Eastman doubt shows the need for permanent criminal review body

By GREG BARNS*

(Note: a fuller background to the case is at the end of this article)

If David Eastman had been convicted of murder in the UK or Scotland then the untidy stand-off between the judiciary and the ACT government over his case would not be happening. That is because, unlike Australia, the UK and Scotland (Scotland has a slightly different legal system to the rest of the UK) both have independent criminal cases review bodies which examine thousands of cases where there are claims of wrongful convictions every year. The Eastman case is a perfect example of why such an organisation ought to exist in each state and territory, or at the national level, in Australia.

Mr Eastman – convicted in 1995 of the murder of former Australian Federal Police Assistant Commissioner Colin Winchester in 1989 – is serving a term of life imprisonment. Justice Shane Marshall, a respected senior Federal Court judge, has found that there is significant risk the conviction was unsound and that an inquiry must be held into the case. This is something the ACT government, in common with the powers that all state and territory governments have, could have done of its own volition rather than putting Mr Eastman and his legal team through the court process...which is a point well made by Justice Marshall.

Governments of course are not too keen on wrongful conviction inquiries and there are many prisoners in Australia who are serving sentences for crimes they did not commit. Wrongful conviction inquiries can show police or prosecutorial misconduct, or poor forensic practices. Governments are morally compelled to compensate victims of wrongful convictions. In summary, relying on the political process to grant a person their right to have new evidence tested is unfair because the urge to resist the establishment of such inquiries outweighs the imperative to ensure justice is done.

That governments are reluctant to allow a potentially innocent person to be able to argue their case before an independent inquiry was exemplified by ACT Attorney-General Simon Corbell who defended himself and his government against the attack by Justice Marshall by arguing that, his "view as attorney, as always been that an inquiry ordered by a government should be the last resort. It is better for these matters to be dealt with, if they can be dealt with, by the court and that's what's occurred in this case." Mr Corbell is wrong. Governments, and particularly the Attorney-General as first law officer, ought to be taking the lead on ensuring that justice is done and that if there are real doubts about a person's conviction for a serious criminal offence that has resulted in their loss of liberty for a lengthy period, move to establish an inquiry immediately.

It is also arguable that the courts are not the place to order an inquiry because as we have seen in Mr Eastman's case they can lead to lengthy litigation.

This is why a criminal cases review body ought to be established. The UK and Scottish model is a good one. Staffed by experienced lawyers, forensic and police experts, cases are reviewed to see if there are grounds for arguing a wrongful conviction. If the case meets the required threshold it is sent back to the courts for an assessment to be made about guilt and in some cases the length of sentence if it is found that a person committed a crime but a less serious one.

Between 1999, when it was established, and this year, the Scottish Criminal Cases Review Commission has sent 107 cases to the courts for review and in 58 of those cases convictions have been overturned or sentences reduced. The UK body, established in 1997, has sent 461 cases to the courts for review and the courts have overturned 325 convictions.

While these commissions have their critics, with some in the UK saying that they are too conservative in the number of cases referred back to the courts, they are a very good mechanism for ensuring that innocent people do not remain behind bars, which is the ultimate sanction any one pays in a democratic society, short of loss of life.

Only in South Australia has anything approaching the UK/Scottish model been proposed. A parliamentary inquiry in South Australia has looked at a proposed criminal cases review commission and baulked at that concept, proposing instead a Forensic Review Panel which will enable convicted individuals to argue about forensic evidence that helped convict them.

Mr Eastman's case ought to get ACT law makers thinking about how to better ensure that claims of wrongful convictions are tested fairly and at arm's length from politics. The criminal cases review model does both those things.

It is imperative that in a democratic society like the ACT, and Australia generally, we protect against the evil of the innocent being convicted. There is a way to do this and it simply requires the political will to establish what citizens of Scotland and the UK have had access to for almost two decades and which have set nearly 400 innocent people free.

ENDS

* Greg Barns is a barrister, former President of the Australian Lawyers Alliance, the ALA's current national criminal law spokesman, and a member of CLA. This article appeared first in the *Canberra Times* on 5 Sept 2012: http://www.canberratimes.com.au/opinion/eastman-row-easily-fixed-20120904-25cl5.html

See below for a fuller background on the Eastman case:

Back story:

A jury convicted David Harold Eastman – in November 1995 after an 85-day trial – of murdering Australian Federal Police assistant commissioner Colin Winchester in the driveway of his suburban Canberra ACT home in January 1989. Two shots from a rifle held to the head at point blank range killed Winchester. Eastman received life, without parole.

The Eastman case has been controversial from the outset:

- high profile victim;
- gangland-style execution method;
- alternative police drug bust/entrapment claims;
- the purchase and disposal of rifles, silencer, telescopic sights;
- then-modern forensic science (now updated) analysing guns, bullets, propellants and residue;
- an accused – a hard-to-like loner – behaving bizarrely in court, sacking several lawyers and ultimately representing himself;
- fuzzy audio surveillance tapes (Eastman was bugged for three-and-a-half years before being charged.) and circumstantial evidence; and
- almost ceaseless appeals, relating to the murder conviction itself and to the rights of Mr Eastman to retain his "council" housing.

As the murder occurred in the ACT jurisdiction, only Australia's Governor-General, on advice from the Federal Government and the Chief Minister of the ACT, can release Eastman. While the AFP exists, it is highly unlikely the Crown or either of the two governments will be disposed to release him...certainly not on the advice of the one police force which serves all three, the Australian Federal Police.

A diverse coterie of journalists, lawyers, very senior politicians and locals has claimed from the outset that Eastman was 'stitched up' and should not have been convicted. They claim his 17 years in jail in NSW and the ACT prisons is a bigger miscarriage of justice than that of Lindy Chamberlain, jailed over the erroneous rejection by police and authorities of her claim that a dingo had taken her baby.

In August 2012, Justice Shane Marshall said he believes there is doubt about Eastman's guilt. "There is significant risk the conviction is unsafe because of the doubt. And it is in the interests of justice that the doubt be considered at an inquiry." Eastman's legal team has filed 19 grounds for review, including what they claim is fresh evidence about gunshot powder and residue, and why it was in his car.

CLA Civil Liberties Australia Inc. A04043
Box 7438 Fisher ACT Australia
Email: secretary [at] cla.asn.au
Web: www.cla.asn.au