

**INTERNATIONAL SOCIETY FOR THE REFORM OF CRIMINAL  
LAW**

**20<sup>TH</sup> ANNIVERSARY CONFERENCE**

**TWENTY YEARS OF CRIMINAL JUSTICE REFORM:**

**PAST ACHIEVEMENTS AND FUTURE CHALLENGES**

**22 - 26 JUNE 2007 FOUR SEASONS HOTEL VANCOUVER BC CANADA**

**Plenary 5 Reform of Evidence Sunday 09:00**

**From appalling vista to appalling vista: twenty years of evidence law reform**

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**Introduction**

1. The Ministry of Justice and Legal Affairs in Solomon Islands is currently undertaking a review of evidence law. Unlike many other jurisdictions, Solomon Islands does not have an Evidence Act.<sup>2</sup>
2. A Bill for an Evidence Act was prepared for Parliament in 1987 but was not passed. In 2006 a Committee of the Bar Association deliberated on the issues of evidence law reform for Solomon Islands. The work of the Committee culminated in a weighty report setting forth various recommendations endorsed by the Committee. The Ministry has reviewed the 1987 draft Bill and the work of the Bar Association Committee and has prepared a draft Bill for consultation.

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<sup>2</sup> The law of evidence is found in the *Constitution*, various pieces of legislation, court rules and the common law. As with many Commonwealth jurisdictions, the law of Solomon Islands includes UK statutory provisions of general application and in force at a particular date (for Solomon Islands that date is 1 January 1961). See section 76 and Schedule 3 *Constitution*.

3. The law reform process in Solomon Islands has gathered pace in the last two years, in part because the Regional Assistance Mission to Solomon Islands (RAMSI) is moving into a new phase beyond support for the completion of tension trials<sup>3</sup> and is working with the Government to support a justice sector program of reform.<sup>4</sup>
4. In relation to evidence, the task set by the Ministry is to develop a Bill for an Evidence Act building on the 1987 proposed Bill and the Bar Association report made almost 20 years later. This task neatly mirrors the scope of this conference on the topic of 'twenty years of criminal justice reform: past achievements and future challenges'. The 1987 Bill is much more legalistic and narrow in its concerns than the proposals made almost twenty years later.
5. In this paper I wish to highlight the key themes in the evidence reform process in common law jurisdictions over the last twenty years. I draw on the papers of the conferences of this Society published since 1999 as a means of highlighting the important role played by the Society in providing a forum for the exchange of ideas and for debate.

### **Miscarriages of justice open up an appalling vista**

6. The title of this paper refers to the 'appalling vista' comment of Lord Denning in 1980. Lord Denning was ruling on whether the Birmingham Six

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<sup>3</sup> See for example, Averre K 2006 *Pre-trial incarceration in Solomon Islands and the reasonableness of its length – A post conflict intervention context* ISRCL Conference Brisbane  
Cauchi J 2005 *The Solomon Islands: Helping to rebuild the criminal justice system* ISRCL Conference Edinburgh

<sup>4</sup> The Ministry has prepared a Bill for a new Corrections Act following widespread consultation. The Law Reform Commission is currently tasked to review the *Criminal Procedure Code* and the *Penal Code*. A Committee headed by the Chief Justice has prepared new *Civil Procedure Rules* which are scheduled to commence on 1 October 2007.

could sue the police and said this about the prospect of the Birmingham Six succeeding against the police:

If the six men win, it will mean that the police were guilty of perjury, that they were guilty of violence and threats, that the confessions were involuntary and were improperly admitted in evidence, and that the convictions were erroneous. That would mean that the Home Secretary would have either to recommend they be pardoned or he would have to remit the case to the Court of Appeal under s 17 of the Criminal Appeal Act 1968. This is such an appalling vista that every sensible person in the land would say: 'It cannot be right that these actions should go any further'.<sup>5</sup>

7. While Lord Denning was dealing with a discrete matter of issue estoppel following trial, his comment and the criticism that it attracted rightly excited considerable debate about criminal trials and the intertwining of the laws of evidence and procedure in the trial process which is in turn inseparable from the investigative process. The importance of the rules of evidence and procedure cannot be doubted. As Volk argues in relation to German experience,

The focal point for the collection of evidence has shifted from the trial to the investigation ... it is the procedural law in which the state demonstrates its power and in which that power is constrained. In reality, the substantive law exists on paper alone. It is procedural law which intervenes in the life of the accused.<sup>6</sup>

8. Two revolutionary changes were to take place as a result of the increased awareness of miscarriages of justice and persistent agitation about those miscarriages. The first was the greater preparedness to re-open criminal cases where a miscarriage of justice is alleged. The second was the review of investigative methods and evidence and procedure laws that enabled the miscarriages of justice to take place. What must not be

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<sup>5</sup> *McIlkenny v Chief Constable of the West Midlands* [1980] QB 283, at 323D

<sup>6</sup> Volk K 2003 *The principles of criminal procedure and post-modern society: Contradictions and perspectives* ISRCL Conference The Hague.

forgotten however is how much effort and public debate was required to get the criminal justice system to admit that errors may have been made.

9. And so, with the Birmingham Six it was not until 1986 after mounting pressure, that the Home Secretary referred the matter back to the Court of Appeal. On 14 March 1991, the convictions of the Birmingham Six were overturned and they were released from custody.
  
10. Examples from Australia illustrate the enormous time, effort and expense required to be spent to obtain a review in relation to a miscarriage of justice. These include the Chamberlains where the prosecution relied on flawed scientific evidence.<sup>7</sup> In the cases of John Button<sup>8</sup> and Daryl Beamish<sup>9</sup> both were young adults in the early 1960s and each was convicted in relation to separate killings even though the police had received a confession to the two killings from a serial killer who was then on death row. Other cases of false confessions and accused persons being 'fitted up' by police were exposed in the Royal Commission into the New South Wales Police Service.

### **The review of convictions**

11. Don Sorochnan<sup>10</sup> documents how over the last century various reports built up an awareness of miscarriages of justice. The 1980s saw a number of

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<sup>7</sup> Convicted in October 1982 and exonerated following the findings of a Royal Commission in September 1988.

<sup>8</sup> Convicted of the manslaughter of his girlfriend in 1963 and sentenced to ten years imprisonment Button was released after five years. Serial killer Eric Edgar Cooke confessed to the murder on death row in 1963. Button was subsequently exonerated by the Court of Appeal on 25 February 2002.

<sup>9</sup> Convicted of the axe murder of a Perth woman. Beamish who is deaf and mute was then 18 and was convicted on the basis of an alleged confession to police. Serial killer Eric Edgar Cooke confessed to the murder on death row in 1963. Beamish was exonerated by the Court of Appeal on 1 April 2005.

<sup>10</sup> Sorochnan D Q.C. 2006 *FPT Heads of prosecution committee report of the working group on the prevention of miscarriages of justice* ISRCL Conference Brisbane.

substantial cases which only gradually came to be addressed and which forced us to confront the stark reality of miscarriages of justice.

12. Lord Steyn, in his dissenting judgment in *R v O'Connor and another and R v Mirza* refers to the comment of Lord Denning as a way of highlighting how far the courts have come in recognising the danger of miscarriages of justice occurring:

Nowadays we know that the risk of a miscarriage of justice, a concept requiring no explanation is ever present. In earlier times courts sometimes approached the risk of a miscarriage of justice in ways which we would not nowadays find acceptable.<sup>11</sup>

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<sup>11</sup> *R v Connor and another, R v Mirza* [2004] UKHL 2, per Lord Steyn dissenting at par 4. Lord Steyn continued:

In 1980 the Court of Appeal denied the Birmingham Six the right to sue the police in civil proceedings. Lord Denning MR said about the possible innocence of the men: "This is such an appalling vista that every sensible person in the land would say: It cannot be right that these actions should go any further": *McIlkenny v Chief Constable of the West Midlands* [1980] QB 283, at 323D. The men stayed in prison. Some 12 years later their convictions had to be quashed. Together the miscarriages in the cases of the Guildford Four, the Maguire Seven and the Birmingham Six were described by Lord Devlin as "the greatest disasters that have shaken British justice in my time": "The Conscience of the Jury" (1991) 107 LQR 398. It led to the appointment of a Royal Commission on Criminal Justice which reported in July 1993: Report (Cm 2263). One of the key messages of that Report was that the Court of Appeal must be readier to examine possible miscarriages of justice. One of the recommendations was the creation of new and independent arrangements for identifying miscarriages of justice. This recommendation was implemented in 1995 by the setting up of the Criminal Cases Review Commission: section 8 of Criminal Appeal Act 1995. It is an independent body with extensive powers to investigate complaints of miscarriages of justice. There was also a more general change in legal culture. A good illustration of that is the decision in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115 where, in the face of some 60 miscarriages of justice in the 1990s, the House of Lords set aside Home Office instructions denying prisoners access to journalists in their efforts to get their convictions overturned. The philosophy became firmly established that there is a positive duty on judges, when things have gone seriously wrong in the criminal justice system, to do everything possible to put it right. In the world of today enlightened public opinion would accept nothing less. It would be contrary to the spirit of these developments to say that in one area, namely the deliberations of the jury, injustice can be tolerated as the price for protecting the jury system.

13. However, the majority<sup>12</sup> held that the common law prohibition on receiving evidence of jury deliberations prevailed in the face of a letter reportedly written by a jury member indicating irregularities in juror decision making.

### **Some of the major evidence issues in criminal trials in the last twenty years**

14. I wish to set out some of the issues raised in relation to distinct areas of concern regarding evidence and procedure over the last twenty years.

They are:

- police methods
- scientific evidence
- witnesses and victims
- reliance on technology
- judicial management
- prosecution responsibilities

15. It is possible only to cover each of these briefly. I wish to draw attention to some of the contributions made at ISRCL conferences since 1999. My conclusion is that while there has been much progress, it has come from enormous effort and we cannot afford to drop our guard against 'miscarriages of justice'. More importantly, we must be prepared to examine and debate the philosophical underpinnings of the criminal trial process and we should take nothing for granted.

### **Police Methods**

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<sup>12</sup> Lord Slynn of Hadley, Lord Hope of Craighead, Lord Hobhouse of Woodborough and Lord Rodger of Earlsferry.

16. The evils exposed in relation to police methods include false confessions, biased police investigations and the improper reliance on prison informers.<sup>13</sup>
17. The opportunity for the abuse of power afforded by a trusting or uncaring justice system is amply demonstrated in relation to the police manipulation of false confessions. The problem has been lessened by the requirement for the electronic recording of police interviews.<sup>14</sup>
18. Biased police investigations have also been problematic with police withholding exculpatory material or failing to look for it. These police biases have also spilt over and affected the gathering or interpretation of forensic evidence.
19. Prison informers are now seen to be inherently unreliable because of their strong motivation to help themselves by 'assisting the authorities'.

### **Scientific evidence**

20. The failure of scientific evidence is at the heart of the Chamberlain case in Australia. Crucial evidence in the conviction of Lindy Chamberlain for murder of her child was given of foetal haemoglobin in a supposed blood splatter under the dashboard of the family car. The Chamberlain Royal Commission of 1986-7 subsequently discounted the blood splatter evidence because the under dash area of cars of that manufacture were routinely sprayed on manufacture with a body treatment that gave the

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<sup>13</sup> Loewy A 2006 *Systemic changes that could reduce the conviction of the innocent* ISRCL Conference Brisbane. Loewy argues that given the reality of wrongful convictions we must establish innocence commissions to review cases; allow all exculpatory material in at trial; eliminate the death penalty; and not condition parole on professed repentance.

<sup>14</sup> Nash S and Choo A 2002 *Avoiding miscarriages of justice: Developments in the use of technology to record police interrogation in England and Wales* ISRCL conference South Carolina.

same appearance and would give a similar reaction to that expected for foetal haemoglobin applying the same test.

21. In the United States the opinion in *Daubert*<sup>15</sup> in 1993, helped significantly to re-assess the value of so-called scientific evidence and to limit the assertions that could be made using experts in the courtroom. According to Gold there is a continuing problem of the lack of proper understanding of the scientific method.<sup>16</sup> Giannelli points to the value of DNA evidence in exonerating the innocent and provides a strong critique of two unvalidated techniques of hair comparison and fingerprints and talks of cases of deliberate misconduct by 'scientific' experts.<sup>17</sup> He calls for better understanding of the underlying science and the accreditation of laboratories.
22. Experience has shown that DNA is more reliable to exclude a suspect and has been responsible for the exoneration of many persons on the review of their conviction, rather than to positively identify a particular suspect as the offender. This problem of individualization is discussed by Broeders<sup>18</sup> who describes the misunderstanding of much scientific evidence related to identification as being categorical or deterministic when it is essentially probabilistic.
23. The value of DNA evidence is examined by Fourney who explains the techniques used and goes on to describe a paradox where rapidly developing technology in this field may become disconnected from the

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<sup>15</sup> *Daubert v. Merrell Dow Pharmaceuticals* (92-102), 509 U.S. 579 (1993).

<sup>16</sup> Gold A 2002 *Miscarriages of justice and the misuse of scientific evidence in criminal cases: They go together like a horse and carriage* ISRCL Conference South Carolina.

<sup>17</sup> Giannelli P 2002 *Scientific evidence and miscarriages of justice* ISRCL Conference South Carolina.

<sup>18</sup> Broeders T 2003 *Forensic evidence and international courts and tribunals: Why bother given the present state of play in forensics?* ISRCL Conference The Hague.

data bases used in validation but which have been built up using old technology.<sup>19</sup>

24. A view from Europe is provided by Traest who describes a distancing of the trial judge from the evidence gathering stage of an investigation making it very difficult to effectively challenge the results of technical evidence.<sup>20</sup> In part this is to do with the organisation of the court but is accentuated by the international character of some investigations. He calls for the introduction of more accusatorial elements to the trial system to enable evidence to be challenged more readily.

### **Witnesses and victims – fairness for whom**

25. The traditional notions of justice in the common law jury trial frame the trial as an adversarial proceeding between the state and the accused. Fairness in this scenario is measured in restricted terms of the contest between these two parties. Over the last twenty years there has been an increasing focus on the interests of victims and witnesses in the trial process. The results have been wide ranging from limiting the cross examination of sexual assault victims regarding their sexual history to disallowing an accused to cross examine certain witnesses, to requirements to provide alternative arrangements for vulnerable witnesses to give their evidence (for example screened from the view of the accused or given by CCTV).

26. Moody argues for the importance of courts to make special arrangements for vulnerable witnesses without having to compromise the rights of the

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<sup>19</sup> Fourney R 2002 *Forensic reality and the practical experience of DNA typing: update* ISRCL Conference South Carolina.

<sup>20</sup> Traest P 2002 *Judicial control on the gathering and reliability of technical evidence in a continental criminal justice system* ISRCL Conference South Carolina.

accused to a fair trial.<sup>21</sup> What is really happening though is that our notion of fairness is being extended beyond the contest between state and individual accused.

### **Reliance on technology**

27. There have been very major reforms to the law of evidence to facilitate the admission of documents and records that now abound in electronic and printed formats.

28. The danger presented here is of our possible over-reliance on the validity of computer based material. This has the potential to be an enormous problem. The presentation of computer based and documentary evidence has been facilitated because of the ubiquitous nature of these materials. It is almost impossible to imagine the usefulness of the original document rule in the modern 'paperless' office. Caution is needed however, because of the ease with which computer records may be falsified or false computer trails left. The results of the Ashcroft case,<sup>22</sup> where it was interpreted as requiring proof that a child depicted is real and not digitally created, points to the problem of putting the prosecution to strict proof. Other cases suggest the possibility of malicious interference in computer records such as with 'Trojan horse' insertion of malicious material.

29. In 2002 Elston and Stein argued that cross border investigations in the digital age require faster means of cooperation than allowed under Mutual Legal Assistance Treaty arrangements.<sup>23</sup> The authors hoped that the Cybercrime Convention would assist but that may remain to be seen in many jurisdictions. In 2005 Bolt was more confident about mutual

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<sup>21</sup> Moody S *Vulnerable witnesses: rights and responsibilities* ISRCL Conference Edinburgh.

<sup>22</sup> *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002)

<sup>23</sup> Elston M and Stein S 2002 *International cooperation in on-line identity theft investigations: A hopeful future but a frustrating present* ISRCL Conference South Carolina.

assistance processes but suggested that too many investigators were unaware of their existence or how to use them properly.<sup>24</sup>

### **Judicial management**

30. The growth of case management processes in relation to criminal trials is another feature of the last two decades. In a review of this development, Trendle argues that the greater involvement of judges should be directed at getting the parties to work better.<sup>25</sup> Trendle notes the lack of consensus on judicial management and the need for a culture of cooperation between prosecutor and defence to exist for case management to work.

### **Prosecution responsibilities**

31. The pivotal role of the prosecutor in procedural reform was highlighted by Lord Goldsmith at the 2005 Conference in Edinburgh.<sup>26</sup> Lord Goldsmith described the reforms to procedure in England and Wales that brought together prosecutors and police in relation to the decision to charge. The role of the prosecutor was also enhanced in relation to the care of victims and witnesses, addressing community concerns about anti-social behaviour and being more accountable and transparent.

32. Justice Smellie in the first Michael Hill QC lecture spoke of the primary importance of prosecution disclosure in ensuring a fair trial.<sup>27</sup> Justice Smellie drew on the strong advocacy role performed by Michael in the

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<sup>24</sup> Bolt A 2005 *International cooperation: investigation, preparation and presentation of cases with an international dimension* ISRCL Conference Edinburgh.

<sup>25</sup> Trendle N 2004 *Judicial case management: reallocating responsibilities* ISRCL Conference Montreal.

<sup>26</sup> Lord Goldsmith 2005 *The impetus for modernization of criminal justice systems* ISRCL Conference Edinburgh.

<sup>27</sup> Smellie A QC 2004 *The prosecution's duty of disclosure: the case for a global standard* ISRCL Conference Montreal.

Eurobank Case<sup>28</sup> to expose prosecution weaknesses that had not been disclosed.

### The value of rules

33. In 2005 MacCarrick looked at the intersection between civil and common law traditions that is taking place in international criminal tribunals.<sup>29</sup> MacCarrick refers to the danger of combining elements of the civil and common law traditions to create a new legal process.<sup>30</sup> McCarrick argues that there must be an agreed recognisable philosophy behind the trial process. Her comment in relation to International Tribunals is I would argue equally applicable in domestic contexts:

Without a common understanding of what constitutes due process, impartiality, judicial independence, the roles of the parties and the parameters of the evidence admissible we can not know the ground rules.

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34. By way of conclusion, I return to the topic of the appalling vista. The appalling vista that I argue we have come to involves:

- prolonged detention without trial,
- torture or 'aggressive' or 'intensive' interrogation techniques,
- evasion of proper process, and
- other gross infringements of human rights.

35. One can only conclude that this appalling vista exists because of a desire to avoid the due process and evidence protections afforded by trial

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<sup>28</sup> *R v Donald Stewart and others* Indictment 6 of 2001 Cayman Islands

<sup>29</sup> MacCarrick G 2005 *The right to a fair trial in international criminal law (Rules of procedure and evidence in transition from Nuremburg to east Timor)* ISRCL Conference Edinburgh.

<sup>30</sup> Citing Johnson S T 1998 On the road to disaster: the rights of the accused and the International Criminal Tribunal of the former Yugoslavia 10 *International Legal Perspective* at p111.

process in a democracy. Unfortunately while the vista exists in a fictional legal vacuum it is a real place created by a democracy and in which at least one other democracy has been complicit. No amount of charge bargaining in such a situation can remedy the defect in the process applied.

36. The appalling vista is of course Guantanamo.