

## Sydney Institute of Criminology

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### It is time Australia established a Criminal Cases Review Commission (CCRC)

On 5 June 2023, on the basis of the preliminary findings of a second commission of inquiry in four years, [Kathleen Folbigg was pardoned](#), having served 20 years for the murder of three of her infant children and the manslaughter of a fourth child. At trial, the prosecution had relied on the statistical improbability of so many of her children dying accidentally. However, at the second inquiry, this reasoning was called into question by fresh scientific evidence pointing to possible medical causes of the deaths. Commissioner Tom Bathurst indicated that, in light of this fresh evidence, “the coincidence and tendency evidence which was central to the Crown case falls away”. At trial, and in the first inquiry, the prosecution had argued that Folbigg’s diary entries relating to the deaths of her children could be interpreted as admissions of guilt. But fresh psychological evidence at the inquiry “suggests they were the writings of a grieving and possibly depressed mother, blaming herself for the death of each child”. Whereas at trial Folbigg had been presented by the prosecution as “[Australia’s worst female serial killer](#)”, Bathurst indicated he was “unable to accept [...] the proposition that Ms Folbigg was anything but a caring mother for her children”.

The Folbigg case is yet another demonstration that Australia needs a Criminal Cases Review Commission – preferably a single Federal body covering all jurisdictions, but failing that, one for each jurisdiction. The criminal justice system carries an in-built risk of wrongful conviction. Ad hoc commissions of inquiry, like the Folbigg inquiry, are inefficient and expensive. The system needs reform. Australia should follow comparable jurisdictions like [England and Wales](#), [Scotland](#), [New Zealand](#), and [Canada](#), and establish a CCRC – a statutory body working at arm’s length with the powers to investigate claims of wrongful conviction and, where it appears appropriate, refer cases back to the Court of Criminal Appeal.

The belated identification of the Folbigg miscarriages of justice is not unusual. In the last decade, [Jason Roberts](#) in Victoria was acquitted in a retrial after serving two decades in prison for the murder of two police officers; [Scott Austic](#) in WA was acquitted at his retrial after serving 13 years for the murder of his partner who was pregnant with his child; [David Eastman](#) in the ACT was acquitted in a retrial after serving 20 years for the murder of Assistant AFP Commissioner Colin Winchester; and [Henry Keogh](#) in SA was freed following an exceptional second appeal, having served 20 years for the murder of his fiancé. The re-evaluation of guilt in these cases was prompted by fresh forensic evidence and/or the revelation of flaws in the original proceedings or investigation.

It is a primary goal of the criminal justice system to avoid the searing injustice of a wrongful conviction. This goal is pursued through principles such as the presumption of innocence and the requirement of

proof beyond reasonable doubt. But absolute certainty in guilt is not feasible and is not required. A risk of error is run and occasional errors should be expected. They will not necessarily be corrected on appeal, where the defendant is no longer presumed innocent and weight is given to the finality principle.

Following an unsuccessful appeal the finality principle bites still harder and it becomes significantly more difficult for the wrongly convicted defendant to achieve justice. There is no right to bring a second appeal, and the imprisoned defendant will face an almost insurmountable challenge in persuading the government (or, in some jurisdictions, court) to order an inquiry or an exceptional subsequent appeal. In order to achieve justice, defendants like Folbigg, Roberts, Austic, Keogh and Eastman require remarkable resilience and supporters on the outside.

The criminal justice system needs to do more to address the statistical certainty of the occasional wrongful conviction. Overcoming this searing injustice should not demand superhuman reserves of fortitude or the chance arrival of a champion. The systemic risk of wrongful conviction demands a systemic solution. Other developed nations have recognised that CCRCs are well-suited to this task. A CCRC has the powers and resources to investigate defendants' claims to have been wrongfully convicted. Claims that are found to have substance can be referred back to the court of criminal appeal. Standing CCRCs have been [shown](#) to bring a cost-effective improvement to the accuracy of criminal justice systems. An inquiry into the Eastman conviction, preceding the retrial and acquittal, was estimated to cost [well over \\$10M](#) and it appears likely that the Folbigg inquiries were similarly costly. With funds of this magnitude, a CCRC would be able to investigate a considerable number of potential wrongful convictions.

Establishing a CCRC would reduce the finality of the jury verdict. The extent of the change can be carefully calibrated through the design of the CCRC. The CCRC is a gatekeeper, and legislation can determine how widely the gate is opened.

The call for this key piece of criminal justice infrastructure isn't new. The [Australian Law Council](#) expressed support for a federal CCRC in 2012. [Commentators](#) have called for an Australian CCRC on many occasions. Last year former High Court Justice, [Michael Kirby](#), reiterated his view that "such a commission is needed". The [Sydney Institute of Criminology](#), with the support of the leading criminal justice commentators whose names appear below, call upon Australian Governments to implement this reform. Cases like Folbigg, Roberts, Austic, Eastman and Keogh demonstrate that the reform is long overdue.

Yours sincerely,

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