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About the 2012 LIV Leading Quill Scholarship

The LIV Young Lawyers Section (YLS), in partnership with the College of Law, offered an exclusive opportunity to one final-year law student to complete their Practical Legal Training free at the College during 2013. The College of Law program is an accredited course of practical legal training for admission as an Australian lawyer in Victoria.

The YLS and College of Law congratulate Felix Ralph on winning the scholarship.

Details about the 2013 scholarship will be announced in due course.

The YLS thanks the College of Law for its generous support.

AUSTRALIA BADLY NEEDS A CRIMINAL CASES REVIEW COMMITTEE.

Reviewing wrongful convictions

It is "better that 10 guilty persons escape than that one innocent suffer".¹ As one of our highest principles of justice, Blackstone's ratio is the keystone of our criminal justice system.² It is in keeping with this principle that we must adopt a Criminal Cases Review Committee (CCRC).

The CCRC would be a low-cost,³ non-judicial body with the power to recommend cases to be reviewed by a state Court of Appeal where there is a "real possibility"⁴ that a wrongful conviction has occurred.⁵ This body would operate where processes of appeal have been exhausted, and there exists a "lurking doubt . . . whether an injustice has been done".⁶ Often this can occur in cases of exculpatory evidence,⁷ DNA evidence⁸ or where an argument was not previously or properly presented to the court.⁹

While the current system of appeal against conviction, where a verdict must be "unsafe and unsatisfactory",¹⁰ is a powerful safeguard, it may be inadequate to detect all wrongful convictions. The inadequacies are three-fold. At the investigative level, once a conviction has been obtained it would generally take very compelling evidence to reopen a matter.¹¹ At the prosecutorial level, it takes particular astuteness to be able to detect miscarriages of justice.¹² At the judicial level, unless particularly probative evidence is adduced and/or the decision of a jury is so far removed as to be "unsafe and unsatisfactory"¹³ it is unlikely that any potential miscarriages of justice would even *reach* the courts.¹⁴ Even Kirby J was one of the justices who denied special leave to appeal the wrongful conviction of Andrew Mallard.¹⁵ Years later Mallard's conviction was famously overturned with His Honour sitting on the High Court bench.¹⁶

The creation of a CCRC is in honest recognition that "[m]istaken convictions are not a relic of some bygone era . . . [T]hey remain as serious and shocking as ever".¹⁷ Since 1997, the UK CCRC has referred 461 cases to the Court of Appeal with 325 convictions being quashed.¹⁸ It would be foolhardy to assume that such errors do not occur in our jurisdiction.

Expert witnesses and miscarriages of justice

Monumental shifts have occurred in our criminal justice system, primarily driven by changes in forensic identification science, evidence and expert testimony. Due to the courts' reliance on expert

witnesses the capacity of an expert to cause or contribute to a wrongful conviction is great.¹⁹ In Canada, the Goudge Inquiry revealed Ontario's chief paediatric pathologist operated unchecked for 10 years and made grievous errors in 20 child autopsies, resulting in many wrongful convictions.²⁰ In the US, an analysis of 86 DNA exoneration cases found that 63 per cent of wrongful convictions were caused by forensic science testing errors and 27 per cent by false or misleading evidence by forensic experts.²¹ These powerful examples demonstrate that the traditional adversarial system might not be robust enough to detect these wrongs. An incalculable number of errors may be present within any given investigation or at trial. Many of these will remain undetected and unknown within the current legal system. The public deserves a system that recognises these inevitable fallibilities of human nature. Establishing a CCRC provides further mechanisms for individual justice while also allowing a system-wide review of how expert evidence is presented to the courts.

Jama's case

Australia is not immune from miscarriages of justice. The wrongful conviction of Farah Jama,²² after a determination of guilt based *solely* on a single piece of DNA evidence, presents a powerful case for establishing a CCRC. It is an example of a systemic failure throughout our criminal justice system to recognise the proper probative value of DNA evidence.

On the facts, the complainant arrived at 10.20pm at a Doncaster nightclub and was found in a locked (from the inside) bathroom cubicle at 10.50pm. She had consumed alcohol and Tetrinol, a medication recognised as capable of causing "blackouts". She had recall up to 10.40pm. This left a window of 10 minutes for a dark-skinned Somali man to enter the club unnoticed, by witnesses or CCTV,²³ enter the female bathroom and commit the purported rape. The Office of Public Prosecutions (OPP) formed the opinion that it could not know the exact manner in which the complainant was raped, but that

What would you do?

she must have been raped. Critically, Farah Jama's DNA had been taken from a separate incident a few days earlier. It has been established that contamination through secondary transfer had clearly occurred. In his report on the matter, Vincent J noted that the defence, prosecution and judiciary had all unquestioningly accepted the DNA evidence.²⁴ Vincent J concluded that every person involved in the matter ignored Locard's principle,²⁵ that every contact leaves a trace. Jama's case illustrates the dilemma that with the increasing sophistication of science (such as DNA evidence), the possibility for secondary transfer increases.²⁶ Remarking on the matter Vincent J noted that:

"Both conceptually and operationally, our legal system is being required to accommodate and respond to awe-inspiring and almost magical developments in human knowledge and technologies concerning which, for most part, those involved have little or no knowledge or experience".²⁷

The capacity of the system to adequately adapt to such developments has been seriously brought into question by Jama's

case. Vincent J further noted that perhaps the most disappointing feature of the case was the "total absence of any indication that any legal research had been conducted, bearing in mind that the circumstances of Jama's case had not occurred in this jurisdiction before."²⁸ Australia must have a system that can adequately deal with these challenges. Establishing a CCRC helps provide a further safeguard against the wrongful convictions that inevitably occur.

Is a national CCRC constitutionally valid?

The creation of a uniform and nationalised review committee may be tested on constitutional grounds, as the Federal Government has no power to legislate regarding state criminal matters. The potential for unease exists because such a body would have the power to review and come to potentially contrary findings over and above a state Court of Appeal or even the High Court.²⁹ Any such argument would most likely be made under s71 of the Constitution,³⁰ which states that

judicial power cannot be exercised by any other body other than a Chapter III court.³¹ However, a committee body such as a national CCRC would not be exercising judicial power because the body would have no power to *enforce* its decisions over and above any Court of Appeal.³² Any such review of a wrongful conviction case would be brought forward to a state Court of Appeal on the basis of a statutory recommendation. By bringing a case for deliberation the CCRC operates much like a state's OPP, or an independent commission.³³ It therefore seems unlikely that any constitutional impediments exist to prevent creating a nationalised CCRC that would be able to systematically review cases of wrongful conviction.

Australia must establish a CCRC

The wrongful conviction of a citizen is the "nightmare of all free peoples".³⁴ Rigorous analysis of convictions by a CCRC would help to ensure a robust and dynamic legal system and help prevent the innocent languishing in prison. We must not wait until our conscience is shocked out of apathy before adopting this principled law reform.³⁵ ■

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1. William Blackstone, *Commentaries on the Laws of England* (1765) Book IV, Ch 27.
2. Kirby J, "Foreword" in Bibi Singha, Kent Roach, Julie Goulding & Robert Moles, *Forensic Investigations and Miscarriages of Justice – The Rhetoric Meets the Reality* (2010).
3. The UK CCRC receives £5.9 million a year. See generally Criminal Cases Review Commission, *Annual Report 2011-2012*, (2012).
4. Section 13, *Criminal Appeal Act 1995* (UK).
5. Additionally, the Court may direct the CCRC to review a matter. Sometimes the Court may be unable to accept new evidence that would be able to establish a full *de novo* appeal, so instead would be able to review the case to the CCRC which would then make submissions to the Court. A similar arrangement is present in the UK under s23A of the *Criminal Appeal Act 1968* (UK) inserted by s5 of the *Criminal Appeal Act 1995* (UK).
6. *R v Criminal Cases Review Commission, ex p Pearson* [1999] All ER 498 citing *R v Cooper* [1969] 1 QB 267.
7. *Mallard v R* [2003] WASC 296.
8. See Victoria, *Inquiry into the Circumstances that Led to the Conviction of Mr Farah Abdulkadir Jama*, 6 May 2010 (The Hon Frank Vincent QC).
9. See for example, *Kansal (No. 2)* [2001] UKHL 62, [2002] 2 AC 69, [2002] All ER 257 where it was held that "where an argument was so poorly presented that the courts may have been misled, or where the appellant's case was not put to the court, then the Commission could reasonably regard such matters as new and could refer".
10. *M v The Queen* (1994) 181 CLR 487.



11. Instances of investigations into wrongful convictions at the investigative area are quite rare, although this is the area in which most exonerating evidence may be found.

12. For example in Jama's case, a solicitor working at the OPP discovered the glaring error and made inquiries after Jama had been convicted. It remains a stroke of luck that such a glaring example of a wrongful conviction was even discovered in the first place. Victoria, *Inquiry into the Circumstances that Led to the Conviction of Mr Farah Abdulkadir Jama*, 6 May 2010 (The Hon Frank Vincent QC).

13. *R v Apostilides* [1984] HCA 38; [1984] 154 CLR 563, [578]; *Gipp v The Queen* (1998) 194 CLR 106, [147]-[150].

14. This is compounded by the lack of funds available to a prisoner, and the scarcity of American-style "Innocence Projects" within Australia. See generally, US Innocence Project, www.innocenceproject.org at 15 September 2012.

15. Note 2 above.

16. In his foreword Kirby J frankly and bravely admits the human and structural deficiencies of the criminal justice system, citing *Mallard v R* [2005] HCA 68; (2005) 224 CLR 125.

17. Criminal Cases Review Commission, *Annual Report 2010-2011*, (2011), p5.

18. For current figures see Criminal Cases Review Commission, www.justice.gov.uk/about/criminal-cases-review-commission at 15 September 2012.

19. See for example Canada, *Inquiry into Pediatric Forensic Pathology* (2008), www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/index.html at 15 September 2012; Scotland, *The Fingerprint Inquiry* (2011), www.thefingerprintinquiry.scotland.org.uk/inquiry/3127.html at 15 September 2012.

20. As above.

21. This was in combination with other factors, but nevertheless played a substantial role in each wrongful conviction case. See Michael Saks and Johnathan Koehler, "The coming paradigm shift in Forensic Identification Science" (2005) 309 *Science* 892.

22. Note 8 above.

23. These CCTV cameras were found to have failed at the two critical moments, further adding to the highly improbable circumstantial case against Farah Jama.

24. Note 8 above.

25. Note 8 above, p27.

26. James Robertson, "Forensic Science: an enabler or dis-enabler to criminal investigation?" (2012) 44 *Australian Journal of Forensic Sciences* 84.

27. Note 8 above, p56.

28. As above.

29. The Legislative Review Committee, Parliament of South Australia, *Inquiry into the Criminal Cases Review Commission Bill* (2010), 77.

30. *Commonwealth of Australia Constitution Act 1900* (Imp), s71, which states that judicial power may only be exercised by Chapter III courts.

31. See *Huddart Parker and Co v Moorehead* (1909) 8 CLR 330 where Griffith CJ explained the power as a "... power which every sovereign must of necessity have to decide controversies between its subjects, or between itself and its subjects ... exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action". (author's emphasis).

32. A Chapter III court must have the power to enforce its decisions. See *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

33. One similar Australian body is found in the Human Rights and Equal Opportunity Commission.

34. Note 2 above.

35. An excellent website resource for wrongful convictions and CCRCs is Dr Robert N Moles' webpage, netk.net.au/CCRCHome.asp. This author thanks Dr Moles for his tireless effort and campaigning.

Legislation

Commonwealth of Australia Constitution Act 1900 (Imp)
Criminal Appeal Act 1995 (UK)
Criminal Appeal Act 1968 (UK)

Cases

Brandy v Human Rights and Equal Opportunity Commission (1995) 183 CLR 245

Gipp v The Queen (1998) 194 CLR 106, [147]-[150]
Huddart Parker and Co v Moorehead (1909) 8 CLR 330
Kansal (No. 2) [2001] UKHL 62; [2002] 2 AC 69; [2002] All ER 257
Mallard v R [2005] HCA 68; (2005) 224 CLR 125
Mallard v R [2003] WASC 296
M v The Queen (1994) 181 CLR 487
R v Apostilides [1984] HCA 38; (1984) 154 CLR 563
R v Criminal Cases Review Commission, exp Pearson [1999] All ER 498
R v Cooper [1969] 1 QB 267

Secondary Materials

Blackstone, William, *Commentaries on the Laws of England* (1765) Book IV
Canada, *Inquiry into Pediatric Forensic Pathology* (2008), www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/index.html at 15 September 2012
Criminal Cases Review Commission, *Annual Report 2010-2011*, (2011)
Criminal Cases Review Commission, *Annual Report 2011-2012*, (2012)
Criminal Cases Review Commission, www.justice.gov.uk/about/criminal-cases-review-commission at 15 September 2012
Kirby J, "Foreword" in Bibi Singha, Kent Roach, Julie Goulding & Robert Moles, *Forensic Investigations and Miscarriages of Justice – The Rhetoric Meets the Reality* (2010)
Robertson, James, "Forensic Science: an enabler or dis-enabler to criminal investigation?" (2012) 44 *Australian Journal of Forensic Sciences*
Saks, Michael and Koehler, Jonathan, "The coming paradigm shift in Forensic Identification Science" (2005) 309 *Science* 89
Scotland, *The Fingerprint Inquiry* (2011), www.thefingerprintinquiry.scotland.org.uk/inquiry/3127.html at 15 September 2012
The Legislative Review Committee, Parliament of South Australia, *Inquiry into the Criminal Cases Review Commission Bill* (2010), 77
US Innocence Project, www.innocenceproject.org at 15 September 2012
Victoria, *Inquiry into the Circumstances that Led to the Conviction of Mr Farah Abdulkadir Jama*, 6 May 2010 (The Hon Frank Vincent QC)

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