FOREWORD

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The five thematic articles in this Issue of the *University of New South Wales Law Journal* look at different aspects surrounding criminal appeals and post-appeal review where a defendant has been wrongfully convicted, and evidence accepted at trial which could lead to other miscarriages of justice. How we as a society deal with those who are wrongfully convicted could rightly be seen as a thermometer for the integrity of our criminal justice system. This is because one fundamental premise on which our criminal justice system operates and maintains legitimacy is that those who are convicted and sent to gaol for a term of imprisonment are actually guilty. It is critical that we have a rigorous and fair system which ensures that the innocent are not deprived of their liberty, and the guilty are dealt with as they justly deserve. A fundamental tenet of justice is that it is better for nine guilty men to go free than for one innocent man to be convicted. The integrity of our legal system is of absolute importance in maintaining public confidence in the judiciary and the criminal justice system.

Given this fundamental premise, an essential ingredient of a rigorous justice system and a free and democratic society is ensuring that an accused has a fair opportunity for an appeal. This is inextricably linked to the fundamental right each and every citizen has to a fair trial. This Issue of the *Journal* is certainly timely, as its release coincides with a broader review of criminal appeals process and legislation which I have asked of the New South Wales Law Reform Commission. The head term of reference of this review was for the Law Reform Commission to have regard, amongst other things, to the balance in our criminal appeals system between the need for finality and the need to provide a fair opportunity for appeal.

This is precisely the topic discussed by Bibi Sangha and Robert Moles, who draw on Professor Sir Neil MacCormick's theory of law to look at how well our criminal justice system can identify and deal with miscarriages of justice in criminal trials. The authors advocate for amendment of the statutory right of appeal contained in the *Criminal Appeal Act 1912* (NSW), so that it is clearer and simpler. The consolidation and clarification of criminal appeal legislation is a very important issue, on which the Law Reform Commission findings will also be able to provide very valuable guidance. Sangha and Moles look at the United Kingdom's appeal process, with its particular human rights focus and subsequent

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emphasis on protecting the right to a fair trial in determining whether a conviction is unsafe and accordingly, ought to be referred for a retrial. Ultimately, the authors are of the view that the key to improving the legislative grounds for appeal is to ensure that changes facilitate protection of the right to a fair trial.

David Hamer in his article argues that under our current appeal system, the balance weighs too heavily in favour of the finality principle, rather than pursuing the comprehensive correction of error. Of course, it is important for the integrity of our legal system that a balance is struck between having finality (which gives legitimacy to and encourages public confidence in the judicial process) and ensuring that people who ought to have the ability to appeal a conviction can do so. The author considers the current post-appeal review mechanisms in part 7 of the *Crimes (Appeal and Review) Act 2001* (NSW), and comments on the recent closure of the DNA Review Panel.

Hamer also advocates for a United Kingdom style Criminal Cases Review Commission, which would have the power to investigate all possible wrongful conviction cases. I note that a few authors in this Issue argue the same. David Caruso and Nicholas Crawford in their article make the point that South Australia, in reforming their post-appeal review process, ultimately decided not to establish a commission because they did not consider it to be an efficient use of resources. This is a difficult consideration which must routinely be undertaken by policy makers and legislators. Of course, reforms to the legal system must be informed by the community, members of the profession and, indeed, the valuable research and commentary provided by the academia. That said, government must be in the business of delivering sensible legislative reforms that are practical, efficient and which are a fruitful and justifiable use of taxpayer funds.

I note that the main thrust of Crawford and Caruso's article is that the institution of mercy as a post-appeal review mechanism ought not to be vested in the executive. The authors put forward a number of arguments which seek to illustrate that it is ultimately a judicial power, and as such, contravenes the constitutional law doctrine of the separation of powers. They argue that the role of the law is to facilitate the courts' ability to hear a subsequent appeal rather than involve the executive in the process.

Rachel Dioso-Villa in her article also advocates this position, albeit in the broader context of examining whether the current method of granting ex gratia payments to those who have been wrongfully convicted are adequate. Ultimately, Dioso-Villa recommends, in addition to removing the executive from the post-appeal review process and establishing an independent review body to investigate possible cases of wrongful conviction, that a comprehensive statutory compensation regime be set up for all wrongful convictions, to provide compensation for monetary loss and full access to necessary services for non-monetary loss.

Both articles raise very interesting and pertinent issues about the royal prerogative of mercy and whether it continues to be a legitimate exercise of power by the executive arm of government. I note that the prerogative of mercy residing in the hands of the executive has a rich history, originating in the

common law. The New South Wales Governor can exercise the royal prerogative pursuant to section 7 of the *Australia Act 1986* (Cth). The prerogative of mercy is also expressly preserved in a number of New South Wales statutes.[1] It is of vital importance that academic legal thought and discussion continues to question, review and critique the balance and appropriateness between the arms of government in contemporary Australian society.

Gary Edmond's contribution to this Issue focuses on the 'front-end' of how miscarriages of justice might occur. Edmond does this by looking at ways to prevent miscarriages of justice at trial by strengthening the standard of expert evidence relied on to incriminate an accused. The author is concerned that not enough emphasis is placed on ensuring that the analytical ability of experts giving evidence are rigorously tested, and provides valuable insights into how peak scientific and technical advisory bodies' protocols and criteria might better inform and improve the quality of expert evidence relied on at trial.

As Attorney-General, I am responsible for ensuring that New South Wales' criminal legislative framework is as robust, efficient, fair and effective as possible. I consider that it is of critical importance that our legal academics continue to produce high quality research which identifies, critiques and recommends improvements to any elements which might potentially weaken the rigour and fairness of the processes which allow a person to seek an appeal, or pursue post-appeal review of a wrongful conviction. Together with the impending findings of the Law Reform Commission on the broader issue of the criminal appeal system more generally, the research contribution of the academia is a significant help in forming a body of evidence-based knowledge from which policymakers and legislators can and must draw.

It is equally important to inform and engage with the wider community, to increase their awareness of the issues facing the criminal justice system and what is being done to continually improve it. Ultimately, public confidence requires an informed and educated public that understands the significance and complexity of the issues being examined by the experts and addressed by the executive.

1 See, eg, *Criminal Appeal Act 1912* (NSW) s 27; *Crimes (Appeal and Review) Act 2001* (NSW) s 114; *Crimes (Administration of Sentences) Act 1999* (NSW) s 270; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 102; *Children (Detention Centres) Act 1987* (NSW) s 43; *Drug Misuse and Trafficking Act 1985* (NSW) s 33A; *Habitual Criminals Act 1957* (NSW) s 7; *Prisoners (Interstate Transfer) Act 1982* (NSW) s 28; *Fines Act 1996* (NSW) s 123.