Miscarriages of Justice: Criminal Appeals and the Rule of Law in Australia

Bibi Sangha and Robert Moles

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Miscarriages of Justice: Criminal Appeals and the Rule of Law in Australia adopts a multi-jurisdictional approach to argue that Australia's court of appeal procedures are in need of reform. Described in the foreword by the Honourable Michael Kirby AC CMG as 'a book of high principle', the authors are sustained campaigners against miscarriages of justice and inadequate criminal appeal processes.[1] The book is written with contextual reference to legal theorist Sir Neil MacCormick, whose work provides the principles to guide the aims and outcomes of successful criminal law reform – namely, that the rule of law must be upheld through judicial consistency and limitations placed on official power.

The text's accessibility is principally due to its meticulous structure; each chapter has a 'flow on' effect within its corresponding Part; for example, the text highlights the structural inadequacies identified in Part II through a series of case studies in Part III. There is no comparably comprehensive literature on Australian miscarriages of justice in the context of criminal appeal processes; thus, the text fills a lacuna in the literature.[2]

Sangha and Moles criticise the High Court's narrow approach towards Australia's 'common form' appeal provisions, arguing that the Court's construction of the 'one appeal' rule is not grounded in the words of the statute, as the provisions merely provide that an individual 'may appeal'.[3] This interpretation applies even in light of 'fresh and compelling' evidence.[4] The Court's justification for this strict approach is grounded in the rationale that a potential miscarriage of justice can be remedied through petition processes. The authors submit that this apparent safeguard is arguably flawed and untenable under the rule of law, and further argue that the High Court erroneously refers to petition processes as a safeguard to prevent injustice.[5]

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1 Bibi Sangha, Robert Moles and Ken Roach, *Forensic Investigations and Miscarriages of Justice: The Rhetoric Meets the Reality* (Irwin Law, 2010).

2 See, eg, the comparative approach of Australia and England by Kerry Carrington, 'Travesty! Miscarriages of Justice' (Pluto Press Australia, 1991). See also the multi-jurisdictional approach of Ronald Huff and Martin Killias, 'Wrongful Conviction: International Perspectives on Miscarriages of Justice' (Temple University Press, 2010).

3 *Burrell v R* (2008) 238 CLR 218; *R v GAM (No 2)* (2004) 9 VR 640.

4 See *Mickelberg v R* (1989) 167 CLR 259, 264 (Mason CJ).

5 Bibi Sangha and Robert Moles, *Miscarriages of Justice: Criminal Appeals and the Rule of Law in Australia* (Lexis Nexis, 2015) 71, citing *Grierson v R* (1938) 60 CLR 431.

The authors therefore propose that the Attorney-General be provided with a right to refer cases directly to a court.[6] However, the text does positively recognise Tasmania and South Australia's implementation of a new statutory right to appeal if 'fresh and compelling' evidence is produced.[7] This analysis is one of the book's greatest strengths and aligns with the academic commentary that similarly scrutinises the petition process for lacking transparency and accountability.[8]

Sangha and Moles critique the effectiveness of Australia's reactive use of Royal Commissions to address individual miscarriages of justice.[9] The authors comparatively analyse and favour how Canadian jurisdictions utilise this type of inquiry to undertake a proactive and systemic review of appeal processes. However, the text does not move further to highlight the practical outcome of Australia's one-dimensional and regressive use of Royal Commissions. Arguably, Australia's reactive use of this inquiry mechanism is one reason why it has not set up an equivalent Criminal Cases Review Commission ('CCRC').[10] The text may have benefited from a suggestion of modest reform by way of a hybrid combining both jurisdictions' processes.

Australia's appeal rights derive from those introduced in Britain in 1907; the book juxtaposes Australia's lack of progress with Britain's extensive reform over the last hundred years. For instance, Britain's CCRC has resulted in 380 convictions being overturned in the first 18 years of its establishment. In that same period, barely a handful of cases have been referred back to the appeal courts in Australia.[11] The authors' emphasis on the establishment of an Australian CCRC equivalent would see Australia's appeal processes fall in line with its international obligations.[12]

While the text conducts an objective assessment of Australia's appeal rights, the authors have arguably written through the lens of a wrongfully convicted individual. This is predictable given the text's thesis. However, there is little recognition that post-appeal rights sit in contrast to the finality

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6 This power would align with s 693.3(3) of the *Canadian Criminal Code*.

7 *Statute Amendments (Appeals Act) 2013* (SA); *Criminal Code Amendment (Second or Subsequent Appeal for Fresh and Compelling Evidence) Act 2015*.

8 See Sue Milne 'The Second or Subsequent Criminal Appeal, the Prerogative of Mercy and the Judicial Inquiry: The Continuing Advance of Post-Conviction Review' (2015) 36(1) *Adelaide Law Review* 212.

9 *Chamberlain v R (No 2)* (1984) 153 CLR 521.

10 The UK's CCRC was established in response to its Royal Commission finding. See Michael Naughton, 'The Criminal Cases Review Commission: Innocence Verses Safety and the Integrity of the Justice System' (2012) 58 *Criminal Law Quarterly* 207.

11 Above n 8, 66.

12 See Lynne Weathered, 'The Growing Acknowledgment of Wrongful Conviction – The Australian Response Within an International Context' (2013) 3(1) *Victoria University Law and Justice Journal* 89.

of a conviction.[13] The text may have benefited from a consideration of the practical ramifications of introducing subsequent appeal rights and alternative appeal mechanisms into the Australian legal landscape.[14] Despite this, *Miscarriages of Justice: Criminal Appeals and the Rule of Law in Australia* provides an in-depth, innovative addition to the scholarship on Australia's appeal processes. Accordingly, this text may prove to be instructive to experts and commentators in the field, including the Australian Law Reform Commission.

*Hannah Grey**

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13 See Milne, above n 12, 212.

14 Further appeal processes may cause the criminal justice system to lose efficacy and could potentially undermine the jury as the constitutionally entrenched trier-of-fact. Victims and society could be denied closure. See David Hamer, 'Wrongful Convictions, Appeals, and the Finality Principle: The Need for a Criminal Cases Review Commission' (2014) 37(1) *University of New South Wales Law Journal*, 270.

* Final year BA-LLB student at the University of Tasmania, and Co-editor of the *University of Tasmania Law Review* for 2016.