

EDITORIAL

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*Miscarriages show not only the structural weakness of the adversary system
... but also the reluctance of the system to consider its own mistakes.¹*

The pursuit of justice is the foundation of our legal system and it is widely accepted that some of the worst injustices are those that take place in the criminal process, when those who are innocent are wrongly convicted. There are many troubling examples of miscarriages of justice in the criminal law in Australia. There are high profile cases that have a special place in the public imagination, such as *Chamberlain*.² Other cases that have reached the High Court include *Mallard*,³ and there are yet others have been the subject of critical extra-judicial scrutiny, such as the recent case of Farah Jama.⁴ But there will be many other cases that have not received such public scrutiny and some will not have been corrected. They may happen on a day-to-day basis at the local courts for less serious charges. They are undetected, unnoticed and invisible.

No single solution exists to address the causes of miscarriages of justice within the criminal justice system. The problem is complex and multifaceted, and what counts as a miscarriage of justice is itself contested.⁵ Discouragingly, in some cases miscarriages might be attributed to factors as fundamental as the structure and organisation of the adversarial system and the jury trial at its heart. Yet, even within the existing constraints legal practitioners and judges should do all they can to minimise such occurrences. The costs of miscarriages of justice can be enormous, in the unjust deprivation of liberty for decades, but also in the resourcing of inquiries, including those that result in posthumous acquittals.⁶

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1 Paul Wilson, 'Miscarriages of Justice in Serious Cases in Australia' in Kerry Carrington et al (eds), *Travesty! Miscarriages of Justice* (Pluto Press, 1991) 1, 1.

2 *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521. Note that the High Court did not remedy the injustice, as the Court dismissed her appeal against conviction.

3 *Mallard v The Queen* (2005) 224 CLR 125.

4 See Victoria, Inquiry into the Circumstances That Led to the Conviction of Mr Farah Abdulkadir Jama, *Report* (2010).

5 See, eg, Hannah Quirk, 'Identifying Miscarriages of Justice: Why Innocence in the UK Is Not the Answer' (2007) 70 *Modern Law Review* 759–60.

6 See, eg, *Re Conviction of McDermott; A Reference by the Attorney-General (NSW) under s 77(1)(b) of the Crimes (Appeal & Review) Act 2001* [2013] NSWCCA 102.

There is a role for public policy and legislative reforms; in this regard, I note South Australia's new statutory right of appeal as a recent positive step.⁷

The five articles in this special Issue explore dimensions of the problem that merit special attention: the problems associated with right of appeal legislation in Australian states;⁸ the finality principle and the restrictive post-appeal mechanisms, and the appropriateness of establishing an agency to review criminal cases in New South Wales;⁹ the role of the executive arm of the governments in Australia's post-conviction review procedures;¹⁰ the ex gratia compensation process for wrongful conviction and the state's role in remedying the exonerates;¹¹ and limitations of expert evidence in criminal proceedings and possible refinement of the practice to reduce miscarriages of justice.¹²

The articles demonstrate both strong scholarship and sensible consideration of possible, practical, solutions to the ongoing manifestations system failures that can result in miscarriages of justice. The articles will be of particular interest to practitioners, scholars and policymakers in the Australian states, but they also speak to those in other countries who will be grappling with similar endemic problems and issues.

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7 *Criminal Law Consolidation Act 1935* (SA) s 353A.

8 Bibi Sangha and Robert Moles, 'MacCormick's Theory of Law, Miscarriages of Justice and the Statutory Basis for Appeals in Australian Criminal Cases' (2014) 37 *University of New South Wales Law Journal* 243.

9 David Hamer, 'Wrongful Convictions, Appeals, and the Finality Principle: The Need for a Criminal Cases Review Commission' (2014) 37 *University of New South Wales Law Journal* 270.

10 David Caruso and Nicholas Crawford, 'The Executive Institution of Mercy in Australia: The Case and Model for Reform' (2014) 37 *University of New South Wales Law Journal* 312.

11 Rachel Dioso-Villa, "'Out of Grace': Inequity in Post-exoneration Remedies for Wrongful Conviction' (2014) 37 *University of New South Wales Law Journal* 349.

12 Gary Edmond, 'The "Science" of Miscarriages of Justice' (2014) 37 *University of New South Wales Law Journal* 376.

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Finally I would like to express my sincere appreciation to the authors of the articles. It is an honour to work with such accomplished scholars. I hope the insight and passion of these authors reach their intended audience, bring about new discussions and help to effect changes that alleviate the tragedy of miscarriages of justice.