Michael Kirby Justice Oration

Victoria University 2024

The Hon Catherine Holmes AC SC

Chancellor, Acting Vice Chancellor, the Hon Michael Kirby AC CMG, Dean Lydia Xynas, guests.

I am greatly honoured to be invited to give this oration named for and in honour of the great jurist and intellectual, the Honourable Michael Kirby. He in fact suggested the topic, Miscarriages of Justice, which I gratefully adopted, because it is such an interesting one and so close to my heart. I did not appreciate at the time that Mr Kirby had already written a paper himself on the subject. Of course he had. He is one of the great human rights lawyers of our time, and one of our most productive legal writers.

So, a little daunted by that precedent, I point to a couple of distinctions. First, my paper is more prosaic and more case-based. Second, I am working from a different concept of miscarriage of justice. I will talk about two of the cases Mr Kirby discussed in his paper, Mallard and Chamberlain, but not the third, the case of Cardinal George Pell. That is because I am using the term "miscarriage of justice" in a broader sense, as referring to those cases where the justice system has not, through the normal appeal processes, corrected the error. You will recall that the High Court allowed Cardinal Pell's appeal and set aside his convictions. In the cases I'm going to talk about, the ordinary appeal process was of no avail.

Why was that so? The Australian criminal justice system generally works well. Trial by jury with the presumption of innocence is a great protection. Someone convicted at a trial can appeal. Each State and Territory has some form of Court of Appeal as part of its Supreme Court. Generally that court will allow an appeal against conviction if it concludes that the jury verdict was unreasonable, which actually is a more stringent standard than it sounds, or cannot be supported on the evidence, or that on any ground there was a miscarriage of justice; for example, if fresh evidence had come to light. Where an appeal is allowed, the conviction will be quashed, and the court may order that a verdict of acquittal be entered, or that there be a re-trial.

But our appeal process is not really designed to pick up cases where evidence, or expert knowledge, has accumulated over time to show, or confirm, that the wrong result was reached. There used only ever be one opportunity to appeal to a Supreme Court. Under that finality rule, if you weren't successful, that was it for appeal, unless the High Court was interested. A defendant whose appeal is dismissed by a Supreme Court can seek special leave to appeal to the High Court, but that is granted according to strict criteria. The special leave gate is a narrow one indeed. And the High Court will not entertain

fresh evidence, that is evidence discovered since trial, that has not been before the appeal court below. That inability to look at fresh evidence is not really conducive to ensuring justice is served, as Mr Kirby has observed elsewhere.

Once appeal processes are exhausted, you can petition for mercy to the Governor, who can relieve you of the consequence of the conviction, that is the sentence, but not the conviction itself. However, the various State jurisdictions enable the Attorney-General where there is a petition for mercy to refer the case back to the appeal court for rehearing, in which case it might quash the conviction. But Attorneys-General for all sorts of reasons may not be keen to use that power. I'll come back to that.

So how do miscarriages of justice come about? I had said when asked that I would discuss five named cases but in preparing for this talk a glaring omission became apparent: that I had not included any case involving an indigenous defendant. You can be quite sure that although such cases may not achieve the prominence of others, they most certainly do occur. So in substitution for the early case of John Button, I will tell you about a case from my home state.

The case comes from the town of Mt Isa in western Queensland. In the early hours of the morning of 1 October 1983, a young indigenous woman was found near death with head injuries in the backyard of a pharmacy. She had been beaten with a metal pole which lay nearby, and a rock had been inserted into her vagina. Mt Isa police wasted no time in approaching her partner, Kelvin Condren, a 22-year-old indigenous man. According to them, he made verbal, unrecorded admissions to having hit her with an iron picket and "shoved a rock up her". He'd done that at 4:15 in the afternoon of 30 September. The timing was critical, because at 5.50 pm that same evening he had been arrested for drunkenness and held in the watch house overnight. The police later recorded the same admissions in a formal typed record of interview made in the presence of a justice of the peace.

So that was all tidied up very briskly. It must have been a nasty shock for the Mt Isa police when, eight weeks later, they were contacted by the Northern Territory police. Andrew Albury, whom they had just taken into custody on a charge of killing an indigenous woman, had informed them that when he was passing through Mt Isa at the end of September, he had killed another indigenous woman; he'd hit her in the head with a pole, and in the same words attributed to Mr Condren, "shoved a rock up her". I won't use his actual terminology, but he said he did not like black women. Two months later the Mt Isa police investigators went to Darwin to interview him, but he refused to talk to them.

At trial the following year, the Crown relied on the police record of interview with Mr Condren. The defence called Albury as a witness, but he denied making any confessions; they called the Darwin police officers who had interviewed him to give

evidence of what he'd said to them; and they called an expert who gave evidence about Mr Condren's incapacity, in light of his level of literacy, comprehension and vocabulary to give a confession of the kind the police had recorded. (Later, in a different context, there was expert evidence about the phenomenon of gratuitous concurrence; the propensity of some indigenous people to agree to anything put to them by persons in positions of authority.) Nonetheless Mr Condren was convicted of murder.

An appeal in 1987 to the Court of Criminal Appeal was unsuccessful. Mr Condren then sought special leave to appeal to the High Court relying in part on some further evidence his representatives had since obtained but you'll recall that the High Court won't accept fresh evidence. But it expressed concerns about the case which led to the Queensland Attorney-General referring it back to the Court of Appeal to examine the further evidence. Two employees of the pharmacy to whom the investigating police had not troubled to speak had separately walked through the backyard of the business between 5:35 pm and 5:45 pm on the day the victim was attacked. They had not seen her or anything out of the usual. It followed that Mr Condren could not possibly have been the killer, because at that time the police were watching him and about to arrest him for drunkenness.

Mr Condren's conviction was set aside. The police did reinvestigate, found some relevant witnesses and in 2021, only 40 or so years late, issued an arrest warrant for Albury. but since he is in a Darwin jail subject to imprisonment for the term of his natural life and an order for life detention on mental health grounds, it seems very unlikely that anything more will come of it.

Now the case of Andrew Mallard, who was convicted of the 1994 murder of a Perth jewellery shop owner, Mrs Lawrence. She had been hit with a heavy object and found dying in the shop. A couple of days after the killing, the police interviewed Mr Mallard who was known to have gone to the shop. He had just been admitted as an inpatient to a psychiatric hospital. His diagnosis is not entirely clear, but it is apparent from subsequent psychiatric evidence that he was manic and a fantasist at the relevant time. On his discharge he was re-interviewed repeatedly, always without cautioning him and without recording the results.

Finally, there was a videotaped interview in which Mr Mallard offered a scenario for the killing. He described breaking into the shop and using a Sidchrome wrench obtained from a back yard shed as the murder weapon. But the way Mr Mallard described things was odd: he often used conditional language and sometimes lapsed into the third person: "Maybe he did it this way". And a number of the details he gave were wrong: his description of the premises and of what the victim was wearing. The Crown said that his inconsistencies were a deliberate ploy to throw police off the scent.

At trial, Mr Mallard said that he had been threatened by the police officers and had tried to appease them by advancing theories of how the killing might have happened. No evidence of his mental illness was given because his defence team feared it would make a bad impression on the jury. He was convicted and sentenced to life imprisonment in strict security. His appeal failed and the High Court refused special leave.

Subsequently, fresh evidence came to light: essentially matters which the prosecution knew before trial but had not disclosed to the defence. A forensic pathologist had tested a wrench as a murder weapon and found that it did not produce wounds like Mrs Lawrence's. Some blue paint had been recovered from the wounds; Sidchrome wrenches weren't painted. Also not disclosed were sketches made by a young witness who had seen a man in the shop at the relevant time. She had drawn a man wearing a bandana with a beard but no moustache and had described him as of medium build, about six feet tall. Mr Mallard was 6 foot 7, was wearing a cap on the day in question and had a substantial moustache. Meanwhile, further DNA testing had been carried out on Mr Mallard's clothes worn on the day of the killing and no material relating to the victim was found.

Consequently, the Attorney general referred his case to the Court of Appeal which nonetheless dismissed the appeal. But the High Court, the members of which included his Honour Justice Michael Kirby, finding that the lower court had taken the wrong approach to the reference, allowed his appeal, quashed the conviction and ordered a retrial.

The police began a case review and found a palm print on top of a display case in the shop which matched that of a man who actually did resemble the eyewitness' sketch and description. Seven weeks after Mrs Lawrence was killed, that man, Simon Rochford, had confessed to murdering his girlfriend with a steel implement whose shape and dimensions were consistent with the wounds in Mrs Lawrence's skull. It was painted blue. He never stood trial: he killed himself when he was named as a person of interest in the Lawrence investigation. The charges against Mr Mallard were dropped and he was released from custody after almost 12 years in prison.

Mallard and Condren illustrate one possible cause of miscarriage of justice: investigators' negligence or misconduct. That may result from the desire of police officers to adopt the simple obvious solution and make the evidence fit, or, more dangerously what is sometimes called "noble cause corruption": the conviction that impropriety is justified to prevent a guilty person from escaping punishment. Someone unfortunate enough to become the prime suspect may be especially vulnerable to that kind of misconduct, through youth, timidity, susceptibility to suggestion or mental fragility. A second cause, evidenced in Mallard, is prosecutorial misconduct in failing to

disclose relevant evidence to the defence; that may be through stupidity or the determination to win at all costs.

Requirements for recording suspects' statements have become much more stringent since the experiences of Condren and Mallard, and provide some protection, but there is always that space before the recording begins when suggestions can be put strongly and inducements and threats, particularly concerning the availability of bail, offered. Some people say why do we need a right to silence? - an innocent person shouldn't have any problem speaking to the police. These cases illustrate why; but the right to silence was not enough to protect these vulnerable men from years in prison. What's needed is rigorous oversight of police procedures, to ensure that interviewing is done fairly and properly and that appropriate and available avenues of investigation are not ignored just because there is an obvious suspect. Prosecuting agencies need to cultivate a culture of integrity, where fairness is more important than success.

I want to turn now to another cause of miscarriages, where scientific evidence which turns out to be unsound overwhelms all else. The older among you will remember the case of Lindy Chamberlain well; everyone in Australia had an opinion about whether she was guilty or innocent and mostly it was that she was guilty. Essentially the timeline independent witnesses described was this: in August 1980, Mrs Chamberlain and her husband were enjoying an evening barbecue with others at a campsite near Uluru. She seemed happy and content. At about 8 pm she left the barbecue to put her sleeping nine-week-old baby to bed in their tent, followed by her six-year-old son. Her evidence was that she put the baby in a bassinet and went to her car and got a tin of baked beans for her son. The witnesses confirmed that she returned to the barbecue about 5 or 10 minutes after she had left with a can of beans and a tin opener looking perfectly normal with no sign of any blood about her.

Soon after one of the women at the barbecue said she heard a baby cry, and the six-year-old said he heard it too. Mrs Chamberlain went to check on the baby and cried out that a dingo had the child. Two other campers heard the growl of a dog from the direction of the Chamberlains' tent. Other campers, police and rangers searched and found dingo tracks; two of them found a place where a dingo had put something down leaving an imprint of fabric in the sand.

A number of witnesses saw blood in the Chamberlains' tent. Later, foetal blood, which is still present in very young babies, was found on some items, but not on the bassinet. Those items included some tracksuit pants which Mrs Chamberlain had not been wearing at the barbecue; she said that she put them on later when she was cold.

The baby's jumpsuit, nappy and singlet were found a week later, but not the matinee jacket Mrs Chamberlain said she had been wearing. There was no trace of the body.

It is not surprising that the coroner in the first inquest found that a dingo had taken the baby, but of course that is not where it ended. he Crown case at trial was that in that five to 10 minutes Mrs Chamberlain was absent from the barbecue, she took the baby to the car and in the front seat, cut her throat, having put the tracksuit pants over her dress to absorb any blood, she then somehow concealed the body, possibly in a camera bag and she and her husband some time later buried the child in sand dunes, leaving the clothing where it was later found. The blood in the tent, the Crown said, was transferred blood from Mrs Chamberlain's clothing when she went back to the tent to take off the tracksuit pants before returning to the barbecue.

Implausible though the case theory sounds, it was based on scientific evidence. This is a summary of its effect. On testing a year after the baby's disappearance, a good deal of foetal blood was identified in the front of the car, including under the glove box and on the passenger side floor, on a small pair of scissors and the buckle of Mr Chamberlain's large camera bag. As for the baby's jumpsuit, there was no dingo saliva found on it; the expert evidence was that cuts to it could only have been made by scissors, not by a dingo's teeth; and blood staining around the neck would have been caused by a cut throat, not by head injuries. The evidence about the foetal blood in the car was particularly damaging, because the Chamberlains could not explain it.

On the other hand, although the experts agreed that cutting the baby's throat would have caused copious bleeding splashing the killer and the car seat with blood, no witness that night saw any blood on Lindy Chamberlain and a nurse who accompanied Michael Chamberlain in the vehicle that night and the following morning saw nothing unusual in the car.

The defence did call experts to challenge the Crown case, particularly about the validity of the blood testing, and both Chamberlains gave evidence. There had been some variation in Mrs Chamberlain's accounts about what she'd seen when in connection with the dingo. When first interviewed she had not mentioned the matinee jacket she later said the baby was wearing, and no such garment had turned up, so the inference was she'd invented that. More problematically, it seems fairly clear that neither she nor her husband made the kind of witness who would appeal to a jury. Both of them seemed remarkably calm in the days after the baby's disappearance, giving dispassionate press interviews. Brennan J, in the High Court, said the jury might have regarded that behaviour as inconsistent with the distress exhibited immediately after the disappearance.

In 1982, Mrs Chamberlain was convicted of murder and sentenced to life imprisonment and her husband was convicted of being an accessory after the fact. Their appeals to the Federal Court and the High Court were dismissed. Concerns rumbled on about the quality of the scientific evidence, particularly the blood testing. In 1986, the missing

matinee jacket was found near Uluru, next to a dingo lair. Mrs Chamberlain was released from prison, and a Royal Commission was established to look into the case.

To cut a long story short, grave doubt was cast on the blood testing, and in particular, the Commissioner reached the conclusion that the supposed blood under the dashboard was most likely sound-deadening material. The matinee jacket explained the absence of dingo saliva on the baby's jumpsuit and also detracted from the expert opinions about what caused the blood stains on it. Experiments showed that dingoes could cut fabric with their teeth producing a scissor-like effect and a dingo was capable of removing a baby from its clothing. Hairs taken from the tent and the baby's clothing were now examined: they were dog or dingo hairs. The two are indistinguishable, and the Chamberlains didn't own a dog.

Their convictions were quashed, and verdicts of acquittal were entered.

My penultimate case is that of Henry Keogh, an Adelaide man who was convicted of the murder of his fiancée, Anna-Jane Cheney, who had drowned in her bathtub in 1994. He had taken out life insurance in her name not long before her death so there was certainly a motive, although he explained he was just trying to keep his insurance agency alive, and his fiancée knew about the policies. But motive alone could not have got him convicted; what did was the evidence of South Australia's most senior forensic pathologist, Dr Manock, who performed an autopsy and came to the view that Ms Cheney had been forcibly drowned. His opinion was that she must have been conscious when she drowned, because there was no mark on her brain indicating a hard impact to the head and bruises on her left ankle resulted from the grip of someone's right hand pulling her under the water. All of that bruising had occurred, he said, within four hours before death.

Two pathologists from other States were called by the defence and disputed Dr Manock's conclusions. They considered that the death could have been the result of a fall caused by accident or cardiac failure. There'd been no proper examination of the heart at autopsy. But the Crown made much of Dr Manock's superior experience: 30 years in the job and10,000 autopsies; more than these other pathologists. The jury plainly preferred the local man's view and convicted Mr Keogh of Ms Cheney's murder.

Mr Keogh's appeal was dismissed, and he was refused special leave to appeal to the High Court. He attempted later to re-open the appeal and also petitioned the Governor for mercy on a number of occasions, all without success. The Attorney-General refused to refer his case back to the court.

That was although it had come to light that Dr Manock had been appointed to his position without actually having any specialist training as a forensic pathologist, on the understanding he would undertake it; but he never did. A coroner had heavily criticised his methodology in three cases he'd been involved in before Keogh's. A decade on, Dr

Manock conceded that his opinion that a blow causing unconsciousness must leave a mark on the brain was wrong and so was his evidence that the bruising must have been sustained within 4 hours of death.

Unfortunately, in 2004, the Crown had obtained a report from a very senior pathologist who like the defence experts at the trial, thought it more likely that Ms Cheney had fallen, hit her head on the bath and drowned while unconscious. He also suggested testing of the supposed bruise tissue to see if it contained a pigment which would indicate the age of the marks. I say unfortunately because, inexplicably, that report was not provided to the defence until the end of 2013. There was still a slide available of the tissue involved in the supposed thumb mark on Ms Cheney's ankle; it was retested in 2014 and found to contain the pigment. if it was a bruise, it had been sustained well over 24 hours before her death.

In 2013, South Australia enacted the nation's first legislation enabling a second appeal against conviction, provided fresh and compelling evidence was put forward. Mr Keogh took advantage of the change and began a fresh appeal, relying on the evidence about the bruising, Dr Manock's recantations and the opinions of a number of experts that there was nothing to support the theory of forcible drowning and that an accidental fall was entirely feasible. The South Australian Full Court allowed his appeal, and Mr Keogh was eventually awarded compensation for his 19 years in gaol.

My final case is the most recent. It's that of Kathleen Folbigg, who was convicted in New South Wales in 2003 of the murder of three of her babies, grievous bodily harm of one of them, and manslaughter of a fourth baby. All had been found dead in their cots, two girls aged 10 1/2 and 19 months respectively, and two boys, the first 19 days old and the second eight months old. The second boy had been rushed to hospital with breathing difficulties when he was about 3 months old. After that episode he had suffered seizures which had left him with severe brain damage.

The Crown case, based on the evidence of experts, was that the breathing difficulties were the result of asphyxiation, which led to the grievous bodily harm charge, and that all the babies had been killed by smothering. The postmortems did not find any signs pointing conclusively to suffocation, such as haemorrhaging or facial injury, but four deaths were too many to be consistent with sudden infant death syndrome where there were no underlying congenital medical abnormalities. One girl did have myocarditis, and the second boy may have developed epilepsy, but those conditions weren't sufficient, it was said, to account for death.

Mrs Folbigg's diary had been seized; it did not contain any direct admission of having harmed any of the children but there was a number of suspicious references to having lost control, feeling that she had taken her stress out on her children and a sense of guilt for their deaths. Her husband said that she was often angry and rough with the children

and on the morning one of the girl babies died had disappeared from their bedroom for a while although his evidence on this varied. He also considered that she had not grieved as he did, and some neighbours gave evidence that she did not appear appropriately heartbroken after the last death.

Mrs Folbigg was convicted and sentenced to 40 years imprisonment. Her appeal against the convictions failed, although her sentence was reduced to 30 years imprisonment with a 25-year non-parole period.

In the years after the trial, evidence emerged suggesting the possibility that the two girls and Mrs Folbigg shared a genetic variant associated with heart arrhythmia, which might account for the girls' deaths.

New South Wales has a post-conviction review procedure unique to it and the ACT. A person may apply for a pardon and hope that the Attorney-General will refer their case to the court, but they may also apply to the Supreme Court to order an inquiry into a conviction by a judicial officer (who may be retired). The inquirer reports on the results and can refer the matter to the Court of Criminal Appeal to consider whether the conviction should be quashed.

In 2018, Mrs Folbigg successfully applied to have an inquiry conducted under that provision, but the inquirer reached the view that she was properly convicted, essentially because he considered that the diary entries amounted to admissions of guilt.

However, medical evidence on the possible causes of the babies' deaths firmed in the following years, and another inquiry, by former Chief Justice Bathurst, was ordered, which reported in 2022. Psychiatric and psychological evidence which I won't attempt to explore here, dealt with Mrs Folbigg's appalling childhood why her responses to the children's deaths might seem abnormal and why the diary entries could not be treated as reliable admissions of guilt. Mr Bathurst accepted that the diaries reflected self-blame rather than being admissions of actual guilt.

International and local experts in a range of fields gave evidence about the genetic variant, some considering that it was likely that the girls' deaths were caused by cardiac arrhythmia and others acknowledging that it was at least a reasonable possibility. Paediatric specialists gave their opinions that the symptoms of the baby boy admitted to hospital with breathing difficulties suggested an underlying neurological disorder, not smothering, and his death could be related to a seizure. One of those experts had been extensively involved in investigating child deaths and said that it would be very surprising if the three older babies could all be smothered without showing any traces of injury to their faces. The cause of death of the fourth baby at 19 days old was not known but given that the other deaths could be explained as a result of natural causes, the same could not be ruled out in his case.

Mr Bathurst referred the matter to the Court of Criminal Appeal with the result that after 19 years in custody, Mrs Folbigg's convictions were quashed.

So in each of these three cases, expert evidence at trial led to the wrong result. The Folbigg case represents a sort of faulty statistical reasoning that resulted in a number of miscarriages of justice in the United Kingdom where women were charged with killing their babies purely on the basis that more than one cot death had occurred. The thesis was that of Sir Roy Meadow, a since discredited British paediatrician, whose ABC of child abuse was that one sudden infant death syndrome case was a tragedy, two were suspicious and three were murder until proved otherwise. It should also be said that in one area of expertise involved in the case, genetics, the state of scientific knowledge later advanced considerably.

The case of Keogh represents the difficulty in challenging a supposedly established expert; the reluctance to accept that confidently given evidence from someone apparently well-credentialled with long experience in the field can actually just be wrong.

A problem all barristers practising in crime encounter is that a witness who wrongly asserts something when first questioned may find it very difficult to admit their error and may adhere doggedly to their inaccurate account. That response can be intensified for an expert having to admit the possibility of error, particularly in a high-profile case, when their professional reputation is on the line. There is a tendency to dig in and see questioning as a personal affront, which I think it could fairly be said was also manifested in the Chamberlain case. I have no great solutions for human frailty, but Queensland's civil practice rules require that an expert giving evidence both undertakes to, and does, abide by a code of conduct. There is no obvious reason why the same should not apply in criminal cases.

What shocks me most about the Chamberlain case is not that the competing scientific evidence offered by the defence was not accepted, but that the accounts of apparently credible, independent eyewitnesses were rejected. This is the power of evidence with the halo of science about it; it could trump the evidence of witnesses who described Mrs Chamberlain's behaviour in a way entirely consistent with what she said had happened, could confirm the baby's cry and the dingo growl; the nurse who saw nothing remarkable in the vehicle which was supposed to have been the scene of a bloody infanticide; the trackers who saw what looked very much like the mark of a dingo stopping to rest with a burden clad in fabric.

Another factor which sometimes feeds into miscarriages of justice is that a suspect may exhibit a personality or atypical grief reaction which predisposes a jury to a conclusion of guilt. In the Folbigg and Chamberlain cases, you had parents perceived not to have responded appropriately to their children's deaths. Fairness may require

that trial judges give juries directions akin to those given in respect of complainants' responses in sexual assault cases, that they should be wary of giving too much weight to demeanour, that there is no textbook human reaction to a shocking event.

I've talked about famous - and infamous - cases but there is no guarantee a case of miscarriage of justice will receive public exposure, or if it does, that relief will come quickly. In some of the cases I've talked about, journalists, academics or members of parliament have agitated over years, with books or articles written. This year a podcast has emerged featuring the Victorian Farquharson case, involving the father convicted of murdering his three sons by steering his car into a dam. There are overtones of the cases I've been discussing, with challenges to medical and scientific evidence and the suggestion that Farquharson's unnaturally calm response at the dam side was taken as indicative of guilt when it may have reflected shock.

Why is it hard to remedy a miscarriage of justice? The traditional means of seeking exoneration once the appeal process is exhausted have been cumbersome and hard to secure. Persuading an Attorney-General to intervene can be difficult, as Mr Keogh found. They may be reluctant to cast doubt on the way the police force or prosecution, for which they are likely to have ministerial responsibility, have acted. Acting to set aside a conviction in a high-profile case may not be politically popular. It can be hard for victims or families of victims to accept, sometimes long after the conviction of the person they have come to believe is responsible for the harm done to them, that there has been a mistake.

A number of jurisdictions - Tasmania, Victoria, Western Australia and the Australian Capital Territory have taken up South Australia's approach of allowing further appeals against conviction if the court considers that there is fresh and compelling evidence, which was the path Mr Keogh took. The South Australian amendment came about after a parliamentary committee was set up to consider a private member's bill, largely motivated by the Keogh case, for the establishment of a Criminal Case Review Commission. The committee didn't like the idea of such a Commission, but it did recommend the enabling of further appeals.

Another advance is the procedure used in Folbigg; both New South Wales and the Australian Capital Territory have both legislated the procedure to apply to a court for referral of a matter to a judicial officer for inquiry.

Those two developments – further appeal and application to a court for an inquiry – significantly improve the prospects of someone wrongly convicted obtaining relief. They have not been consistently adopted across Australian jurisdictions, and they should be. Are they enough? I don't think so. I've spoken about five high profile murder cases, but you can be sure that there are many more, not so well known, perhaps involving less serious charges, but nonetheless with life-changing consequences for those wrongly

convicted. I've come round to the view that what's needed is a systemic and independent means of correction. A Criminal Cases Review Commission, of the kind rejected in South Australia, is the most effective way of remedying miscarriages of justice.

A number of overseas jurisdictions have them in varying forms. Probably the best known is the United Kingdom's Commission, established in 1997. It reviews cases, and may carry out further investigation with witnesses interviewed or new forensic tests undertaken. It can refer a conviction (or a sentence) to the Court of Appeal if there is new evidence or exceptional circumstances of some kind and a real possibility the court will not uphold the original result.

As at July this year it had received 32,100 applications, referred 848 of them to the appeal court, resulting in 587 successful appeals. Looked at one way that's a minuscule success rate, about .02%. On the other hand, for the 587 successful applicants, it probably mattered quite a lot.

And one must never lose sight of the individuals involved. Being wrongly convicted is a dreadful thing. One doesn't like to imagine the anguish of a parent who suffers the double blow of losing a child and being wrongly convicted of its killing. In Lindy Chamberlain's case she lost a second daughter who was taken from her when she gave birth to her in prison. Mr Keogh and Mrs Folbigg both spent 19 years in custody. Imprisonment means loss of work, home, identity. It's extraordinarily difficult to maintain personal relationships. Even when someone is exonerated and released, after a long period of imprisonment, pre-custody life is irretrievable.

Even if you are unperturbed by the fate of individuals, there can be considerable risk to the community in allowing a wrong conviction to stand. The danger in cases where police opt for the most obvious candidate and stick to their theory is that when that candidate is in fact the wrong one, the real culprits are free to offend again. It is arguable that with better investigation work in the Condren and Mallard cases, Albury and Rochford would not have remained free, Albury to kill the Darwin woman and Rochford to kill his girlfriend.

And there is a larger social interest in this. Democracy depends on respect for institutions: the police, prosecutors, parliament and the courts. It is diminished when miscarriages of justice occur, or worse, are identified but go unremedied. We can do better, and we should.