criminal Justice and Some Suggestions for Reform' (2005) 95 *American Journal of Public Health* 107. See also D Michael Risinger, 'Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?' (2000) 64 *Albany Law Review* 99.

63 See, eg, Gary Edmond and Mehera San Roque, 'The Cool Crucible: Forensic Science and the Frailty of the Criminal Trial' (2012) 24 *Current Issues in Criminal Justice* 51.

inevitable. But that is what appeals are for, to correct the occasional errors that occur at trial. Perhaps this is a further point in which the Australian system manages better than that of the US. Lissa Griffin observes that the US courts' 'adherence to finality and deference to the jury ... greatly limit their ability to correct wrongful convictions'.<sup>64</sup>

But as shown below, jury deference and finality are key concerns for Australian criminal appeals. The High Court of Australia ('HCA') recently commented that '[a] central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances.'<sup>65</sup> It added that the appellate system is '[t]he principal qualification to the general principle ... But even there, the importance of finality pervades the law.'<sup>66</sup> The constraints upon review undermine any suggestion that appeals provide a reliable and comprehensive mechanism for correcting factual error.

### A The Finality Principle

At trial, the defendant has the benefit of the presumption of innocence. For conviction guilt must be proven beyond reasonable doubt. This is intended to minimise the risk of wrongful conviction. However, it cannot totally eliminate the risk. Some innocent defendants are convicted. And then, on appeal, the defendant 'does not come before the Court as one who is "innocent," but on the contrary as one who has been convicted by due process of law'.<sup>67</sup> Instead of being presumed innocent, the defendant is presumed guilty – the conviction is presumed to be correct – and this presumption can be difficult for the defendant to displace.

There are a number of reasons for the appeal court's reluctance to overturn the trial court's finding of facts. First, the trial court may be viewed as being epistemically superior to the appeal court. The trial court saw and heard the witnesses, whereas the appeal court only has access to the transcript of the evidence.<sup>68</sup> In superior courts the fact finder is generally a jury of 12 lay

64 Griffin, above n 25, 134. Griffin adds that the obstacles in the US are greater than those in the UK. However, this is an observation of the overall system including post-appeal review where the CCRC works much more effectively than the mechanisms in the US. Putting the CCRC to one side, Griffin asserts at 151:

the original guilt-adjudication process in the United States has more opportunities for review than the process in the United Kingdom, where there is no right to a direct appeal in serious cases. By the time a defendant raises a claim of wrongful conviction in the United States, substantial resources, time, and effort have already been expended.

And so, given the lack of a CCRC in Australia currently, this may be a respect in which the US does better than Australia.

65 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, 17 [34] (Gleeson CJ, Gummow, Hayne and Heydon JJ) ('*D'Orta-Ekenaike*'), quoted in *Burrell v The Queen* (2008) 238 CLR 218, 223 [15] (Gummow ACJ, Hayne, Heydon, Crennan and Kiefel JJ).

66 *D'Orta-Ekenaike* (2005) 223 CLR 1, 17 [35] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

67 *Herrera v Collins*, 506 US 390, 399–400 (Rehnquist CJ) (1993), quoted in Emily Hughes, 'Innocence Unmodified' (2011) 89 *North Carolina Law Review* 1083, 1099.

68 See, eg, *M v The Queen* (1994) 181 CLR 487, 493–5 ('*M*').

people. The jury is both larger than an appeal court bench, and is likely to have a wider range of experience, giving it a further epistemic advantage.<sup>69</sup> A second reason for the appeal court's reluctance to intervene is constitutional. The jury is a 'little parliament',<sup>70</sup> the 'constitutional judge of fact'.<sup>71</sup> It is an institution that allows the general community to directly participate in an important governmental function. Third is the practical matter of efficiently distributing work within the judicial hierarchy.<sup>72</sup> The trial court is given the resources to operate as the primary decision-maker. The appeal court is not equipped to routinely review the trial court's findings. If the trial courts became merely provisional, subject to automatic review by the appeal court, the system would break down. Fourth is the desirability of achieving closure.<sup>73</sup> If trial verdicts were routinely overturned, victims' capacity to put the events behind them would be delayed and the normative message projected by the trial verdict would be diluted.

The finality principle derives further impetus from a sceptical pragmatism.<sup>74</sup> If the original trial verdict is open to doubt, aren't the appeal decision and verdict on retrial equally doubtful? We face the prospect of 'infinite regress'.<sup>75</sup> 'If two trials are okay, why not three, or four, or ... ?'<sup>76</sup> Obviously the line must be drawn somewhere, and the least arbitrary place to draw it is under the original trial verdict.<sup>77</sup> This philosophy appears to underlie the classic statement by Lord Wilberforce in *The Amphyll Peerage*:

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69 See below n 95 and accompanying text.

70 *Cheng v The Queen* (2000) 203 CLR 248, 290 [123], quoting Lord Patrick Devlin, *Trial by Jury* (Steven and Sons, 1966) 164.

71 *Darkan v The Queen* (2006) 227 CLR 373, 414 [139], quoting *Hocking v Bell* (1945) 71 CLR 430, 440; *Mechanical & General Inventions Co Ltd v Austin* [1935] AC 346, 373 (Lord Wright).

72 Richard Nobles and David Schiff, 'The Right to Appeal and Workable Systems of Justice' (2002) 65 *Modern Law Review* 676.

73 See, eg, South Australia, *Report of the Legislative Review Committee on Its Inquiry into the Criminal Cases Review Commission Bill 2010*, Parl Paper No 211 (2012) 82.

74 This perspective is in tension with the widespread view that factual accuracy is the 'overriding', 'paramount' or 'foremost' goal of the trial, respectively: William Twining, *Theories of Evidence: Bentham and Wigmore* (Stanford University Press, 1985) 117; Marvin E Frankel, 'The Search for Truth – An Umpireal View' (1975) 123 *University of Pennsylvania Law Review* 1031, 1033, 1055; A A S Zuckerman, *The Principles of Criminal Evidence* (Oxford University Press, 1989) 7.

75 Paul Roberts, 'Double Jeopardy Law Reform: A Criminal Justice Commentary' (2002) 65 *Modern Law Review* 393, 400, 421.

76 *Ibid* 411, quoting Akhil Reed Amar, 'Double Jeopardy Law Made Simple' (1997) 106 *Yale Law Journal* 1807, 1815.

77 Although if a later verdict is based on a larger body of evidence it is, all else being equal, epistemically superior: David Hamer, 'The Truth Will Out? Incoherence and Scepticism in *Foundations of Evidence Law*' (2007) 70 *Modern Law Review* 318, 337; David Hamer, 'Probability, Anti-resilience, and the Weight of Expectation' (2012) 11 *Law, Probability and Risk* 135.

Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry.<sup>78</sup>

And so the appeal court's efforts to investigate and correct possible factual error are subject to a number of common law and statutory restrictions. Two are fairly slight. Notice of the intention to appeal to the Court of Criminal Appeal must be given within a few weeks of conviction,<sup>79</sup> and leave is required for an appeal on matters of fact or mixed fact and law.<sup>80</sup> But if the defendant had strong grounds for appeal, the court would presumably dispense with the time limit<sup>81</sup> and grant leave.<sup>82</sup> These obstacles may not be so great. Other obstacles to the correction of wrongful convictions are more formidable.

## B Resistance to the Correction of Purely Factual Error

The wrongfully convicted defendant (in the core factual-innocence sense) is ultimately arguing that the conviction is factually wrong. However, the defendant will be well advised to also look for a legal ground of appeal. The appeal court is more reluctant to intervene on a purely factual basis. According to one dominant view, if the appeal court finds that a legal error was made at trial,<sup>83</sup> the conviction will be quashed unless, by the operation of the proviso, the prosecution can persuade the court that 'had there been no blemish in the trial, an appropriately instructed jury, acting reasonably on the evidence properly before them and applying the correct onus and standard of proof, would inevitably have convicted

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78 [1977] AC 547, 569, quoted in *R v Carroll* (2002) 213 CLR 635, 643 [22] (Gleeson and Hayne J).

79 28 days: *Criminal Appeal Act 1912* (NSW) s 10(1)(a). The provision is ambiguous. It sets a time limit for appeals against conviction or sentence of 28 days 'after conviction or sentence'. The previous version made it clear that appeals against conviction must be brought within 28 days of conviction, and appeals against sentence within 28 days of sentence.

80 *Criminal Appeal Act 1912* (NSW) ss 5(1)(a)–(b).

81 *Criminal Appeal Act 1912* (NSW) s 10(1)(b).

82 Until recently the leave requirement was not enforced. While the court now recognises leave is required, in most cases this will just be a formality: *Krishna v DPP (NSW)* (2007) 178 A Crim R 220, 228 [43], 231 [53] (Rothman J); Hugh Donnelly, Rowena Johns and Patrizia Poletti, 'Conviction Appeals in NSW' (Monograph No 35, Judicial Commission of NSW, June 2011) 23. By contrast the English CACD grants leave in fewer than half the cases: Andrew Ashworth and Mike Redmayne, *The Criminal Process* (Oxford University Press, 4<sup>th</sup> ed, 2010) 375. And note that, in NSW, leave is also required on a point of law where there was a failure to object to the alleged error at trial: *Criminal Appeal Rules* (NSW) r 4. This requirement is not a mere formality, although leave will be granted where the defendant can establish that the error caused a miscarriage of justice: *Picken v The Queen* [2007] NSWCCA 319, [20]–[21].

83 '[W]rong decision of any question of law': *Criminal Appeal Act 1912* (NSW) s 6(1).

the accused'.<sup>84</sup> That is, the prosecution must show 'a verdict of acquittal was not open'.<sup>85</sup> But where the defendant cannot identify a legal error and merely argues the conviction 'is unreasonable, or cannot be supported, having regard to the evidence',<sup>86</sup> the conviction will stand if the appeal court considers that 'upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty'.<sup>87</sup> A conviction will only be quashed if it was not open.

The difference between the two tests is a product of jury deference in combination with recognition that 'there may be reasonable views of facts which do not commend themselves to the court'.<sup>88</sup> As the HCA has acknowledged in a different context, 'there is open on any given body of evidence a great diversity of reasonable opinion ranging between widely set limits'.<sup>89</sup> Where the defendant argues purely factual error, provided the conviction was open to a reasonable jury, the appeal court will allow it to stand. This is regardless of the appeal court's own views. The finding of guilt does 'not become unreasonable' just because the court takes a different view.<sup>90</sup> But if a legal error was made at trial and, in the absence of error, a reasonable jury may have acquitted, the conviction will be quashed and a retrial ordered. It does not matter that the appeal court itself would have convicted in the absence of error. If acquittal is a reasonable possibility, the case should be given back to the jury.

At times appeal courts have struggled with the proposition that a reasonable jury could take a view of the facts that differs from its own. This is not necessarily judicial imperiousness. Appeal courts may have trouble acknowledging that the process is so subjective that the verdict is contingent on the decision-maker. In a pure factual error case, the court may also hesitate to

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84 *Baini v The Queen* (2012) 246 CLR 469, 487 [50] (Gageler J) ('*Baini*'), quoting *Wilde v The Queen* (1988) 164 CLR 365, 372. *Wilde v The Queen* is authority that some errors are so fundamental as to go to the root of the proceedings, precluding the operation of the proviso. Note that *Baini* concerns the new Victorian appeal provision, whereas the other authorities discussed here concern the common form provision. It appears that the High Court will apply a broadly similar interpretation to both. The 'fundamental tenets of the criminal justice system in Australia' and 'trial by jury' in particular may exert greater force than surface dissimilarities in statutory language: *Baini* (2012) 246 CLR 469, 481 [33] (French CJ, Hayne, Crennan, Kiefel and Bell JJ). See also Stephen Odgers, 'Editorial: Appeals against Conviction Part 2' (2013) 37 *Criminal Law Journal* 3; Nobles and Schiff, 'After Ten Years: An Investment in Justice?', above n 33, 157. However, 'close attention must be paid to the language' of the legislation and so some distinctions may arise: *Fleming v The Queen* (1998) 197 CLR 250, 256 [12]. See also *Weiss v The Queen* (2005) 224 CLR 300, 305 [9] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ) ('*Weiss*'); *Baini* (2012) 246 CLR 469, 476 [14] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), 484 [43] (Gageler J).

85 *Baini* (2012) 246 CLR 469, 481 [32] (French CJ, Hayne, Crennan, Kiefel, Bell JJ).

86 *Criminal Appeal Act 1912* (NSW) s 6(1).

87 *Baini* (2012) 246 CLR 469, 482 [48] (Gageler J), quoting *M* (1994) 181 CLR 487, 493.

88 *Ratten v The Queen* (1974) 131 CLR 510, 519 (Barwick CJ) ('*Ratten*').

89 *Naxakis v Western General Hospital* (1999) 197 CLR 269, 292 [64] (Kirby J), quoting from Justice H H Glass, Michael H McHugh and Francis M Douglas, *The Liability of Employers in Damages for Personal Injury* (Lawbook, 2<sup>nd</sup> ed, 1979) 217.

90 *Ratten* (1974) 131 CLR 510, 519 (Barwick CJ). See also *M* (1994) 181 CLR 487.

uphold a conviction in the face of its own doubts.<sup>91</sup> Chief Justice Barwick in *Ratten* declared: '[i]t is the reasonable doubt in the mind of the court which is the operative factor ... If the court has a doubt, a reasonable jury should be of a like mind.'<sup>92</sup> In a legal error case the court may consider it unduly wasteful to overturn a conviction about which it has no doubts. In *Weiss* the High Court suggested that, rather than 'attempting to predict what a jury (whether the jury at trial or some hypothetical future jury) would or might do',<sup>93</sup> the appeal court should make up its own mind. If 'the appellate court is persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt',<sup>94</sup> then the conviction should stand.

To the extent that the appeal court's view is taken as the benchmark of reasonableness the difference between factual error and legal error grounds of appeal is diminished. In either case it just becomes a question of how the appeal court views the case. This is to the defendant's advantage in a factual error case, but to the defendant's disadvantage in a legal error case. The latter consequence, in particular, has given rise to considerable disquiet. Why should the defendant be 'denied a retrial because three, or perhaps only two, judges of appeal are satisfied he is guilty'?<sup>95</sup> The High Court more recently has sought to provide reassurance that *Weiss* should not prevent an appeal court, in a legal error case, from asking 'whether the jury's verdict might have been different if the identified error had not occurred.'<sup>96</sup> This appears to acknowledge and defer to the subjectivity and contingency of a jury verdict. It carries the implication that, in factual error cases, convictions may be upheld despite an appeal court's own doubts about their factual accuracy.

### C Reluctance to Consider New Evidence

The previous section highlighted the difficulty that a wrongfully corrected defendant faces in overturning a conviction on the basis of factual error. The defendant's task will be easier if he can also point to a legal error. Deference to

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91 Stephen Odgers, 'Editorial: Appeals against Conviction' (2011) 35 *Criminal Law Journal* 131, 133.

92 *Ratten* (1974) 131 CLR 510, 516 (Barwick CJ).

93 *Weiss* (2005) 224 CLR 300, 314 [35].

94 *Ibid* 317 [44]. The House of Lords has used similar language:

If the court has no reasonable doubt about the verdict, it follows that the court does not think that the jury could have one; and conversely, if the court says that a jury might in the light of the new evidence have a reasonable doubt, that means that the court has a reasonable doubt.

*R v Pendleton* [2002] 1 Cr App R 34, 452 [15].

95 Frank Callaway, 'Farewell Speech upon His Retirement from the Bench' (Speech delivered at Supreme Court of Victoria, Melbourne, 22 February 2007) 17–18, quoted in Odgers, 'Editorial: Appeals against Conviction', above n 91, 132. As Odgers notes, this was cited by Frank Callaway as a 'main reason' for his retirement from the Bench. This was also a factor in Victoria's departing from the common form appeal provision: at 131.

96 *AK v Western Australia* (2008) 232 CLR 438, 457 [59] (Heydon J). See also Transcript of Proceedings, *RWB v The Queen* [2011] HCATrans 34 (11 February 2011). See discussion in Odgers, 'Editorial: Appeals against Conviction', above n 91, 132–3.

the jury may then work in the defendant's favour since the error deprived the jury of the opportunity to give the case proper consideration.

This section considers another way a wrongfully convicted defendant may seek to circumvent jury deference. The defendant may present new evidence to the appeal court and argue that the conviction was a miscarriage of justice because the jury did not have access to a complete body of evidence.<sup>97</sup> While this addresses jury deference, the other finality concerns with efficiency and closure remain, and limits are set on the appeal court's preparedness to consider new evidence.

The appeal court will be far readier to intervene on the basis of fresh evidence than evidence that is merely new. Evidence is 'fresh' if it is 'evidence which was not actually available to the appellant at the time of the trial, or which could not then have been available to the appellant by the exercise on his part of reasonable diligence in the preparation of his case.'<sup>98</sup> 'Great latitude must of course be extended to an accused in determining what evidence by reasonable diligence in his own interest he could have had available at his trial'.<sup>99</sup> However, evidence will not be viewed as fresh where the defendant possessed it but chose not to adduce it. If evidence is fresh, credible, and presents a 'significant possibility' that a reasonable jury would have acquitted,<sup>100</sup> the conviction will be quashed and a retrial ordered. If the evidence is merely new, it must be 'of such cogency that innocence is shown to the Court's satisfaction' for the conviction to be quashed.<sup>101</sup>

The difference between the appeal court's treatment of fresh evidence and merely new evidence resembles the difference between its treatment of legal error and purely factual error. Where the defendant relies on merely new evidence or purely factual error the appeal court is less likely to intervene than where the defendant relies on legal error or fresh evidence. In the former cases, wrongful convictions are less likely to be corrected. In the purely factual error scenario, this is a result of jury deference. In the merely new evidence scenario this reflects a commitment to 'the adversary nature of a trial ... and ... the desirable finality of its outcome'.<sup>102</sup> The defendant 'must bear the consequences of his own decision as to the calling and treatment of evidence at the trial'.<sup>103</sup> The conviction may stand 'even though it may appear that if that evidence had been

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97 *Criminal Appeal Act 1912* (NSW) s 6(1).

98 *Ratten* (1974) 131 CLR 510, 516 (Barwick CJ).

99 *Ibid* 517 (Barwick CJ).

100 *Gallagher v The Queen* (1986) 160 CLR 392, 402 (Mason and Deane JJ), 410 (Brennan J) ('*Gallagher*'); *R v Abou-Chabake* (2004) 149 A Crim R 417, 428 [63] (Kirby J) ('*Abou-Chabake*'); *Ratten* (1974) 131 CLR 510, 520 (Barwick CJ). Justice Brennan in *Gallagher* (1986) 160 CLR 392, 410, uses the term 'likely' which appears too strong: *R v Ali* (2001) 122 A Crim R 498, 501 [9] (Badgery-Parker AJ).

101 *Abou-Chabake* (2004) 149 A Crim R 417, 428 [63] (Kirby J); *Ratten* (1974) 131 CLR 510, 518–9 (Barwick CJ). Cf *Gallagher* (1986) 160 CLR 392, 398–9 (Gibbs CJ).

102 *Ratten* (1974) 131 CLR 510, 517 (Barwick CJ).

103 *Ibid*.



called and been believed a different verdict at the trial would most likely have resulted'.<sup>104</sup>

### D Only One Appeal

The finality principle adds a further restriction on the appeal court's capacity to correct a wrongful conviction. The defendant has only one opportunity to appeal to the NSWCCA from a trial conviction: 'the *Criminal Appeal Act* does not confer jurisdiction to re-open an appeal which has been heard on the merits and finally determined'.<sup>105</sup> No matter how solid the ground of appeal, no matter how compelling the fresh exculpatory evidence, if the defendant has already failed once, the appeal court will not hear the appeal (unless, exceptionally, a referral has been made under one of the post-appeal mechanisms discussed in the next Part). While the defendant may attempt to appeal to the HCA, special leave to appeal is difficult to obtain,<sup>106</sup> and, in any case, the Court views itself as a strict court of appeal and will not consider fresh evidence.<sup>107</sup>

## IV INEFFECTIVENESS OF CURRENT POST-APPEAL MECHANISMS

The criminal standard of proof is demanding, but it does not demand absolute certainty, and leaves an expectation that some innocent defendants will be convicted. The appeal system pursues finality and does not aim for comprehensive error correction. Some potential errors are deliberately left untouched. It is not hard to believe that the wrongful conviction rate in Australia would be similar to the US's three per cent.

In this Part, I discuss various Australian post-appeal mechanisms for correcting wrongful convictions. However, as will be seen, the finality principle applies still more strongly at this point. Wrongfully convicted defendants would struggle to utilise these mechanisms, and very few do. In the next Part, I argue

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<sup>104</sup> Ibid.

<sup>105</sup> *Elliott v The Queen* (2007) 234 CLR 38, 42 [7] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ). Subject to narrow exceptions such as the slip rule, and fraud: *R v Reardon [No 2]* (2004) 60 NSWLR 454, 467; *R v Pinfold* [1988] 1 QB 462; *Burrell v The Queen* (2008) 238 CLR 218; *R v GAM [No 2]* (2004) 9 VR 640. Kathleen Folbigg effectively was allowed a second appeal from the same convictions at trial since the second appeal was apparently brought before the order from the first had been perfected: *Folbigg v The Queen* [2007] NSWCCA 128. Of course, if the defendant is successful on one appeal, and there is a retrial resulting again in conviction, there may be a further appeal from that decision.

<sup>106</sup> See, eg, in 2011–12 the Court heard 384 special leave applications and 59 appeals: High Court of Australia, *Annual Report 2011–2012* (2012). This suggests the success rate of special leave applications is about 15 per cent. Note, however, that the frequency of High Court criminal appeals is increasing: 19 out of the 59 High Court judgments for 2013, up from 9 out of the 49 judgments in 2010: see Mirko Bagaric, 'The High Court on Crime in 2012: Outcomes and Jurisprudence' (2013) 37 *Criminal Law Journal* 6.

<sup>107</sup> *Mickelberg v The Queen* (1989) 167 CLR 259; Weathered, 'The Criminal Cases Review Commission', above n 8, 251. Nor will the court be too welcoming of novel grounds of appeal: eg, *Crampton v The Queen* (2000) 206 CLR 161; see further below nn 235–41.

that the English CCRC provides a far better model for post-appeal review, and one that still provides adequate respect for the finality principle.

At common law, the only way of addressing a wrongful conviction is through the royal pardon.<sup>108</sup> This mechanism suffers a number of failings. First, it operates only to *excuse* the convicted defendant; the conviction is not quashed.<sup>109</sup> Second, in practice this prerogative is exercised on the advice of the government, raising concerns over ‘separation of powers’ and the conflation of the ‘investigation of alleged miscarriages of justice’ with ‘law and order’.<sup>110</sup> In the current law and order environment, it is difficult imagining the government taking a cool objective view of a case involving a confirmed sex offender, such as *Solomon*,<sup>111</sup> discussed in the next Part, referred back to the CACD, or a high-profile terrorism case like the Lockerbie bomber case, referred back by the Scottish Commission.<sup>112</sup> Third, applications for pardons tend to be treated by the government on an ad hoc and reactive basis rather than systematically and consistently.<sup>113</sup>

A number of reforms have been introduced over the years in NSW, with similar reforms in other Australian jurisdictions, to supplement and provide alternatives to pardons as a method of addressing wrongful convictions post-appeal. Having received a petition the government, instead of considering a pardon, may order a judicial inquiry into a possible wrongful conviction,<sup>114</sup> or refer the matter back to a court of criminal appeal.<sup>115</sup> Where a defendant has been pardoned, an application may be made to the NSW Supreme Court for the conviction to be quashed.<sup>116</sup> These reforms bring improvements but they still suffer some of the weaknesses with the prerogative of mercy, mentioned above. The procedures appear ad hoc and reactive and, to the extent that they hinge upon government action, may be subject to political pressure.

In this Part, I will focus on more substantial reforms, most of more recent origin. In NSW applications for a judicial inquiry or a referral of a fresh appeal

108 Indeed, until early in the 20<sup>th</sup> century, there was no right of appeal and limited scope for the judiciary to correct its errors. The English Court of Appeal was established by the *Criminal Appeal Act 1907*, 7 Edw 7, c 23, and Australian jurisdictions followed soon after: see, eg, *Eastman* (2003) 214 CLR 318, 344 [74] (Heydon J).

109 *Eastman* (2003) 214 CLR 318, 342, 350–1 (Heydon J), citing, eg, Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (Macmillan, 1883) vol 1, 312–13; *R v Cosgrove* [1948] Tas SR 99, 106; Rosemary Pattenden, *English Criminal Appeals 1844–1994* (Clarendon, 1996) 383.

110 *Runciman Royal Commission Report*, above n 17.

111 *R v Solomon* [2007] EWCA Crim 2633. See below nn 245–52.

112 Scottish Criminal Cases Review Commission, *Annual Reports and Accounts 2007–08*, 16–17.

113 *Runciman Royal Commission Report*, above n 17.

114 *Crimes (Appeal and Review) Act 2001* (NSW) s 77(1)(a) (‘CARA’); *Crimes Act 1900* (ACT) pt 20.

115 The original criminal appeal legislation made provision for this: eg, *Criminal Appeal Act 1907*, 7 Edw 7, c 23, s 19; *Criminal Appeal Act 1912* (NSW) s 26. Now see CARA s 77(1)(b), formerly *Crimes Act 1900* (NSW) s 474C; *Criminal Code Act 1983* (NT) sch 1 s 431(a); *Criminal Code Act 1899* (Qld) sch 1 s 672A(a); *Criminal Law Consolidation Act 1935* (SA) s 369(1)(a) (‘CLCA’); *Criminal Code Act 1924* (Tas) sch 1 s 419(a); *Criminal Procedure Act 2009* (Vic) s 327(1)(a); *Sentencing Act 1995* (WA) s 140(1)(a).

116 CARA s 84(3). Cf CLCA s 369(2), which requires a referral by the Attorney-General.

may be made to the Supreme Court.<sup>117</sup> A short-lived 21<sup>st</sup> century reform, lasting until 23 February 2014, gave NSW another body independent of the government with the power to refer a fresh appeal, the DNA Review Panel.<sup>118</sup> And South Australia has recently given defendants a narrow opportunity to apply to the Full Court for a ‘second or subsequent appeal’.<sup>119</sup> These mechanisms are a move in the right direction – they operate systematically, and independently of government.<sup>120</sup> However, as will be seen, they operate exceedingly narrowly, giving most wrongfully convicted defendants little real hope.

### A Applications to the NSW Supreme Court

Wrongfully convicted defendants in NSW, having exhausted their regular opportunities for appeal, can apply to the NSW Supreme Court under *Crimes (Appeal and Review) Act 2001* (NSW) (‘CARA’) section 78 for the reference of a further appeal to the NSWCCA. Under section 79(2) the Court may make such an order ‘if it appears that there is a doubt or question as to the convicted person’s guilt ... or as to any part of the evidence in the case’. Given that this is ‘remedial legislation designed to overcome injustices that sometimes arise in the course of the administration of criminal justice’,<sup>121</sup> it is arguable that the Court should construe the legislation beneficially.<sup>122</sup> The language of section 79(2) would sustain this, and at times the court appears to follow this path, suggesting that the judge should consider ‘whether the material relied on caused unease or a sense of disquiet in allowing the conviction to stand’.<sup>123</sup> However, this appearance of openness is deceptive. The Court has indicated that the provision ‘is not intended to provide a convicted person with yet another avenue of appeal

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117 CARA s 78. The NSW Supreme Court has, since the late 19<sup>th</sup> century, had the power to order a judicial inquiry into a conviction of its own motion: *Crimes Act 1900* (NSW) s 475; *Criminal Law Consolidation Act 1883* (NSW) s 383, discussed in *Eastman* (2003) 214 CLR 318, 324 [8] (McHugh J), 338–44 [64]–[83] (Heydon J). In 1993 this power was modified so that the Court could also receive applications to exercise this power: *Crimes Legislation (Review of Convictions) Act 1993* (NSW) sch 1 item 3, inserting *Crimes Act 1900* (NSW) pt 13A which includes s 474E. Since 1996 the Court has had the additional option of referring a conviction back to the Court of Criminal Appeal: *Crimes Amendment (Review of Convictions and Sentences) Act 1996* (NSW) sch 1 item 7, amending *Crimes Act 1900* (NSW) s 474E. The power extends to the referral of a sentence. Legislatively, the Court’s powers are now virtually identical to those of the government: compare CARA ss 76–7 and ss 78–9.

118 CARA pt 7 div 6.

119 CLCA s 353A.

120 Although, as Jeremy Roberts notes in respect of the new SA appeal provision, the head of the SA judiciary, Kourakis CJ, was previously the SA Solicitor-General who advised the government on the petitions of defendants claiming to be wrongfully convicted, such as Henry Keogh who has now brought an appeal under the new Act: Jeremy Roberts, *Keogh Case Inspires Legal Reform* (21 March 2013) Civil Liberties Australia <[http://www.cla.asn.au/News/keogh-case-inspires-legal-reform/?zoom\\_highlight=Keogh+Case+Inspires+Legal+Reform](http://www.cla.asn.au/News/keogh-case-inspires-legal-reform/?zoom_highlight=Keogh+Case+Inspires+Legal+Reform)>.

121 *Re Application of Holland under s 78 Crimes (Appeal and Review) Act 2001* [2008] NSWSC 251, [5] (Johnson J) (‘Holland’), citing *Kirk Group Holdings Pty Ltd v WorkCover Authority of NSW* (2006) 66 NSWLR 151, 154–5 (Spigelman CJ).

122 *Varley v A-G (NSW)* (1987) 8 NSWLR 30, 38 (Kirby P), 46 (Hope JA); *Eastman* (2003) 214 CLR 318, 337 [60] (Heydon J); *Bull v A-G (NSW)* (1913) 17 CLR 370, 384.

123 *GAR v The Queen [No 1]* [2010] NSWCCA 163, [16].

after the usual avenues have been exhausted'.<sup>124</sup> In other words, the test for a referral of a further appeal is more demanding than the test imposed at the regular appeal.

In other respects, the legislation facilitates this narrow approach. The Court has a broad discretion to 'refuse to consider or otherwise deal with an application'<sup>125</sup> because, for example, it 'appears' the matter 'has been fully dealt with' in previous proceedings<sup>126</sup> and the Court 'is not satisfied that there are special facts or special circumstances that justify the taking of further action'.<sup>127</sup> Further, under section 79, the Court is acting administratively, not judicially.<sup>128</sup> The Court is entitled to say to an applicant: 'I am not obliged to give reasons and it would be sufficient for me to read all the proffered material and, in the absence of any conclusion that it gave rise to a sense of disquiet or unease, simply take no action'.<sup>129</sup> The Court's decision is not subject to appeal,<sup>130</sup> and may not be subject to judicial review.<sup>131</sup>

And, while the bar that the defendant has to clear is higher for a section 78 application than at trial or on appeal, the defendant will frequently be in a weaker position.<sup>132</sup> Many convicted defendants face barriers to communication due to their socially disadvantaged backgrounds, high rates of mental illness and drug dependence.<sup>133</sup> Many defendants will have exhausted their resources at trial and

124 *R v Milat* (2005) 157 A Crim R 565, 574 [26] (Barr J); *Holland* [2008] NSWSC 251, [9] (Johnson J).

125 *CARA* s 79(3).

126 *CARA* s 79(3)(a)(i).

127 *CARA* s 79(3)(b).

128 *CARA* s 79(4); *Eastman* 214 CLR 318, 362 [124] (Heydon J); *Patsalis v A-G (NSW)* (2013) 303 ALR 568, 572, 574 (Basten JA, with Bathurst CJ and Beazley P agreeing) ('*Patsalis*').

129 *Re Kalajzich* (Unreported, Supreme Court of New South Wales, Grove J, 18 September 1992); *Holland* [2008] NSWSC 251, [14] (Johnson J).

130 *Patsalis* (2013) 303 ALR 568, 572, 574 (Basten JA, with Bathurst CJ and Beazley P agreeing).

131 See Bibi Sangha and Bob Moles, 'Mercy or Right? Post-appeal Petitions in Australia' (2012) 14 *Flinders Law Journal* 293. The latest authority, *Patsalis* (2013) 303 ALR 568, is unclear but discouraging. The application to obtain judicial review of the Supreme Court's rejection of a s 78 application was dismissed. Justice of Appeal Basten gave the leading judgment. Chief Justice Bathurst and Beazley P agreed with the decision. Chief Justice Bathurst added that '[i]t follows that I agree with Basten JA that the decision ... is susceptible to judicial review for jurisdictional error': at 569 [3] (emphasis added). However, it is not clear that Basten JA resolved this issue. Justice of Appeal Basten held that 'the proceeding should be dismissed on the basis that ... the matters relied upon by the applicant do not provide a basis for the exercise of the court's supervisory jurisdiction, without finally determining the *existence or scope* of that jurisdiction': at 571 [14] (emphasis added).

132 The experience of those involved in uncovering wrongful convictions is that the defendants are in no position to investigate and uncover the flaws for themselves: see, eg, Justice Edward P MacCallum, *Report of the Commission of Inquiry into the Wrongful Conviction of David Milgaard* (2008) 356, discussed in Roach, above n 48, 442–3.

133 See, eg, Craig Jones and Sandra Crawford, 'The Psychosocial Needs of NSW Court Defendants' (2007) 108 *Crime and Justice Bulletin* 1; Michele LaVigne and Gregory J Van Rybroek, 'Breakdown in the Language Zone: The Prevalence of Language Impairments among Juvenile and Adult Offenders and Why It Matters' (2011) 15 *UC Davis Journal of Juvenile Law & Policy* 37.

on appeal.<sup>134</sup> Their support network is likely to have shrunk considerably. Most will be in prison, adding to the difficulty of preparing an application. A NSW Government website tells prospective applicants to provide ‘specific evidence and submissions ... new evidence, not raised previously at trial.’<sup>135</sup> But the government will not help: ‘No independent investigation is undertaken by the Crown’.<sup>136</sup> And the Court will not assist the defendant by issuing subpoenas as it views the application as ‘anterior’ to proceedings.<sup>137</sup>

Unsurprisingly, very few wrongful convictions are corrected under *CARA* section 78, or its predecessor, *Crimes Act 1900* (NSW) section 474D. No regular statistics are produced for these applications<sup>138</sup> – perhaps because there are so few – but some useful figures have been gathered in a number of recent reports.<sup>139</sup> Sixty-nine applications were made to the Supreme Court over the period from 1994 to 2003, resulting in the order of seven inquiries and the reference of seven appeals, and the quashing of five convictions.<sup>140</sup> It appears that most if not all of these convictions were quashed since 2000.<sup>141</sup> Another study of NSW criminal appeals for the period 2001 to 2007 identifies a dozen successful appeals.<sup>142</sup> Since then, however, while application rates remain at about the same level – averaging eight a year<sup>143</sup> – the flow of corrections has almost ceased.<sup>144</sup>

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134 Applicants under *CARA* s 78 can seek legal aid and many will satisfy the means test, but given the difficulty of persuading the Supreme Court to order an appeal or inquiry, their chances of satisfying the merit test by showing ‘reasonable prospects of success’ appear slim: Legal Aid NSW, *Criminal Law Matters – When Legal Aid Is Available* (16 December 2010) <[http://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/4.-criminal-law-matters-when-legal-aid-is-available/4.14.-matters-under-part-7-of-the-crimes-appeal-and-review-act?SQ\\_DESIGN\\_NAME=print-section](http://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/4.-criminal-law-matters-when-legal-aid-is-available/4.14.-matters-under-part-7-of-the-crimes-appeal-and-review-act?SQ_DESIGN_NAME=print-section)>.

135 NSW Attorney General and Justice, *Review and Annulment of Convictions (Crimes (Appeal and Review) Act 2001)* (25 July 2013) <[http://www.lsb.lawlink.nsw.gov.au/lsb/legal\\_services\\_review\\_annul/legal\\_services\\_review\\_conviction.html](http://www.lsb.lawlink.nsw.gov.au/lsb/legal_services_review_annul/legal_services_review_conviction.html)>.

136 *Ibid.*

137 *Holland* [2008] NSWSC 251, [76] (Johnson J).

138 See, eg, applications under *CARA* pt 7 are expressly excluded from the statistics in the Supreme Court’s most recent Annual Review: Supreme Court of NSW, *Annual Review 2010 & 2011* (2011) 55.

139 Mervyn Finlay, *Review of the NSW Innocence Panel* (2003) 12; Nicholas Cowdery, ‘Wrongful Conviction and Double Jeopardy’ (2005) 17(4) *Judicial Officers’ Bulletin* 27; Gareth Griffith and Lenny Roth, ‘DNA Evidence, Wrongful Convictions and Wrongful Acquittals’ (Briefing Paper No 11/06, Parliamentary Library, Parliament of New South Wales, 2006); Donnelly, Johns and Poletti, above n 82.

140 Finlay, above n 139, 12–13. Cowdery notes that 17 applications were made to either the Supreme Court or the Governor between 2000 and 2002: Cowdery, above n 139, 29. A comparison of the two suggests that most applications were made to the Supreme Court rather than the government.

141 Cowdery counts eight pt 13A appeals in the years 2000–02, with six appeals being upheld: Cowdery, above n 139, 29. While Finlay was considering only referrals from the Supreme Court under s 474D of the *Crimes Act 1900* (NSW), Cowdery also considered s 474B referrals from the government.

142 Donnelly, Johns and Poletti, above n 82, 182.

143 Over the five years from 2008 to 2012 there were 13, 2, 6, 7 and 12 applications per year, respectively. Thanks to Jeannie Highet, NSWSC Caseload Analysis Manager, for these figures.

The aberrantly higher number of corrections at the beginning of the century – though still only a couple a year – is easily explained. These were virtually all cases where police corruption threw doubt on convictions:

The work of investigative commissions such as the Royal Commission into the NSW Police Service, the Police Integrity Commission, the Independent Commission against Corruption, and the NSW Crime Commission was instrumental in bringing to light or exploring the fresh evidence ...<sup>145</sup>

Since the mid-1990s significant government resources have been dedicated to uncovering police corruption which has had the incidental benefit of revealing consequential wrongful convictions. Now that the backlog of police corruption cases has been cleared away, the flow of wrongful conviction corrections has slowed again.

In 2003 the former Supreme Court Justice, Mervyn Finlay, suggested that the Supreme Court referral ‘has proved an effective provision of the criminal law in this state to handle cases of alleged miscarriages of justice’.<sup>146</sup> This positive assessment appears totally unwarranted. Nicholas Cowdery, then NSW Director of Public Prosecution (‘DPP’), may be right in observing that ‘the ancillary mechanisms of complaint and investigation operated effectively to cast the conduct of police in its proper light.’<sup>147</sup> But police corruption is only one among many possible causes of wrongful conviction.<sup>148</sup> What of mistaken eyewitness identification, failure of prosecution disclosure, biased expert witnesses, and ineffective defence counsel? There may be many more wrongful convictions that are not being corrected because the state has not invested resources in uncovering them. The fact that ‘the number of successful challenges ... is exceedingly low’ provides no comfort.<sup>149</sup>

Strangely, while it is very difficult for a wrongfully convicted defendant to get a subsequent appeal, winning this appeal may be easier than usual. Under the legislation the ‘whole case’ is referred to the appeal court.<sup>150</sup> This has been held to ‘embrace the whole of the evidence properly admissible, whether “new”, “fresh” or previously adduced’.<sup>151</sup> The court should approach the case free of the ‘inhibitions’ that,<sup>152</sup> as discussed above, it usually feels in considering evidence

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144 Case databases searches have revealed only three occasions when the Court of Criminal Appeal has considered pt 7 conviction appeals since 2007: *Re Conviction of McDermott* (2013) 303 ALR 143; *Kearns v The Queen* (2011) 213 A Crim R 150; *GAR v The Queen [No 1]* [2010] NSWCCA 163. Only the first of these was upheld. This atypical case concerns a 1947 conviction in connection with a 1936 disappearance. Doubts about the conviction gave rise to a 1951 Royal Commission and the defendant’s early release. The defendant died in 1977. The present appeal stemmed from new evidence found by chance in 2004.

145 Donnelly, Johns and Poletti, above n 82, 183; see also Cowdery, above n 139, 29; Griffith and Roth, above n 139, 29–30.

146 Finlay, above n 139, 13.

147 Cowdery, above n 139, 29.

148 See above n 48.

149 Cowdery, above n 139, 29.

150 See, eg, *CARA* s 79(1)(b).

151 *Mallard v The Queen* (2005) 224 CLR 125, 131 [10] (Gummow, Hayne, Callinan and Heydon JJ).

152 *Ibid* 131 [9]–[10] (Gummow, Hayne, Callinan and Heydon JJ).

that is merely new, not genuinely fresh. This departure from the finality principle is a historical anomaly. The reference to the appeal court is ‘effectively both a substitute for, and an alternative to, the invocation, and the exercise of the Crown prerogative [of mercy which is] ... unconfined by any rules or laws of evidence, procedure, and appellate conventions and restrictions.’<sup>153</sup>

## B NSW DNA Review Panel

Between 2007 and early 2014 NSW had another avenue for the quashing of a conviction, the NSW DNA Review Panel. This independent statutory body, established by division 6 of part 7 of *CARA*,<sup>154</sup> had a range of powers directed towards the correction of wrongful convictions on the basis of exonerating DNA evidence. The Panel could receive and consider applications from defendants claiming to be innocent,<sup>155</sup> arrange for biological evidence to be searched for and for a DNA profile to be generated,<sup>156</sup> and where a comparison of DNA profiles suggested that the defendant was innocent the Panel could refer the matter to the Court of Criminal Appeal.<sup>157</sup> In effect, this mechanism for overturning a conviction operated on the basis of actual innocence rather than legal innocence.<sup>158</sup>

While the Panel received about five applications a year, it did not correct a single wrongful conviction.<sup>159</sup> The NSW government took this as a sign that there are few wrongful convictions requiring correction.<sup>160</sup> However, this is unjustified. The DNA Review Panel was subject to a number of restrictions on its effectiveness and reach. One was the narrowness of the eligibility requirements for applicants. In the absence of ‘special circumstances’ the offence was required to be one ‘punishable by imprisonment for life or for a period of 20 years or

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153 Ibid 129 [6] (Gummow, Hayne, Callinan and Heydon JJ).

154 A predecessor, the Innocence Panel, operated between 2000 and 2003. It was a non-statutory body that reported to the Minister for Police. Its position within the police portfolio, and its lack of powers raised concerns: see, eg, Mark Findlay, ‘Independent Review of the *Crimes (Forensic Procedures) Act 2000*’ (Criminal Law Review Division, Attorney-General’s Department, 2003) 88–92. But its suspension was apparently prompted when the application of a high-profile ‘killer’ raised concerns about distress to the victim’s family: Stephen Gibbs, ‘Appeal Panel Shut Down after Balding Killer’s Action’, *Sydney Morning Herald* (Sydney), 12 August 2003, 4. Queensland recently made provision for similar testing, however, this is managed by Attorney-General’s Department, and does not extend to a reference for a subsequent appeal: Department of Justice and Attorney-General, Queensland Government, *Guidelines for Applications to the Attorney-General to Request Post-conviction DNA Testing* (5 August 2010) (‘*Qld DNA Testing Guidelines*’).

155 *CARA* ss 91(1)(a), 92.

156 *CARA* ss 91(1)(b), 91(4)–(5), 92(3)(a).

157 *CARA* ss 91(1)(c), 94.

158 *Qld DNA Testing Guidelines* indicate that the defendant must accompany the application with a ‘statutory declaration by the applicant asserting the applicant’s innocence of the offence’: above n 154, 3.

159 In its Annual Report for 2011–12, the Panel reported having received 28 applications since its commencement on 23 February 2007. No matters had been referred to the NSWCCA: DNA Review Panel, NSW Department of Attorney-General and Justice, *Annual Report 2011–12*, 34–5. Note that the work of its predecessor, the Innocence Panel, also corrected no wrongful convictions: at 26.

160 New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 November 2013, 25418 (Geoff Provest).

more',<sup>161</sup> and the applicant must have 'continue[d] to be subject to the sentence ... [or] supervision or detention' as a result of the conviction.<sup>162</sup> Also, the applicant must have been convicted before 19 September 2006.<sup>163</sup> This last restriction assumed that for more recent offences DNA profiling would have been used if relevant.<sup>164</sup> It failed to recognise, however, that DNA profiling technology continues to develop creating fresh opportunities for useful profiles to be generated, for example, in respect of mixed samples or very small samples.<sup>165</sup> Further, even where DNA profiling is used during an investigation it is not infallible.<sup>166</sup> Contamination or some other human error may have occurred which could, in some cases, be corrected through further DNA analysis.<sup>167</sup> As mentioned above, innocence projects in the US continue to achieve DNA exonerations in respect of convictions from recent decades.<sup>168</sup>

Of course, a further limit on the Review Panel's potential may have been that there were relatively few cases capable of being resolved through DNA testing. DNA profiling has obvious potential for sexual and other violent assaults where biological material is transferred and identity is in issue, but it has limited scope with other offences and where identity is not in issue.<sup>169</sup> Further, even where useful DNA evidence was generated, it must have been gathered – requiring prompt reporting of the offence and proper forensic investigation – and then preserved.<sup>170</sup> It is difficult to know what proportion of cases have the potential to be resolved through DNA profiling. While the US innocence projects list more

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- 161 *CARA* s 89(3)(a), as repealed by *Crimes (Appeal and Review) Amendment (DNA Review Panel) Act 2013* (NSW) sch 1 item 3. Cf *Qld DNA Testing Guidelines* which are narrower still. The offence must be punishable by life imprisonment: *Qld DNA Testing Guidelines*, above n 154, 2.
- 162 *CARA* s 89(5), as repealed by *Crimes (Appeal and Review) Amendment (DNA Review Panel) Act 2013* (NSW) sch 1 item 3. This includes ongoing supervision or detention under the *Crimes (High Risk Offenders) Act 2006* (NSW). Cf *Qld DNA Testing Guidelines*, above n 154, 2.
- 163 *CARA* s 89(3), as repealed by *Crimes (Appeal and Review) Amendment (DNA Review Panel) Act 2013* (NSW) sch 1 item 3.
- 164 New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 November 2013, 25418 (Geoff Provest). See also Lynne Weathered, 'Reviewing the New South Wales DNA Review Panel: Considerations for Australia' (2013) 24 *Current Issues in Criminal Justice* 449, 452. Note the similar Qld restriction. An application cannot be made if the biological material sought to be tested was previously subjected to DNA testing using the Profiler Plus System.
- 165 Which the Government now acknowledges: New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 November 2013, 25418 (Geoff Provest). This is not to say that the new methods are unproblematic: see, eg, David J Balding, 'Evaluation of Mixed-Source, Low-Template DNA Profiles in Forensic Science' (2013) 110 *Proceedings of the National Academy of Sciences of the United States of America* 12 241; *R v Dlugosz* [2013] 1 Cr App R 32.
- 166 See, eg, Victoria, Inquiry into the Circumstances That Led to the Conviction of Mr Farah Abdulkadir Jama, *Report* (2010).
- 167 See also Weathered, 'Reviewing the New South Wales DNA Review Panel', above n 164, 45.
- 168 See above n 53.
- 169 There may be some unusual cases where DNA could go to an issue other than identity. Eg, consider a disappearance-murder case where it is in issue whether or not the 'victim' is dead. If a body is found, DNA profiling may be used to establish whether that is the 'victim'.
- 170 Developments in DNA analysis make preservation of biological evidence crucial: see, eg, Weathered, 'Investigating Innocence', above n 48, 80–1; Findlay, above n 154, 91; Mike Redmayne, *Expert Evidence and Criminal Justice* (Oxford University Press, 2001) 23; *CARA* s 96.



than 300 DNA exonerations, they have scarcely featured among the references of the English CCRC.<sup>171</sup>

But whatever potential DNA evidence has for correcting wrongful convictions, the DNA Review Panel was not equipped to make the most of it. It was empowered to order searches and the provision of information regarding biological material,<sup>172</sup> but the defendant was expected to do the preliminary investigation and analysis. An applicant would be ineligible unless his or her ‘claim of innocence may be affected by DNA information obtained from *biological material specified in the application*’.<sup>173</sup> At a minimum this required an analysis of the circumstances of the offence and the investigation. For the reasons discussed in the previous section, this is a burden that the wrongfully convicted defendant, often with limited skills, resources and support, will struggle to meet.

Given these restrictions – the narrow eligibility requirements, the limited potential of DNA evidence, and the constrained assistance provided by the Panel – it is not surprising that the DNA Review Panel achieved so little. In its *Annual Report of 2011–12* the Panel suggested that if its eligibility requirements were broadened the ‘work of the Panel would potentially increase significantly’.<sup>174</sup> According to reports, the Attorney-General supported some broadening of the Panel’s scope, but apparently this did not fit with the Premier’s law and order agenda.<sup>175</sup> A government report into the Panel produced faulty figures and falsely suggested that the Panel was not required since the section 78 application to the Supreme Court provided an effective mechanism for wrongfully convicted defendants to be granted a subsequent appeal.<sup>176</sup> The Panel was abolished while

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- 171 *R v Hodgson* [2009] EWCA Crim 490; *R v Shirley* [2003] EWCA Crim 1976; and the very recent case of Victor Nealon may be the only ones: Carole McCartney, *Another DNA Exoneration for the UK?* (19 July 2012) Wrongful Convictions Blog <<http://wrongfulconvictionsblog.org/2012/07/19/another-dna-exoneration-for-the-uk/>>; Gwyn Topham, ‘Wrongly Jailed Victor Nealon Spends First Night as Free Man on Streets’, *The Guardian* (Manchester), 16 December 2013, 8. McCartney suggests that the CCRC has been too reluctant to conduct DNA testing. Perhaps this stems from *R v Hanratty* [2002] 2 Cr App R 30, where the DNA evidence adduced on the referred appeal tended to confirm guilt. The suggestion that there have been ‘a number’ of DNA exonerations among CCRC referrals appears overstated: DNA Review Panel, *Annual Report 2011–12*, above n 159, 21.
- 172 *CARA* ss 91(1)(b), 91(4), as repealed by *Crimes (Appeal and Review) Amendment (DNA Review Panel) Act 2013* (NSW) sch 1 item 3.
- 173 *CARA* s 89(2) (emphasis added), as repealed by *Crimes (Appeal and Review) Amendment (DNA Review Panel) Act 2013* (NSW) sch 1 item 3. *Qld DNA Testing Guidelines* also place the onus on the defendant: *Qld DNA Testing Guidelines*, above n 154, 5.
- 174 DNA Review Panel, *Annual Report 2011–12*, above n 159, 37. See also Weathered, ‘Reviewing the New South Wales DNA Review Panel’, above n 164, 452.
- 175 Andrew Clennell and Alicia Wood, ‘Smith DNA Appeal Plan Struck from Cabinet Talks’, *The Daily Telegraph* (Sydney), 30 October 2013, 5.
- 176 At one point the report stated that ‘69 applications were considered during the period of the Panel’s operation [2007–13], and at least five convictions were quashed’: Department of Attorney-General & Justice, *The DNA Review Panel: Review of Division 6 of Part 7 of the Crimes (Appeal and Review) Act 2001* (2013) 29. However, over that period it appears that the Court of Criminal Appeal only considered three subsequent appeals, only one of which resulted in the quashing of a conviction: see above n 144. The error appears to be the product of an inappropriate extrapolation from figures for an earlier period. Earlier the report notes:

leaving in place a weakened procedure for convicted defendants to apply for DNA testing.<sup>177</sup>

In fact, as discussed in the previous section, the section 78 Supreme Court mechanism is scarcely more effective than the DNA Review Panel as a means for correcting wrongful convictions. The section 78 procedure is not limited to cases involving DNA evidence and is not subject to the Panel's tight statutory eligibility requirements, however, like the Panel, it is premised on the unrealistic expectation that wrongfully convicted defendants possess the resources and skills to identify evidence revealing their innocence. To be effective in correcting wrongful convictions, an independent body needs to be established, not only to refer fresh appeals, but with proper investigative powers and resources. The English CCRC, discussed in the next part, provides a good model. Before discussing that, however, we should consider a recent innovation of South Australia.

### C South Australia's 'Second or Subsequent Appeal'

In May 2013 section 353A was inserted into the *Criminal Law Consolidation Act 1935* (SA) ('*CLCA*') providing defendants with the opportunity to seek a 'second or subsequent appeal' against conviction on the basis of 'substantial miscarriage of justice'.<sup>178</sup> At first glance this may appear preferable to the NSW schemes discussed above as it enables the defendant to apply directly to the appeal court without the need for a referral from the government, the Supreme Court, or the DNA Review Panel. However, on closer examination, the new South Australian appeal provision will operate very narrowly, presenting wrongfully convicted defendants with similar obstacles to the NSW scheme.

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During the period 2007–2013 (the period of the Panel's operations), the Supreme Court received 69 applications for review under Part 7 of the Act. The Review was unable to obtain details on the outcome of these applications, however, it is known that the same number of applications were received in the period 1994–2003, resulting in at least 5 convictions being quashed and 1 re-trial being ordered.

Department of Attorney-General & Justice, above n 176, 18–19 (citations omitted). However, this earlier period experienced a much higher rate of referrals and successful subsequent appeals due to the work of the Royal Commission into the NSW Police Service: see above n 145 and accompanying text. Since then successful s 78 applications have virtually ceased.

177 There is one slight improvement. The date restriction on convictions has been dropped, but the other tight eligibility requirements have been retained: *CARA* s 97(5)–(7). And in other respects, the new procedure makes it still less likely that wrongful convictions will be corrected through DNA testing. Defendants must apply to the Police Commissioner for information and testing of biological material: at s 97(2). Shifting control from an independent body to the police is a backward step. This was one of the flaws with the DNA Panel's predecessor, the Innocence Panel: above n 154. The defendant can apply to the Supreme Court for a compliance order: *CARA* s 97(4), but few defendants would be in a position to take such a step. Further, the costs of DNA testing are now to be borne by the defendant: at s 97(3). Finally, the obligation on police to retain evidence has been weakened. Under the new provisions they need only retain a swab or sample of the biological material, and not the physical evidence itself: at s 96(2A). This clearly reduces the capacity for uncovering problems of contamination and mislabelling of evidence: see above n 166.

178 *CLCA* s 353A(3).

First of all, it is inaccurate to characterise the reform, as many have done, as creating a ‘new *right* of appeal’.<sup>179</sup> In South Australia, as in NSW and other Australian jurisdictions,<sup>180</sup> a defendant convicted on indictment or information may only appeal ‘*as of right* on any ground that involves a question of law alone’.<sup>181</sup> An appeal ‘on any other ground’ requires leave,<sup>182</sup> and this is true of the new appeal provision: ‘A convicted person may only appeal under this section with the permission of the Full Court.’<sup>183</sup> Further, under section 353A, if leave is given and the Court finds there has been a substantial miscarriage of justice, the Court retains a peculiar discretion not to grant the appeal. Ordinarily the Court ‘*shall* allow the appeal’ if it thinks that the ground is made out.<sup>184</sup> Under section 353A, however, ‘[t]he court *may* allow an appeal’.<sup>185</sup>

And there is a further massive restriction on the availability of the appeal. The Court cannot hear the appeal unless it is persuaded ‘that there is fresh and compelling evidence that should, in the interests of justice, be considered on an appeal’.<sup>186</sup> ‘Fresh evidence’ is defined in familiar terms as evidence which was ‘not adduced ... and ... could not, even with the exercise of reasonable diligence, have been adduced at the trial’.<sup>187</sup> To be ‘compelling’ evidence must be ‘reliable ... substantial ... and ... highly probative’.<sup>188</sup> In advancing the reform, the Legislative Review Committee of the South Australian Parliament suggested it was appropriate that ‘the principle of finality ... should only be disturbed by the court in these exceptional and limited circumstances’.<sup>189</sup>

Some sign of just how tight the ‘fresh and compelling’ requirement is can be obtained by considering the operation of a related provision. The Legislative Review Committee drew the ‘fresh and compelling’ formula from the double jeopardy exception in *CLCA* part 10.<sup>190</sup> Section 337 enables the DPP to apply to have an acquittal overturned on the basis of ‘fresh and compelling evidence’ of guilt. This provision commenced operation on 3 August 2008,<sup>191</sup> and has

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179 See, eg, ABC News, ‘New Appeal Right Proposed In SA Legislation’ (28 November 2012) <<http://www.abc.net.au/news/2012-11-28/new-appeal-right-proposed-in-sa-legislation/4396374>> (emphasis added); Robert N Moles and Bibi Sangha, *Appeals and Post-conviction Reviews Homepage*, Networked Knowledge <<http://netk.net.au/AppealsHome.asp>>; South Australia, above n 73. It is oxymoronic for the committee to refer to a ‘right of appeal ... with the leave of the court’ and to suggest ‘[a]ny further right of appeal should be at the discretion of the court’: at 82–3.

180 See above n 82.

181 *CLCA* s 352(1)(a)(i) (emphasis added).

182 *CLCA* s 352(1)(a)(ii).

183 *CLCA* s 353A(2).

184 *CLCA* s 353(1) (emphasis added).

185 *CLCA* s 353A(3) (emphasis added).

186 *CLCA* s 353A(1).

187 *CLCA* s 353A(6)(a).

188 *CLCA* s 353A(6)(b).

189 South Australia, above n 73, 83.

190 *Ibid* 82.

191 *Criminal Law Consolidation (Double Jeopardy) Amendment Act 2008 (SA)* s 2; South Australia, *South Australian Government Gazette*, No 43, 31 July 2008, 3519.

counterparts in all the other states, commencing with NSW in 2006.<sup>192</sup> There is no sign that any Australian prosecuting body has used this exception to double jeopardy.<sup>193</sup> If the prosecution, with all of its resources and expertise, is unable to meet this demanding threshold, what hope can there be for the wrongfully convicted defendant, in most cases lacking skills, resources and support, and stuck in prison?<sup>194</sup>

The South Australian Parliament was very pleased with itself for passing the reform. '[T]his is indeed a proud time for the Parliament of South Australia'.<sup>195</sup> Two Legislative Council members separately read out a message of congratulations from former HCA Justice Michael Kirby in which he characterised the Act as 'an instance of ... principle triumphing over complacency and mere pragmatism'.<sup>196</sup> But this assessment and Parliament's self-satisfaction appear unwarranted. The new South Australian appeal provision subjects the wrongfully convicted defendant to obstacles similar to those encountered by

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192 *CARA* pt 8, div 2, commencing 15 December 2006; Qld followed in 2007, adding ch 68 to its Criminal Code; South Australia in 2008; Tasmania in 2008, adding ch XLIV to its Criminal Code; Victoria in 2011, adding ch 7A to *Criminal Procedure Act 2009* (Vic); and Western Australia in 2012, adding pt 5A to its *Criminal Appeals Act 2004*. Only the territories do not have double jeopardy exceptions, yet: ABC News, 'Push to Change Double Jeopardy Laws' (1 March 2013) <<http://www.abc.net.au/news/2013-03-01/push-to-change-double-jeopardy-laws/4546672>>.

193 The Australian reforms followed similar reforms in the UK, *Criminal Justice Act 2003* (UK) c 44, pt 10, commencing in 2005. As Lord Brown observed in *A-G's Reference (No 3 of 1999)* [2010] 1 AC 145, 166 [31]: 'this power has been little used'. However, it has got much more use than the Australian versions. The reforms allowing retrial following acquittal arose out of the failed police investigation and prosecutions in connection with the murder of Stephen Lawrence in 1993. In *R v Dobson* [2011] 1 WLR 3230, the acquittal of one of the murderers was overturned, and he was convicted on retrial, along with another murderer whose prosecution had previously been discontinued: see *Norris v The Queen* [2013] EWCA Crim 712. A database search reveals a further six cases where acquittals were quashed and retrials ordered: *R v Weston* [2010] EWCA Crim 1576; *R v Cellaire* [2009] EWCA Crim 633; *R v Andrews* [2009] 1 WLR 1947; *R v Chapman* [2007] 1 WLR 1657; *Maxwell v The Queen* [2009] EWCA Crim 2552; *R v Dunlop* [2007] 1 WLR 1657. Several applications have been rejected on the ground that the new evidence is insufficiently reliable: *R v B(J)* [2009] EWCA Crim 1036; *R v G(G)* [2009] EWCA Crim 1077; *R v Miell* [2008] 1 WLR 627. In *R v Andrews* [2009] 1 WLR 1947, 1955 [28], the CACD approved the DPP's policy that

he would only proceed in cases where, as a result of new evidence, a conviction is highly probable and any acquittal by a jury at a subsequent trial would appear to be perverse. We believe that this guidance is entirely appropriate, and consistent with the relevant legislative framework, and reflects a proper appreciation of the continuing (but not absolute) importance of finality in the criminal justice process.

Note that there may be a delay in finding out about cases because of reporting restrictions in connection with an ordered retrial. All jurisdictions that have introduced double jeopardy reforms also have a 'tainted acquittal' exception. This appears not to have been used anywhere.

194 Admittedly the application to have an acquittal reversed on the basis of fresh and compelling evidence can only be made in respect of very serious, 'Category A' offences: *CLCA* ss 331, 337. But then, given the asymmetric standard of proof, it would be expected that there would be more mistaken acquittals than mistaken convictions: David Hamer, 'Probabilistic Standards of Proof, Their Complements and the Errors that Are Expected to Flow from Them' (2004) 1 *University of New England Law Journal* 71, 87–95.

195 South Australia, *Parliamentary Debates*, Legislative Council, 19 March 2013, 3463 (Ann Bressington). To her credit, Bressington originally introduced a bill to establish a CCRC. The Act that passed was a very poor second.

196 *Ibid*; South Australia, *Parliamentary Debates*, Legislative Council, 19 March 2013, 3461 (S G Wade).

applicants to the NSW Supreme Court. The bar that the defendant has to clear is set at a very high level, the decision-maker has a great deal of discretion to reject the defendant's application, and, in many cases, the defendant will lack the resources required to put together a persuasive application. A handful of wrongfully convicted defendants may, with assistance, be able to take advantage of the provision.<sup>197</sup> But for most wrongfully convicted defendants, this reform provides no hope.

The finality principle dictates that there must be some restriction on the opportunities for defendants to challenge and overturn convictions. However, as they currently function, the opportunities open to defendants are so tightly constrained as to be illusory. Given the searing injustice of wrongful convictions, it must be asked whether the current law has the balance wrong. Can wrongfully convicted defendants be given more genuine opportunities for correction consistently with the finality principle?

## V THE CCRC MODEL: BALANCING CORRIGIBILITY AND FINALITY

Wrongful convictions come to light relatively rarely. This reflects the difficulty of uncovering them, rather than their infrequency. The finality principle makes it difficult for the defendant to demonstrate factual error at the appeal stage and even more difficult post-appeal. And by this time most defendants – in prison, lacking resources and skills – are ill-placed to meet these demands.

The English CCRC provides an alternative model for uncovering wrongful convictions. It receives applications from defendants claiming to have been wrongfully convicted, and is equipped with the powers and resources to conduct investigations where they appear warranted.<sup>198</sup> If doubt is thrown on the conviction, the Commission can refer the case back to the CACD.<sup>199</sup> Investigations into possible wrongful convictions may also be directed by the CACD.<sup>200</sup> The Commission, in making it easier to challenge and correct wrongful convictions, clearly reduces finality. Jury deference is diminished, closure delayed, and increased demands are placed on the public purse, both for the new body and the additional appeals. The English experience, however, is that the benefits in terms of increased corrigibility outweigh the costs to finality. Furthermore, the CCRC model is flexible. Its scope of operation can be varied so as to manage its impingement on the finality principle.

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197 There are suggestions that a number of defendants may bring applications under the new provision: Roberts mentions the Keogh case, above n 120; *R v Keogh* [2013] SASCFC 74; Robert N Moles and Bibi Sangha, *David Szach Homepage*, Networked Knowledge <<http://netk.net.au/SzachHome.asp>>; Robert N Moles, *Derek Bromley Homepage*, Networked Knowledge <<http://netk.net.au/BromleyHome.asp>>.

198 *CAA* ss 17–22.

199 *CAA* ss 9–12.

200 *CAA* s 15.

## A The English Commission, the Court of Appeal and the Government

The English Commission was established, following the 1993 report of the Runciman Royal Commission on Criminal Justice,<sup>201</sup> in response to criticisms of the existing mechanism for dealing with possible wrongful convictions. Previously, convicted defendants, having failed on appeal, could only petition the Home Office for a pardon or referral back to the Court of Appeal.<sup>202</sup> The Runciman Commission noted that the government, a political body, was ill-equipped to make such decisions – it tended to approach them in a cautious and reactive manner, without sufficiently deep enquiry<sup>203</sup> – and recommended that a new body take over these functions, with independence from government and appropriate powers and resources.

The CCRC was established by part II of the *CAA* and commenced work on 1 April 1997. Up until the end of 2013, from more than 17 200 applications it referred 543 cases to the Court of Appeal, at an average rate of more than 32 a year.<sup>204</sup> In 353 of these cases, the Court quashed convictions or sentences, at an average rate of more than 21 a year.<sup>205</sup> This is a massive increase from the previous mechanism. Most years the Home Office only referred four or five cases back to the Court of Appeal.<sup>206</sup> What is more, the Commission has conducted this work while successfully managing concerns about its potential threat to the finality principle.

In exercising its referral power, the Commission plays a significant gatekeeping role,<sup>207</sup> controlling the rate and quality of the flow of cases to the CACD, and refers only three or four per cent of applications received.<sup>208</sup> This has still increased the CACD's workload.<sup>209</sup> Referrals amount to about two per cent of the number of applications to the Court of Appeal for leave to appeal against conviction, and about 7.5 per cent of the conviction appeals heard by the

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201 See *Runciman Royal Commission Report*, above n 17.

202 Ibid 181.

203 Ibid 182.

204 CCRC, *Case Library*, above n 18.

205 Ibid.

206 Weeden, above n 59, 194.

207 See, eg, Kyle, above n 16, 664.

208 CCRC, *Case Library*, above n 18. The latest annual report gives a long-term annual referral rate of 32.4. For the most recent year, the figure was 21, only 1.6 per cent of applications: CCRC, *Annual Report and Accounts 2012/13*, above n 33, 11.

209 Zellick, then CCRC Chairman, suggests that that Nobles and Schiff 'grossly overstate[d]' the situation in suggesting that the Commission's 'continuing work ... represents a significant ongoing threat to the Court of Appeal's ability to manage its role': Zellick, 'The Criminal Cases Review Commission', above n 52, 941; Richard Nobles and David Schiff, 'The Criminal Cases Review Commission: Establishing a Workable Relationship with the Court of Appeal' [2005] *Criminal Law Review* 173, 174; Richard Nobles and David Schiff, 'A Reply to Graham Zellick' [2005] *Criminal Law Review* 951, 951–2. While the threat has not yet been realised Nobles and Schiff are correct that the Commission has this 'capacity'.

Court.<sup>210</sup> But it should be noted that almost 70 per cent of the referred appeals are successful,<sup>211</sup> far higher than the usual success rate which rarely exceeds 50 per cent.<sup>212</sup> It would be difficult to argue that these cases should be kept from the Court.

And the CACD is generally positive in its attitude to Commission referrals. On rare occasions the Court has criticised the Commission for wasting its time,<sup>213</sup> but expressions of appreciation are more common.<sup>214</sup> In *R v Spicer*,<sup>215</sup> for example, a case following a Court-ordered Commission investigation,<sup>216</sup> the Court expressed its

wish ... to record and underline [its] immense debt of gratitude ... to the Criminal Cases Review Commission and pay tribute to and emphasise the importance of [the Commission] being well funded to be able to undertake such enquiries so essential to the administration of justice.<sup>217</sup>

The CACD's observation about funding was probably prompted by the fact that the CCRC's budget had been reduced sharply in previous years. In 2005–06 the Commission had a budget of nearly £8 million.<sup>218</sup> By 2012–13 it had dropped to £5.8 million.<sup>219</sup> In 2004–05 the Commission had a full-time equivalent of 42 case review managers.<sup>220</sup> By 31 March 2013 it was down to 28.46.<sup>221</sup> But the government was not targeting the Commission. The reductions were part of the government's national deficit reduction strategy.<sup>222</sup> In June 2013 the Commission

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210 The Commission can receive applications regarding convictions and sentences, but most concern convictions: see below n 286. For this reason, the Commission's cases are best compared with the Court's conviction appeals. The Court hears many more sentence appeals than conviction appeals. Eg, in 2011, the Court heard 503 conviction appeals from 1535 leave applications, and 2073 sentence appeals from 5623 leave applications: Ministry of Justice, *Judicial and Court Statistics 2011* (28 June 2012) 11. Further, the Commission has the power to refer appeals on both indictable and summary matters, whereas the Court of Appeal generally only hears appeals on indictable matters. Again, however, the vast bulk of Commission referrals are of indictable matters: see below n 286.

211 CCRC, *Annual Report and Accounts 2012/13*, above n 33, 12.

212 Over the years 2004 to 2008, the rate of success on appeals heard by the Full Court ranged from 42 per cent (in 2006) to 52 per cent (in 2008). The latter was the only figure above 50 per cent: Ashworth and Redmayne, above n 82, 375.

213 Ashworth and Redmayne, above n 82, 391, citing *R v Ellis* [2003] EWCA Crim 3930; *R v Gerald* [1999] Crim LR 315.

214 Zellick, 'The Criminal Cases Review Commission', above n 52, 937–8; see, eg, *R v Hewgill* [2011] EWCA Crim 1778, [4]; *R v Hallam* [2012] EWCA Crim 1158, [81]; *Bryan v The Queen* [2009] EWCA Crim 2291, [44]. In *R v Pinfold* [2009] EWCA Crim 2339, [43], [46]: even though the Court rejected the appeal and suggested that the Commission had 'made an unsustainable leap' in identifying one ground of appeal, the Court concluded by recording that it is 'grateful to the CCRC for their customary thorough investigation'.

215 [2011] EWCA Crim 3247.

216 Under *CAA* s 15.

217 [2011] EWCA Crim 3247, [20] (Sir Thomas P, Silber and Parker JJ).

218 CCRC, *Annual Report and Accounts: 2010/11* (Stationery Office, 2011) 26.

219 CCRC, *Annual Report and Accounts 2012/13*, above n 33, 25.

220 CCRC, *Annual Report and Accounts: 2010/11*, above n 218, 24.

221 CCRC, *Annual Report and Accounts 2012/13*, above n 33, 23.

222 CCRC, *Annual Report and Accounts: 2010/11*, above n 218, 25–6.

passed its first *Triennial Review* with ‘flying colours’.<sup>223</sup> Eighty-three per cent of respondents to the Review, including senior judiciary, individuals and legal bodies, agreed that the Commission was ‘necessary’, 98 per cent of them ‘emphatic[ally]’.<sup>224</sup> The Law Commission said that the CCRC was ‘essential ... A functioning and developed criminal justice system needs an effective mechanism for the identification and review of potential errors.’<sup>225</sup> And the Commission received a significantly increased budget for 2013–14,<sup>226</sup> a very notable outcome given that the triennial review process was intended to save the government money.<sup>227</sup>

## B Drawing in Cases of Factual Innocence

While most stakeholders appear very satisfied with the work of the Commission, a small but vocal minority are not. Michael Naughton, for example, criticises the Commission both for ‘assisting the factually guilty to overturn convictions on abuses of process and [for] turning a blind eye to potentially factually innocent victims’.<sup>228</sup> These criticisms raise important questions about the criteria for referrals, and the nature of the referred appeal. If the English model is adopted in NSW or Australia, these are areas where refinements and variations to the model may be introduced. In this section I consider whether the model should be broadened to draw in more cases of factual innocence. In the next section I consider whether the model should be narrowed in other respects so as to exclude technical appeals of the factually guilty.

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223 CCRC, *Annual Report and Accounts 2012/13*, above n 33. This description appears quite accurate. The Review concluded:

The CCRC has demonstrated strong evidence that it complies with the vast majority of governance and accountability which are placed on it by statute, regulation, the MoJ and governmental guidelines or best practice. ... The CCRC appears as a well structured organisation with strong governance in all the key areas.

Ministry of Justice, *Triennial Review: Criminal Cases Review Commission Combined Report on Stages One and Two* (June 2013) 26 (*‘Triennial Review’*). Apart from minor restructuring to the composition of the Board: at 27, the only significant change to the operation of the Commission entertained by the review was an increase in the powers of the Commission so that it could ‘requir[e] disclosure of information from non-public bodies’: at 11. It has long been viewed as an ‘anomaly’ that the Commission’s powers to obtain documents were limited to public bodies, particularly when private bodies frequently cover similar ground – eg, health bodies, utilities, broadcasters and forensic examiners: Kyle, above n 16, 668.

224 *Triennial Review*, above n 223, 7.

225 *Ibid.*

226 CCRC, *Annual Report and Accounts 2012/13*, above n 33, 24–5; Brian Thornton, ‘Miscarriages of Justice Body to Receive Increased Funds after Applications Rise’, *The Guardian* (online), (4 July 2013) <<http://www.theguardian.com/law/2013/jul/03/miscarriages-of-justice-crc-funding>>. The Commission’s workload had increased as a result of its success in making itself more accessible in particular through a new ‘easy read’ application form: see CCRC, *Easy Read Form*, above n 35.

227 See James Tapsfield, ‘Government Insists “Bonfire of Quangos” Will Save £2.6bn’, *The Independent* (online), (22 August 2012) <<http://www.independent.co.uk/news/uk/politics/government-insists-bonfire-of-quangos-will-save-26bn-8072525.html>>.

228 Michael Naughton, ‘The Criminal Cases Review Commission: Innocence versus Safety and the Integrity of the Criminal Justice System’ (2012) 58 *Criminal Law Quarterly* 207, 211.



It is easy to accept that the Commission does miss some cases of factual innocence. It is carrying out an extremely difficult task with limited resources. This is not what the critics are complaining about. The criticism is that the Commission is too deferential to the CACD, focusing on legal innocence at the expense of factual innocence.<sup>229</sup> However, given that the Court is the ultimate decision-maker, it seems inevitable that the Commission will give considerable weight to the legal criteria that the CACD will apply on appeal. For the Commission to refer cases with little chance of success would waste resources, falsely raise and then dash the hopes of applicants, increase the Court's criticism of the Commission, and potentially threaten the Commission's continued existence.<sup>230</sup> Perhaps the Commission could be criticised for playing it too safe with referrals, achieving a success rate of almost 70 per cent.<sup>231</sup> But, given that this is a subsequent appeal, the finality principle arguably demands that the Commission aim for a success rate higher than the one applying to ordinary appeal, around 40 to 50 per cent.<sup>232</sup>

A more appropriate target of these criticisms is the CACD. Does it systematically exclude cases of factual innocence? The CAA requires the CACD to approach the referred appeal as though it were an ordinary appeal.<sup>233</sup> Broadly speaking, English criminal appeals resemble Australian criminal appeals discussed above in Part III.<sup>234</sup> There are two obstacles to a criminal appeal court recognising factual innocence. The court resists reconsidering issues previously dealt with, and is reluctant to examine new evidence and arguments.

With regard to the first point, the criticisms appear justified. The CACD and the Commission are extremely reluctant to revisit issues that have already been

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229 This is one of the main themes of Naughton, *The Criminal Cases Review Commission*, above n 33, 212; Bob Woffinden, 'The Criminal Cases Review Commission has Failed', *The Guardian* (online), (30 November 2010) <<http://www.theguardian.com/commentisfree/libertycentral/2010/nov/30/criminal-cases-review-commission-failed>>.

230 Kevin Kerrigan, 'Real Possibility or Fat Chance?' in Michael Naughton (ed), *The Criminal Cases Review Commission: Hope for the Innocent?* (Palgrave Macmillan, 2009) 166, 174; Michael Zander, 'Foreword' in Michael Naughton (ed), *The Criminal Cases Review Commission: Hope for the Innocent?* (Palgrave Macmillan, 2009) xvi, xviii; Nobles and Schiff, 'After Ten Years: An Investment in Justice?', above n 33, 157–8.

231 CCRC, *Case Library*, above n 18. CAA s 13(1)(a) provides that the Commission may only refer cases to the Court of Appeal where it considers 'that there is a *real possibility* that the conviction, verdict, finding or sentence would not be upheld were the reference to be made' (emphasis added). The Commission appears to aim for a high probability of success rather than a 'real possibility', described by Lord Bingham as 'imprecise but ... more than an outside chance or a bare possibility ... less than a probability or a likelihood or a racing certainty. ... [A] reasonable prospect': *R v Criminal Cases Review Commission; Ex parte Pearson* [2000] 1 Cr App R 141, 149 [17]. See also Zellick, 'The Criminal Cases Review Commission', above n 52, 939; Nobles and Schiff, 'After Ten Years: An Investment in Justice?', above n 33, 159. However, from the perspective of the finality principle, the fault may be in the statutory formula rather than the CCRC.

232 See above n 212 and accompanying text.

233 CAA s 9(2).

234 See Rosemary Pattenden 'The Standards of Review for Mistake of Fact in the Court of Appeal, Criminal Division' [2009] *Criminal Law Review* 15.

dealt with at trial or on appeal.<sup>235</sup> Very rarely will the Court overturn the verdict of the jury simply because the Court takes a different view of the facts. Given the jury's 'constitutional primacy and public responsibility' this will only occur in the 'most exceptional' cases.<sup>236</sup> The Commission shows similar reluctance. Under the *CAA*, unless there are 'exceptional circumstances' the Commission should not refer a case back to the CACD other than on the basis of 'an argument, or evidence, not raised' in previous proceedings.<sup>237</sup> And then, on the referral, the Court should be equally conservative 'in the absence of new argument or evidence, the proper exercise of the Court's power to depart from its previous reasoning or conclusion should ... equally be confined to "exceptional circumstances"' <sup>238</sup>

As discussed in Part III above, the scope for purely factual appeals in Australia is also restricted. However, the NSWCCA seems less constrained than the CACD. A recent survey of English Court of Appeal found that only seven appeals out of 300 in 2002 raised this ground, and only one was successful.<sup>239</sup> A survey of NSWCCA cases covering the period 2001 to 2007 found 65 out of 315 successful appeals were of this variety, making up 20.5 per cent of the total.<sup>240</sup> Even though NSW is a much smaller jurisdiction, the NSWCCA intervenes on this basis far more frequently than the English court. The English restriction, that only in 'exceptional circumstances' should a referral be based on 'an argument, or evidence, ... raised' in previous proceedings, does not match the current NSW approach to appeals.<sup>241</sup>

With regard to the second restriction on the English Court's recognition of factual innocence, Naughton's criticisms are overstated. It is inaccurate to suggest that the court applies '*strict* grounds for receiving [new] evidence'

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235 See, eg, Kerrigan, above n 230, 175. In England the basis for the CACD overturning a conviction on purely factual grounds is 'lurking doubt': see, eg, L Leigh, 'Lurking Doubt and the Safety of Convictions' [2006] *Criminal Law Review* 809.

236 *Pope v The Queen* [2013] 1 Cr App R 14, 217 [14]; see also Ashworth and Redmayne, above n 82, 379–80.

237 *CAA* s 13(1)(b)(i), (2).

238 *R v Thomas* [2002] EWCA Crim 941, [73], applied in *R v Stock* [2008] EWCA Crim 1862, [41].

239 Stephanie Roberts, 'The Royal Commission on Criminal Justice and Factual Innocence: Remediating Wrongful Convictions in the Court of Appeal' (2004) 1 *JUSTICE Journal* 86, 91; Ashworth and Redmayne, above n 82, 380. Similar criticisms may be made of the approach of the Scottish courts: Peter Duff, 'Straddling Two Worlds: Reflections of a Retired Criminal Cases Review Commissioner' (2009) 72 *Modern Law Review* 693, 716–18, discussing *Harper v Her Majesty's Advocate* [2005] Scottish Criminal Case Reports 245. Duff suggests only one appeal in 80 years has been successful on this ground (ie, *E v Her Majesty's Advocate* [2002] Scottish Criminal Case Reports 341), and perhaps a couple more on the similar ground of internal illogic (eg, *Rooney v Her Majesty's Advocate* [2007] Scottish Criminal Case Reports 49).

240 Donnelly, Johns and Poletti, above n 82, 51.

241 *CAA* s 13(1)(b)(i), (2).

presenting defendants with ‘insurmountable barriers’.<sup>242</sup> The English approach is broadly comparable to that of the Australian courts discussed in Part III above.<sup>243</sup> It *will* be more difficult to persuade the court to entertain an appeal based on evidence that is merely ‘new’, where ‘there is [no] reasonable explanation for the failure to adduce the evidence’ in earlier proceedings.<sup>244</sup> But even then, as in Australia, if the evidence is sufficiently compelling, the court will consider it.

*R v Solomon* provides a clear example.<sup>245</sup> The defendant was charged with various counts of indecent assault, rape and buggery with two girls, one aged 14, the other 15. The prosecution case was that he had enticed them back to his place by claiming to be a fashion photographer. As proof of his innocence the defendant tendered a video, DDS/1, which only showed innocent interactions with the children. But the jury did not accept that this was a complete record. It believed the complainants and convicted. Some time later, after the defendant had unsuccessfully appealed, served several years in prison and was on release subject to sex offender restrictions, a further video was found of his meeting with the girls, KH3. While this showed the defendant having intercourse with the complainants, it was clear that the intercourse was consensual, and that there had been vaginal penetration from behind rather than buggery. It showed, in other words, that the defendant was innocent of the most serious offences. The Commission referred the case back to the CACD.

The Court held:

it is clear that there is no reasonable explanation for the appellant’s failure to produce video KH3 at the original trial. He did not do so because he took a tactical decision to attempt to secure an acquittal on all charges by relying simply on video DDS/1, which had been deliberately edited for the purpose.<sup>246</sup>

However, the Court indicated it has discretion to admit new evidence ‘even where there is no reasonable explanation for failure to produce the evidence at the trial’.<sup>247</sup> The discretion would be exercised only ‘in quite exceptional circumstances ... where the evidence has been deliberately withheld at the trial

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242 Naughton, ‘The Criminal Cases Review Commission’, above n 228, 213–14 (emphasis added), describing the supposed operation of s 23 of the *Criminal Appeal Act 1968* (UK) c 19. See also Michael Naughton, ‘The Importance of Innocence for the Criminal Justice System’ in Michael Naughton (ed), *The Criminal Cases Review Commission: Hope for the Innocent?* (Palgrave Macmillan, 2009) 17, 21. Actually, s 23 gives the Court considerable discretion. The Scottish Appeal Court takes a stricter approach to the consideration of new evidence: *Criminal Procedure (Scotland) Act 1995* (UK) c 46, s 106(3A); Peter Duff, ‘Criminal Cases Review Commissions and “Deference” to the Courts: The Evaluation of Evidence and Evidentiary Rules’ [2001] *Criminal Law Review* 341, 351. The English Court may be open to greater criticism for being too restrictive in considering fresh expert evidence: William E O’Brian Jr, ‘Fresh Expert Evidence in CCRC Cases’ (2011) 22 *King’s Law Journal* 1; but see Campbell Malone, ‘Only the Freshest Will Do’ in Michael Naughton (ed), *The Criminal Cases Review Commission: Hope for the Innocent?* (Palgrave Macmillan, 2009) 107, 107–9; *Meachen v The Queen* [2009] EWCA Crim 1701.

243 The English statutory principles in s 23 of the *Criminal Appeal Act 1968* correspond to Australian case-law principles. See above nn 98–101.

244 *Criminal Appeal Act 1968* (UK) c 19, s 23(2)(d).

245 [2007] EWCA Crim 2633.

246 *Ibid* [25].

247 *Ibid* [28].

for tactical reasons.<sup>248</sup> In this case, exceptional circumstances were found. Not only did the KH3 video ‘plainly [show] that the appellant was wrongfully convicted’ of the more serious charges,<sup>249</sup> the defendant had served time for these offences,<sup>250</sup> and at this point the admission of the evidence ‘will simply be to permit the record to be put straight so that the appellant is not hereafter at risk of being treated on the basis of an inaccurate criminal record.’<sup>251</sup> He had been subject to restrictions as a sex offender on the basis of the convictions.<sup>252</sup>

The obstacles to an appeal court’s recognition of factual innocence are not as absolute as some critics suggest. The courts take a flexible approach to new material, and the NSWCCA at least appears quite prepared to overturn convictions on factual grounds even without new material. But while not as great as sometimes represented, the obstacles do exist. In the interest of finality appeal courts deliberately leave some potential errors untouched. And so the question remains whether the appeal on a commission’s referral should be opened up in these respects.

Of course, we already have a model for a broader subsequent appeal. As noted above in Part IV, a subsequent appeal following a reference by the Crown or the NSW Supreme Court is an appeal on the ‘whole case’.<sup>253</sup> In *Mallard v The Queen*,<sup>254</sup> the HCA held that this meant that the Court should consider, for itself, issues already considered on the previous appeal. An appeal court may ‘if it think it useful, derive assistance from the way in which a previous appellate court has dealt with some, or all of the matters before it, but under no circumstances can it relieve it of its statutory duty to deal with the whole case.’<sup>255</sup> Further, ‘the words “the whole case” embrace the whole of the evidence properly admissible, whether “new”, “fresh” or previously adduced’.<sup>256</sup>

The Runciman Royal Commission in its 1993 Report recommended that a referred appeal should be treated on this broad basis, but this was not picked up

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248 Ibid [29].

249 Ibid [31].

250 The court suggested that it would be ‘highly unlikely’ that the evidence would have been received on an ordinary appeal: *ibid* [26].

251 Ibid [30].

252 Ibid [15].

253 See above n 150 and accompanying text.

254 (2005) 224 CLR 125 (*Mallard*’).

255 Ibid 131 [10] (Gummow, Hayne, Callinan and Heydon JJ).

256 Ibid. Similar legislation operated in England prior to the establishment of the CCRC: *Criminal Appeal Act 1968* (UK) c 19, s 17, repealed by *CAA* s 3. The HCA in *Mallard* (2005) 224 CLR 125, 131–2 [12] drew support from *R v Chard* [1984] AC 279, 289B (Lord Diplock), which broadened the approach to referred appeals: Nobles and Schiff, ‘The Criminal Cases Review Commission’, above n 209, 177. However, with this referred appeal as with the regular appeal, the English appeal courts may be more deferential than the Australian appeal courts to the findings in previous proceedings. The appeal court will be ‘very slow to differ, unless it is persuaded that some cogent argument that had not been advanced at the previous hearing would, if it had been properly developed at such hearing, have resulted in the appeal against conviction being allowed’: *R v Chard* [1984] AC 279, 294A (Lord Diplock).

in the legislation.<sup>257</sup> The Law Council of Australia, in its 2012 policy document, also recommended that referred appeals be on the ‘whole case’. However, there are arguments against this. As discussed in the previous Part, the ‘whole case’ appeal is something of a historical anomaly.<sup>258</sup> The policy argument for putting the subsequent appeal on a broader footing than the standard first appeal is murky. Of course, this would be attractive to the defendant. But it appears to fly in the face of the finality principle, which implies, all else being equal, the longer a case drags on, the more strongly the finality principle applies. Given that the establishment of the Commission already constitutes a significant narrowing of the finality principle, it may not be politically viable to couple this with a ‘whole case’ appeal.<sup>259</sup>

### C Excluding Cases of Purely Legal Innocence

Given the Commission’s limited role, some degree of deference to the appeal court is appropriate. Cases with little chance of success should not be referred. This is not to say that the Commission should necessarily refer every case that has a reasonable chance of success. The English Commission has been criticised for referring cases on purely technical grounds, leading to the quashing of convictions of defendants who are legally innocent but factually guilty. Is this criticism of the English Commission warranted? Should an effort be made to exclude such cases?

As discussed in Part II above, the distinction between factual innocence and legal innocence is well founded. The conviction of a factually innocent defendant is a searing injustice. It is also an injustice for a factually guilty defendant to be convicted in flawed proceedings, but this is an injustice of a different kind and degree. As a matter of policy, it may be appropriate for the Commission to focus on the factually innocent. As former Scottish Commissioner, Peter Duff, suggests, ‘the Commission was set up to offer an *exceptional remedy of last*

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257 *Runciman Royal Commission Report*, above n 17, 183; Naughton, ‘The Criminal Cases Review Commission’, above n 228, 220. CCRC referrals were not treated as ‘whole case’ appeals, however, in another respect they were broad. Consistently with another Royal Commission recommendation, the Act provided that ‘the appeal may be on any ground ... (whether or not the ground is related to any reason given by the Commission for making the reference)’: *CAA* s 14(5). The CACD was extremely critical of this provision, noting that it enabled the defendant to argue matters with no merit, wasting the Court’s time: *R v Bamber* [2002] EWCA Crim 2912, [522]; *Day v The Queen* [2003] EWCA Crim 1060, [2], [45]. Parliament promptly responded by amending the *CAA* so that a defendant cannot without leave raise ‘any ground which is not related to any reason given by the Commission for making the reference’: *Criminal Justice Act 2003* (UK) c 44, s 315; *CAA* s 14(4A), (4B).

258 Naughton confusingly refers to this ‘whole case’ appeal as ‘a first appeal’: Naughton, ‘The Importance of Innocence’, above n 242, 27; Naughton, ‘The Criminal Cases Review Commission’, above n 228, 221. This is a subsequent appeal which operates more broadly than the first appeal.

259 The South Australian Parliament recently rejected an independent member’s Bill to establish a CCRC. The referred appeal would be like a regular appeal, not on the ‘whole case’, and the defendant could not add grounds to those identified by the CCRC without leave: Criminal Cases Review Commission Bill 2010 cl 11(2), (5). However, this was still too much for the South Australian Parliament. Instead, it provided for the exceedingly narrow subsequent appeal on the basis of ‘fresh and compelling evidence’ discussed in this article at Part 4-C.

resort for the genuinely innocent person who has somehow been convicted for a crime he did not commit.’<sup>260</sup> The Commission, unlike the Court, does not necessarily bear the ‘fundamental responsibility to guarantee the integrity of the criminal justice system’.<sup>261</sup>

And yet, while the English Commission has a discretion whether or not to refer cases that fit the statutory criteria,<sup>262</sup> it appears reluctant to consider issues beyond the legal viability of the defendant’s appeal.<sup>263</sup> Only in ‘rare cases’ will the discretion be exercised not to refer, for example where there appears to have been ‘a serious irregularity or abuse of process, but [the defendant] admits his guilt publicly and sensationally for payment in a national newspaper’.<sup>264</sup> Generally, as English Commissioner, David Kyle, noted, ‘the Commission does not have to concern itself with questions of guilt or innocence in the absolute sense’.<sup>265</sup>

For both practical and philosophical reasons, the Commission is reluctant to draw the distinction between factual innocence and legal innocence. As Richard Foster, Chair of the Commission, observes:

unequivocal evidence of innocence is rare to find outside the pages of crime fiction. More common is evidence which may not prove innocence, but casts doubt on the safety of the conviction. What is at issue is the presumption of innocence and the integrity of the process. That is our strongest safeguard against miscarriages of [justice] ... and why safety, and not innocence, is the test Parliament requires the Court of Appeal – and thus us – to apply.<sup>266</sup>

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260 Duff, ‘Criminal Cases Review Commissions’, above n 242, 360 (emphasis added). See also Duff, ‘Straddling Two Worlds’, above n 239, 703–5; Richard Nobles and David Schiff, ‘Absurd Asymmetry: A Comment on *R v Cottrell and Fletcher* and *BM, KK and DP (Petitioners) v Scottish Criminal Cases Review Commission*’ (2008) 71 *Modern Law Review* 464, 472.

261 Duff, ‘Criminal Cases Review Commissions’, above n 242, 360.

262 See, eg, CAA s 9(1)(a); CCRC, *Formal Memorandum: Discretion in Referrals (Including Applications Based on a Change in the Law)* <<http://www.justice.gov.uk/downloads/about/criminal-cases-review/policies-and-procedures/casework/discretion-referrals.pdf>> (‘*CCRC Discretion Memorandum*’). Carolyn Hoyle is currently researching how this discretion is exercised: Faculty of Law, *News* (29 July 2013) University of Oxford <<http://www.law.ox.ac.uk/newsitem=645>>.

263 See CCRC, *Discretion Memorandum*, above n 262, [3], [6]; Kyle, above n 16, 664; Naughton, ‘The Importance of Innocence’, above n 242, 22; Roberts and Weathered, above n 52, 58. The Scottish Commission appears more prepared to exercise its discretion: Duff, above n 239, 693.

264 CCRC, *Discretion Memorandum*, above n 262, [11].

265 Kyle, above n 16, 664. Eg, the easy-read application form does not ask whether the applicant is innocent, but rather ‘what you think went wrong with your case’: CCRC, *Easy Read Form*, above n 35, 12. The terms ‘innocent’ and ‘innocence’ do not appear in the CCRC, *Annual Report and Accounts 2012/13*, above n 33 (except in reference to innocence projects), nor do they appear on the CCRC website: CCRC, *About the Criminal Cases Review Commission* (UK Department of Justice) <<http://www.justice.gov.uk/about/criminal-cases-review-commission>>.

266 CCRC, *Annual Report and Accounts: 2010/11*, above n 218, 5. Duff, in his nine years on the Scottish Commission, cannot remember any case where innocence was certain: ‘Straddling Two Worlds’, above n 239, 721. Ewan Smith in four and a half years on the English Commission remembers only two applicants who he believed innocent, adding ‘I have certainly referred people back who I personally believed were guilty.’: Amelia Hill, ‘Criminal Cases Review Commission: The Last Bastion Of Hope’, *The Guardian* (30 March 2011) <<http://www.theguardian.com/law/2011/mar/30/criminal-cases-review-commission-inside>>.

Often there is often a strong connection between the grounds of a legal challenge to a conviction its factual accuracy. An example is provided by the HCA case of *Eastman*.<sup>267</sup> The defendant sought to challenge his conviction on the basis that he was unfit to plead at trial. The DPP argued that this issue was independent of the question of ‘whether the person committed the offence’.<sup>268</sup> However, as McHugh J observed:

if a prisoner is unfit to plead to the charge, he or she will not be able to defend himself or herself adequately. ... [A] doubt or question concerning the guilt of a prisoner must inevitably arise if that prisoner was unfit to plead to the charge upon which he or she was convicted.<sup>269</sup>

However, McHugh J goes too far in suggesting that it is ‘fanciful to speak of “[factual] guilt” as being an entity that is independent of [legal guilt]’.<sup>270</sup> The distinction can be difficult to draw in practice, but, as Heydon J points out, the two are ‘strictly separate’.<sup>271</sup> Occasionally courts draw the distinction themselves. Naughton mentions two cases where the CACD freed apparently guilty men.<sup>272</sup> In *R v Weir*, the CACD noted that the defendant ‘was convicted of a brutal murder on the compelling evidence of the DNA sample,’<sup>273</sup> but quashed the conviction on the basis that the defendant’s DNA profile had wrongly been retained on the police database.<sup>274</sup> In *R v Mullen*,<sup>275</sup> the defendant’s conviction for terrorist offences was quashed even though, as the House of Lords subsequently observed in rejecting his claim for compensation, he ‘was not innocent ... On the contrary, the conclusion [of his guilt] is inescapable’.<sup>276</sup> However, clear-cut cases like this are rare. While Naughton uses these cases to criticise the Commission, these were not Commission referrals. There is a Commission referral where the CACD made similar observations. In the M25 Three case, *R v Davis*,<sup>277</sup> the Court quashed the defendants’ convictions for robberies, grievous bodily harm and murder, while noting ‘the case against all three appellants was formidable. ... [T]his is not a finding of innocence, far from it.’<sup>278</sup> However, Naughton would not agree with these observations. He has described the case as one in which ‘three black men were wrongly imprisoned for 10 years’.<sup>279</sup> Distinguishing factual and legal innocence is rarely clear-cut.

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267 (2003) 214 CLR 318.

268 Ibid 320 (D A Buchanan SC) (during argument).

269 Ibid 329 [24].

270 Ibid 325 [11].

271 Ibid 347 [85].

272 Naughton, ‘The Criminal Cases Review Commission’, above n 228, 216–17.

273 [2000] EWCA Crim 43, 6.

274 The correctness of this exclusion was doubted, but in a further bungle the prosecution was a day late in lodging the appeal: see *Re British Broadcasting Corporation* [2010] 1 AC 145, 169 [42].

275 [1999] EWCA Crim 278.

276 *R (Mullen) v Secretary of State for the Home Department* [2005] 1 AC 1, 48 [57].

277 [2001] 1 Cr App R 8.

278 Ibid 145 [95].

279 Michael Naughton, ‘The Scales of Injustice’, *The Guardian* (28 July 2002) <<http://www.theguardian.com/uk/2002/jul/28/ukcrime.prisonsandprobation>>.

It will be difficult for a CCRC to identify cases where, although having a reasonable prospect of success on appeal, the defendant is factually guilty. However, this may be territory that a CCRC cannot avoid. As Duff points out, a major function of the Commission is ‘to foster public confidence in the criminal justice system’, and this will not be furthered if defendants are freed where it appears they are clearly guilty, particularly if the defendant reoffends.<sup>280</sup> In Australia, where victims’ organisations have considerable leverage with governments, a Commission with a remit to refer appeals despite factual guilt may not be established in the first place.<sup>281</sup>

#### D Other Restrictions on Referrals

The political palatability of a commission may also be increased by restricting its focus in other respects. Perhaps the most resonant miscarriage of justice is one where the factually innocent defendant has spent years in prison for a serious offence and still has many years still to serve. The English Commission has been criticised for expending its and the CACD’s resources on cases that diverge too sharply from this exemplar.<sup>282</sup> The Commission has a broad purview including sentences as well as convictions, and summary offences as well as indictable offences, and it has been reluctant not to refer cases that fit the statutory criteria. Should tighter statutory restrictions be imposed?

There are persuasive objections to tightening the Commission’s scope. It is not invariably the case that wrongful convictions are not necessarily worse than sentencing mistakes, mistakes on indictable offences are not necessarily worse than mistakes on summary offences, and injustice is not necessarily in proportion to time still to be served. Much depends upon the circumstances of the individual case. Given the wide range of sentencing options an error in sentencing may have just as great an impact as a wrongful conviction. For one defendant a first summary conviction may be extremely damaging to career, family and relationships, whereas for another, already in prison on other unchallenged convictions, an additional indictable conviction may make little difference. The injustice of a wrongful conviction does not necessarily decrease over time. The injustice may grow and fester with the passage of time, even extending beyond the defendant’s death.<sup>283</sup> The defendant’s family and supporters may also be

280 Duff, ‘Criminal Cases Review Commissions’, above n 242, 360.

281 Concerns about the family of a victim led to the suspension of the NSW Innocence Panel: see above n 154. The South Australian Legislative Review Committee, in recommending against a CCRC, noted the views of the Commissioner for Victim’s Rights, Michael O’Connell, who described it as ‘another mechanism to continue what many victims find intolerable or reprehensible about the way our justice system operates now’: see above n 73, 55. It said, ‘the principle of finality is needed ... to provide certainty in the community and for victims of crime, and should only be abrogated in exceptional circumstances’: at 82.

282 See, eg, Woffinden, above n 229.

283 See Graham Zellick, *Memorandum Submitted by the Criminal Cases Review Commission to the Select Committee on Home Affairs* (January 2004) Parliament of the UK, [16]–[18] <<http://www.publications.parliament.uk/pa/cm200304/cmselect/cmhaff/289/4012708.htm>>.



viewed as victims of the wrongful conviction. The correctness of the conviction may also be a matter of important public interest.<sup>284</sup>

Note also that while the English Commission indicates it will only exercise its discretion not to refer ‘where the conviction was extremely minor’,<sup>285</sup> other forces of selection operate so that the vast majority of referrals are of relatively recent convictions for serious offences. Between April 2001 and March 2012 almost 90 per cent of applications and about 95 per cent of referrals related to indictable offences. Over the same period only 15 per cent of applications and 14 per cent of referrals were sentence-only.<sup>286</sup> Cases involving deceased defendants generate notoriety – and occasional criticism by the CACD<sup>287</sup> – but they are extremely rare.<sup>288</sup> Having regard to these considerations, most respondents to the English Commission’s recent *Triennial Review* supported the Commission’s broad remit, and the Review recommended no changes.<sup>289</sup>

As a matter of policy and principle, it appears difficult to justify laying down hard and fast rules that would prevent the Commission from entertaining applications for lesser offences, sentencing errors, and where the sentence has been served or the defendant has died. Nevertheless, from a political perspective, a Commission with confined scope may be more appealing. Given that the establishment of a NSW Commission poses a threat to finality, even a relatively arbitrary restriction on its remit may have some appeal.<sup>290</sup>

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284 Ibid [18].

285 Ibid [16].

286 Thanks to Adam Barnes, CCRC Case Review Manger, for this data. See further discussion in *Triennial Review*, above n 223, 7–9. And so I do not agree with Weathered that restricting the CCRC’s remit to “‘serious cases’” ... exclud[ing] matters that were dealt with summarily ... would significantly decrease the financial pressure and other resource demands of any established CCRC’: Weathered, ‘The Criminal Cases Review Commission’, above n 8, 262.

287 The oldest cases include *R v Bentley (Deceased)* [2001] 1 Cr App R 21 (hanged 1952); *R v Hanratty* [2002] 2 Cr App R 30 (hanged 1962); *R v Knighton* [2002] EWCA Crim 2227 (hanged 1927); *Ellis v The Queen* [2003] EWCA Crim 3556 (hanged 1955); *R v Luckhurst (Deceased)* [2010] EWCA Crim 2618 (convicted 1966, application by widow). Only in *R v Bentley* was the conviction quashed. In the other cases the CACD clearly doubted whether its time was being well spent. See particularly *Ellis v The Queen* [2003] EWCA Crim 3556, [90]: ‘The Court of Appeal’s workload is an ever-increasing one ... Parliament may wish to consider whether going back many years into history to re-examine a case of this kind is a use that ought to be made of the limited resources that are available.’ See also *R v Knighton* [2002] EWCA Crim 2227, [73]; *R v Hanratty (Deceased)* [2002] 2 Cr App R 30, 480 [215]; *R v Luckhurst (Deceased)* [2010] EWCA Crim 2618, [53]–[54].

288 CCRC, *Annual Report and Accounts: 2010/11*, above n 218, 21; Zellick, *Memorandum Submitted by the Criminal Cases Review Commission*, above n 283, [22].

289 *Triennial Review*, above n 223, 7–9.

290 Applications for a subsequent appeal under pt 7 of *CARA* are not limited by the seriousness of the offence. However, the new SA appeal is limited to offences on information: *CLCA* s 353A(1). The DNA Review Panel could only consider applications relating to very serious offences where the defendant was still subject to detention or supervision: see above nn 161–2. And the double jeopardy exceptions are also limited to very serious offences: see above n 194.

## VI CONCLUSION

Proof of crime at trial is a complex and difficult process. Absolute certainty is not achievable, and it is not demanded. Inevitably, innocent defendants are convicted. In Australia these errors only come to light occasionally, but there is reason to believe that many wrongful convictions remain hidden from view. Analyses of DNA exonerations in the US suggest that the wrongful conviction rate is three per cent or higher. While the Australian criminal justice system may claim superiority in certain respects, there is no reason to believe the error rate in Australia would be radically lower.

An individual wrongful conviction is a searing injustice. The fact that only a very small proportion of wrongful convictions are corrected is a grave social problem. However, the problem is not straightforward. There are good reasons to view the trial verdict as final, and to constrain the opportunities for review at the appeal and post-appeal stages. To reduce the finality of conviction at trial would potentially diminish the jury's role, upset the efficient distribution of work within the judicial hierarchy, and make it more difficult for victims to achieve closure.

Nevertheless, it is becoming increasingly clear that wrongful convictions occur at a higher rate than previously thought, and that finality is being pursued at too great a cost. It appears likely that there are dozens of innocent defendants convicted in NSW each year who fail on appeal, and for whom the current post-appeal avenues offer no genuine hope of correcting the injustice. And there is no excuse for leaving this problem unaddressed. There is an effective post-appeal mechanism available which can operate without inordinate impact on finality. NSW should adopt a CCRC based on the English model. The English Commission greatly increased the rate of correction of wrongful convictions. It is viewed by bodies such as the Court of Appeal, Criminal Division and the Law Commission as an essential part of the English criminal justice infrastructure. And the British government, even in the current straitened economic environment, considers that the Commission provides society with good value for money. To not, at least, give serious consideration to this option would be a severe policy failing.