

THE GROWING ACKNOWLEDGMENT OF WRONGFUL CONVICTION – THE AUSTRALIAN RESPONSE WITHIN AN INTERNATIONAL CONTEXT

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The wrongful conviction of innocent people is being acknowledged in an increasing number of countries around the world. The problem of wrongful conviction is now framed as an international human rights issue. More attention is being given to whether criminal justice systems are providing sufficient measures for the effective review and rectification of wrongful convictions and whether international obligations in that regard are being met. England, Wales, Northern Ireland, Scotland, Norway, Canada and the United States have substantial new mechanisms in place to better identify and correct wrongful convictions but Australia has been slower to respond. While some Australian states have introduced reforms such as DNA innocence testing and a new appeal avenue, many issues remain as highlighted in recent debates as to whether Australia should establish a Criminal Cases Review Commission.

I: INTRODUCTION

The problem of wrongful conviction is becoming more widely acknowledged at an international level. The growing number of exonerations, particularly apparent in the United States but also evident in several countries elsewhere in the world, demonstrate beyond doubt that innocent people are convicted of crimes that they did not commit. This article considers the increasing international acknowledgement of the problem of wrongful conviction, including its framing as an international human rights issue. This article then outlines the most significant responses enacted for the identification and rectification of wrongful convictions, being the reforms that have been implemented in the United Kingdom, Norway, Canada and the United States. Within this international context it details Australia's response to date, and includes consideration of issues raised in a recent South Australian initiated review as to whether Australia should establish a Criminal Cases Review Commission.

The term 'wrongful conviction' as used in this article refers to someone being convicted of a crime that they did not commit and also being unsuccessful at the appellate level, thereby exhausting the traditional appeal avenue available within the Australian criminal justice system. Reference to someone as 'wrongly convicted', 'exonerated' or similar, applies where a previous erroneous conviction has been subsequently corrected by an appellate court. The term 'wrongful conviction applicant' (or similar term) refers to someone claiming to be wrongly convicted.

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II: THE GROWING GLOBAL ACKNOWLEDGEMENT OF WRONGFUL CONVICTION

There is a growing acknowledgement that innocent people have been and are, convicted of crimes that they did not do. According to the National Registry of Exonerations in the United States, there were twenty known wrongful conviction cases in that country in 1989.¹ Today 1,250 exonerees are officially listed on site.² The Criminal Cases Review Commission, the official government-funded body established in Birmingham, England to review claims of wrongful conviction, (and other types of miscarriages of justice) for England, Wales and Northern Ireland, has quashed 341 convictions.³ In Canada, the Association in Defence of the Wrongly Convicted ('AIDWYC'), an organisation dedicated to assisting wrongly convicted people,⁴ lists 18 Canadians known to have been wrongly convicted in that country.⁵ While an official list of exonerations does not exist in Australia, there are numerous known cases of wrongful conviction – John Button, Andrew Mallard, Lindy Chamberlain and Kelvin Condren to name but a few.⁶

The problem of wrongful conviction was initially most palpably highlighted as a distinct issue in the United States. As the number of DNA and non-DNA exonerations steadily increased over time, it came to be viewed as a civil rights movement in that country.⁷ However, with increased international acknowledgement and attention to the problem, wrongful conviction is now squarely framed as an international human rights issue.⁸

Compliance with international obligations, which ensure that wrongful conviction applicants are given the opportunity for effective review and potential correction of their convictions, has become an important consideration in regard to the need for reform in Australia and elsewhere. For example, considerations as to whether Australia's criminal justice system met international obligations were a significant part of the overall debate in determining whether a Criminal Cases Review Commission should be established here (as discussed later in this article). A desire for adherence to international obligations was also evident in Mauritius when in 2012 their Law Reform Commission undertook a review of mechanisms for alleged wrongful convictions and recommended the establishment of a Criminal Cases Review Commission.⁹

¹ National Registry of Exonerations, *Exonerations by Year: DNA and Non-DNA* (2012) <<https://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx>>.

² Ibid.

³ See, Justice, *About the Criminal Cases Review Commission* (2012) <<http://www.justice.gov.uk/about/criminal-cases-review-commission>>.

⁴ Association in Defence of the Wrongly Convicted, *About Us: AIDWC History* <<http://www.aidwyc.org/history.html>>.

⁵ Association in Defence of the Wrongly Convicted, *AIDWYC Exonerations: Individual Cases* <<http://aidwyc.org/Exonerations.html>>.

⁶ For a potential (but not definitive) list of miscarriage of justice cases, see Rachel Dioso-Villa, 'Without Legal Obligation: Compensating the Wrongfully Convicted in Australia' (2012) 75(3) *Albany Law Review* 1329, 1369–71.

⁷ See, eg, Allen G Breed 'Innocence Projects Called 'New Civil Rights Movement'', *Ocala Star-Banner* (Florida), 3 June 2002; Harry Kreisler, *A Passion for Justice: Conversation with Peter Neufeld* (2001) Institute of International Studies, University of California Berkeley <<http://globetrotter.berkeley.edu/people/Neufeld/neufeld-con6.html>>.

⁸ See, eg, Adrian Hoel, 'Compensation for Wrongful Conviction' [2008] (356) *Trends and Issues in Crime and Criminal Justice* 1; Nancy Petro, '2012: A Banner Year for Cause of Reducing Wrongful Conviction' on Mark Godsey (ed) *The Wrongful Convictions Blog*, (1 January 2013) <<http://wrongfulconvictionsblog.org/2013/01/01/2012-a-banner-year-for-the-cause-of-reducing-wrongful-conviction/>>.

⁹ Law Reform Commission of Mauritius, *Mechanisms for Review of Alleged Wrongful Conviction or Acquittals*, Report (2012).

The expansion of the Innocence Network ('IN'), an 'affiliation of organisations dedicated to providing pro bono legal and investigative services to individuals seeking to prove innocence of crimes for which they have been convicted and working to redress the causes of wrongful convictions'¹⁰, is in part itself demonstrative of a growing international acknowledgement of the problem of wrongful conviction. The IN currently has over 60 member organisations. Originating in the United States, the vast majority of its members are from within the United States. However, in the past decade non-US membership has increased. There are currently eleven officially listed non-US member organisations from the United Kingdom, Ireland, Canada, Australia, New Zealand, the Netherlands and France.¹¹ This number is greater if one considers that the Innocence Network – UK ('INUK'), while classified as only one non-U.S. innocence organisation member, is itself an umbrella organisation for approximately twenty-five innocence projects in the United Kingdom.¹² Interest from other non-US countries continues to grow.

A major international wrongful conviction conference that took place in 2011, namely the Innocence Network Conference: An International Exploration of Wrongful Conviction, involved 500 participants and representatives from over twenty-five countries. Conference sessions detailed a range of wrongful conviction issues specific to the different jurisdictions¹³ and culminated in the collation of academic articles encapsulating issues from this wide cross-section of countries, which included the Netherlands, Latin America, Nigeria, Switzerland, South Africa, Poland, China, Japan, Ireland, England and Wales, Chile, Norway, Australia, Singapore and Canada.¹⁴

In 2012, the problem of wrongful conviction saw active international attention given to it in places such as Argentina, Bolivia, Chile, Mexico, Nicaragua, Paraguay, Peru, France, the Netherlands, Poland, the Czech Republic, South Africa, Israel, Taiwan, the Philippines, China and elsewhere.¹⁵ The 2013 Innocence Network conference was also attended by representatives from approximately twenty countries across the world, again highlighting international concern with wrongful convictions.

However, undertaking work on behalf of those who have been wrongly convicted and those who claim to be wrongly convicted, has always been far from limited to Innocence Network member organisations. This activity has been taking place in countries around the world, in various forms and by various groups and individuals for countless years. In Australia, a number of the exonerations that have taken place to date simply would not have occurred without the intensive, on-going efforts of individuals who believed in a person's claim of innocence and fought long and hard on their behalf.¹⁶ While the exhaustive efforts

¹⁰ Innocence Network (2012) <<http://www.innocencenetwork.org/>>.

¹¹ Innocence Network, *Members* (2012) <<http://www.innocencenetwork.org/members>>.

¹² Innocence Network UK, *INUK Members 2012-2013* (2013) <<http://www.innocencenetwork.org.uk/membership/inuk-members-2011-2012>>.

¹³ Petro, above n 8.

¹⁴ Symposium, 'An International Exploration of Wrongful Conviction' (2012) 80 *University of Cincinnati Law Review* 1.

¹⁵ Mark Godsey, 'International Expansion of the Innocence Movement in 2012' on Mark Godsey (ed) *The Wrongful Convictions Blog* (1 January 2013) <<http://wrongfulconvictionsblog.org/2013/01/01/international-expansion-of-the-innocence-movement-in-2012/>>.

¹⁶ Just two examples of this are the exonerations of John Button (*Button v The Queen* (2002) 25WAR 382; and Andrew Mallard (*Mallard v The Queen* (2005) 224 CLR 125).

of individuals and groups may always be required, this should not be the process relied upon by a criminal justice system for the identification and correction of wrongful convictions.

Wider societal implications, beyond the devastating impact on wrongly convicted individuals and their families, are at play when justice systems convict the wrong person, and, as such, addressing the problem would ideally be served through a cooperative approach from all parties involved. As Acker comments:

[I]ndulging an inflexible mindset of ‘us-against-them’ in the context of miscarriages of justice is not only misguided but also counterproductive. Wrongful convictions entail profound social costs in addition to the hardships borne by the unfortunate individuals who are erroneously adjudged guilty. When innocents are convicted, the guilty go free. Offenders thus remain capable of committing new crimes and exposing untold numbers of additional citizens to continuing risk of victimisation. Public confidence in the administration of the criminal law suffers when justice miscarries. At some point, as cases mount and the attendant glare of publicity intensifies, the perceived legitimacy of the justice system and the involved actors is jeopardised. Associated monetary costs, paid from public coffers, represent yet another tangible social consequence of wrongful convictions.¹⁷

Along with the growing recognition of the problem of wrongful conviction, comes the expectation to address it. Legislators should not shy away from such an obligation as in modern society it is not the recognition that wrongful convictions occur, but the denial of it, that may destroy confidence in a criminal justice system, as noted by Weeden:

From the modern perspective it perhaps seems obvious that simple justice requires wrongful convictions to be acknowledged and rectified. On the same basis, it is clear that, whereas public confidence in our criminal justice systems may be jolted by the occasional revelation that an error has been made and (only belatedly) rectified, public confidence in those systems will wholly disappear if we attempt to pretend that such errors simply cannot and do not occur ... there is no doubt that people have always been – and will always be – wrongly convicted for a variety of reasons in every civilised society. It is essential to recognise this and to have a mechanism to address it.¹⁸

Countries that have officially responded to the problem of wrongful conviction and implemented significant governmental bodies and other legal mechanisms for the identification and correction of wrongful convictions include England, Wales, Northern Ireland, Scotland, Norway, Canada and the United States.

¹⁷ James R Acker, ‘The Flipside Injustice of Wrongful Convictions: When the Guilty Go Free’ (2013) 76(3) *Albany Law Review* 1629, 1630 – 1.

¹⁸ John Weeden, ‘The Criminal Cases Law Review Commission (CCRC) of England, Wales and Northern Ireland’ (2012) 80 *University of Cincinnati Law Review* 1415, 1418-19.

III: INTERNATIONAL RESPONSES

A: England, Wales, Northern Ireland, Scotland and Norway: Criminal Cases Review Commissions

The Criminal Cases Review Commission ('CCRC') was first established in Birmingham, England in 1997 and still operates for England, Wales and Northern Ireland.¹⁹ Scotland²⁰ and then Norway²¹ followed suit, establishing similar bodies to the CCRC in England. Other countries too have considered its emulation, including Australia, New Zealand, Canada and Mauritius.²²

The Birmingham-based CCRC was created as an independent body for the investigation of miscarriage of justice claims with the power to refer cases to the courts of appeal,²³ following high profile cases of wrongful conviction in the United Kingdom. The CCRC receives significant public funding to undertake its work and has extensive investigative powers. It also has the ability to review a broad range of miscarriage of justice claims and issues of sentencing.²⁴

Independence of any governmental body that is dedicated to reviewing claims of wrongful conviction is an important aspect in terms of the reviews achieving objectivity. Weeden explains that the CCRC is not only independent from the public officials within the Government, police and prosecuting authorities and the courts, but also of the applicant in that it does not assume a solicitor/client relationship.²⁵

As at 30 June 2013, the CCRC based in England had referred 530 matters to the Courts of Appeal (representing an approximate referral rate of approximately three and a half per cent). Of those, 498 cases had been heard, resulting in 341 convictions being quashed, 145 upheld and 2 reserved.²⁶ However, despite the general acclaim for this organisation, some critiques are concerned that the CCRC is not sufficiently assisting factually innocent wrongful conviction applicants.²⁷

If a body akin to the CCRC was established in Australia it would represent a major advancement in mechanisms for the identification and rectification of wrongful convictions – but to believe it would resolve the problem of wrongful conviction would be mistaken. The importance of front-end measures and ensuring procedural fairness to reduce the occurrence of wrongful convictions, are essential components in addressing the problem. As stated in Sangha, Roach and Moles:

¹⁹ Justice, above n 3.

²⁰ See Scottish Criminal Cases Review Commission (2013) <<http://www.sccrc.org.uk/home.aspx>>.

²¹ See Norwegian Criminal Cases Review Commission <<http://www.gjenopptakelse.no/index.php?id=31>>.

²² Special Issue (2012) 58(2) *Criminal Law Quarterly* 135.

²³ Justice, above n 3.

²⁴ For relevant legislation in England, Wales and Northern Ireland, please see the *Criminal Appeal Act 1995* (UK) ch 35, s 8. See also Justice, above n 3.

²⁵ Weeden, above n 18, 1419.

²⁶ Justice, above n 3.

²⁷ For exploration of this issue see, eg, Michael Naughton, 'The Criminal Cases Review Commission: Innocence Versus Safety and the Integrity of the Criminal Justice System?' (2012) 58 *The Criminal Law Quarterly* 207; Michael Naughton (ed), *The Criminal Cases Review Commission: Hope for the Innocent?* (Palgrave Macmillan, 2009).

There is a danger of a false sense of security that the CCRC will catch miscarriages of justice that fall through the cracks even while the legislature widens the cracks by enacting legislation that increases the risk of wrongful convictions. This observation is not an argument against the introduction of a CCRC; rather, it is a cautionary tale that suggests that error correction in individual cases should be supplemented by systemic reform efforts and the ability to monitor and critique legislative developments that will increase the risk of wrongful conviction.²⁸

B: *Canada: Criminal Convictions Review Group*

Canada offers a less expensive and less expansive post-conviction review mechanism that could potentially be adopted into Australia. Previously operating on mercy provisions similar to those still applying in Australia, Canada updated those measures in 2002. Whilst not implementing reform as far reaching as a CCRC, it nevertheless made significant changes through enacting new, more transparent legislative provisions for miscarriage of justice applications, in conjunction with creating a Criminal Conviction Review Group (CCRG) to investigate those claims.²⁹ The CCRG is a somewhat smaller version of the CCRC, and appears to be structurally less independent than the CCRC though their aim is to remain at ‘arm’s-length’ to the rest of the Department of Justice.³⁰ They have the power to investigate claims of miscarriages of justice, but not to directly refer cases to the Court of Appeal. This remains the decision of the Minister for Justice.³¹ Figures show considerably fewer applications to the Canadian group to those in England, but a higher rate of referrals. From 2002–2011, the Canadian CCRG had decided upon 102 cases, resulting in 13 referrals back to the courts.³²

C: *United States: DNA Innocence Testing Legislation*

The problem of wrongful conviction has been most highly visible in the United States, particularly through the volume of DNA exonerations that have been exposed in that country in the past twenty-one years. For much of that time, innocence organisations in the United States were lobbying for reform to bring about DNA innocence testing legislation that would enable wrongful conviction applicants the opportunity to have DNA testing undertaken on biological material still in existence in a matter, where such testing could be probative of the identity of the perpetrator of the crime. Exonerations increased in number as DNA innocence testing legislation gained momentum throughout the United States.³³ As of 28 May 2013, DNA innocence testing legislation became available in all of its 50 states,

²⁸ Bibi Sangha, Kent Roach and Robert Moles, *Forensic Investigations and Miscarriages of Justice* (Federation Press, 2010), 359.

²⁹ Department of Justice (Canada), *Annual Report 2012 Minister of Justice* (30 April 2013), [2] <<http://www.justice.gc.ca/eng/rp-pr/cj-jp/ccr-rc/rep12-rap12/p2.html#s23>>.

³⁰ Ibid.

³¹ Ibid, see details as set out in the review process.

³² Legislative Review Committee (SA), *Report of the Legislative Review Committee on its Inquiry into the Criminal Cases Review Commission Bill 2010* (Parliament of South Australia, 2012) 76 [8.3.2].

³³ Innocence Project, *Today, All 50 States Have DNA Access Laws* (2013) Yeshiva University <http://www.innocenceproject.org/docs/DNA_innocenceproject_website.pdf>.

although not all of the various legislative provisions applying across the country are equally effective.³⁴

There are now 311 DNA-based exonerations in the United States to date.³⁵ The exonerees have, between them, spent approximately 4,156 years in prison.³⁶ In almost 50 per cent of the DNA exonerations in the United States, the real perpetrator has been uncovered through that same DNA testing.³⁷ Therefore, the potential consequences flowing from wrongful convictions are not limited to those who experience that error. While an innocent person is in prison, the real perpetrator remains free to commit further crimes – making wrongful conviction a public safety issue. This is already evident, despite the small amount of data available to date. Acker notes:

The actual perpetrators of crimes were identified in nearly half (149/307, or 48.5%) of the DNA-exoneration cases reported by the Innocence Project through February 2013. These true offenders are known to have committed at least 123 additional violent crimes, including 32 murders and 68 rapes, following the arrest of the eventual exonerees.³⁸

These numbers are even more disturbing when it is understood that:

- a) DNA evidence only applies to a small percentage of overall cases within the criminal justice system;
- b) DNA exonerations represent a relatively small proportion of exonerations overall; and
- c) it appears that it is only in approximately half of the DNA exonerations that do occur, that DNA testing will additionally assist in the identification of the real perpetrator.

The violent crime statistics stemming from the wrongful convictions corrected through DNA testing, as noted above, would therefore represent the tip of the iceberg in regard to the true number of additional crimes committed by real perpetrators, while innocent people take responsibility for their crimes.

The virtues of post-conviction DNA testing are clear in terms of exposing wrongful convictions, as the US exonerations demonstrate, however caution does need to be applied in regard to the use or misuse of DNA evidence within the criminal justice system more generally. The Victorian case of Farah Jama, wrongly convicted of rape because of contaminated DNA evidence, highlights the potential for DNA evidence to cause wrongful

³⁴ Innocence Project, 'With Passage of Oklahoma Bill, DNA Testing Guaranteed in All 50 States' on Innocent Project, *Innocent Blog* (28 May 2013) <http://www.innocenceproject.org/Content/With_Passage_of_Oklahoma_Bill_DNA_Testing_Guaranteed_in_All_50_States.php>.

³⁵ Innocence Project, above n 10.

³⁶ Innocence Project, *Factsheet: DNA Exonerations Nationwide* (2013) Yeshiva University <http://www.innocenceproject.org/Content/DNA_Exonerations_Nationwide.php>.

³⁷ *Ibid.*

³⁸ Acker, above n 17, 1632.

convictions – and a range of other issues have been noted in regard to the potential misuse of DNA evidence in court.³⁹

IV: THE AUSTRALIAN RESPONSE TO DATE

Australia has been falling behind our international counterparts when it comes to implementing reforms for better identifying and correcting wrongful convictions. To date, the main developments in Australia are: (1) DNA innocence testing regimes introduced in New South Wales and in Queensland; and (2) a new appeal avenue introduced in May 2013 in South Australia, discussed below.

A: DNA Innocence Testing

New South Wales (NSW) was the first Australian State to introduce DNA innocence testing, initially through the creation of the now defunct Innocence Panel and subsequently via the legislative provisions found in Division 6 of Part 7 of the *Crimes (Appeal and Review) Act 2001*, ‘Applications to the DNA Review Panel’. The latter developments incorporated the establishment of a specifically empowered DNA Review Panel to review DNA-based claims of wrongful conviction, search for evidence relating to those matters and refer appropriate cases to the Court of Appeal.⁴⁰

From its commencement in June 2007 through to June 2012, the Panel had considered 31 applications, had taken searches for items in eight cases, undertaken DNA testing in 6 cases, obtained a DNA profile in 5 cases and determined that the results of the DNA testing did not assist the applicant in 6 cases.⁴¹ There were no referrals to the Court of Appeal.⁴² Included in the remaining cases considered, seven were out of time or otherwise outside the statutory powers of the Panel, and the Panel determined that in nine matters, DNA evidence would not assist the applicant in their claim of innocence.⁴³

A further analysis into the reasons for the zero referral rate and why numerous applications fell outside the ambit of the Panel is required for a better understanding of the application of the criteria employed by the Panel through this legislation, (including its discretionary elements). Two important recommended changes to the Panel’s legislative scope, were:

³⁹ To list just a few articles relevant to these issues, see: Frank Vincent, *Report: Inquiry into the Circumstance that led to the Conviction of Mr Farah Abdulkadir Jama*, (Victorian Government Printer, 2010); Kirsten Edwards, ‘Ten Things about DNA Contamination that Lawyers Should Know’ (2005) 29 *Criminal Law Journal* 71; Angela van Daal and Andrew Haesler, ‘DNA Evidence: Current Issues and Challenges’ (2011) 23 *Judicial Officers’ Bulletin* 1; Jeremy Gans, ‘A Tale of Two High Court Forensic Cases’ (2011) 33 *Sydney Law Review* 515.

⁴⁰ DNA Review Panel (NSW) *Annual Report 2010–2011* (Department of Attorney-General and Justice, 2012). For a more detailed analysis as to the DNA Review Panel (NSW) and DNA innocence testing in Australia, see Lynne Weathered, ‘Reviewing the New South Wales DNA Review Panel: Considerations for Australia’ (2013) 24 *Current Issues in Criminal Justice* 449; Lynne Weathered and Robyn Blewer, ‘Righting Wrongful Convictions with DNA Innocence Testing: Proposals for Legislative Reform in Australia’ (2009) 11 *Flinders Journal of Law Reform* 43; Lynne Weathered, ‘A Question of Innocence: Facilitating DNA-Based Exonerations in Australia’ (2004) 9 *Deakin Law Review* 277.

⁴¹ DNA Review Panel (NSW), *Annual Report 2011–2012* (Department of Attorney-General and Justice, 2013).

⁴² *Ibid.*

⁴³ *Ibid.*

- a) the removal of the restriction that only persons convicted prior to 19 September 2006 are eligible for review; and
- b) reducing the minimum sentence eligibility from 20 years to 14 years or more, would see a more equitable and effective legislative regime in place and according to the Panel itself, significantly increase its work.⁴⁴

A statutory review of the NSW DNA Review Panel was recently undertaken to determine whether it should continue beyond its seventh anniversary, which occurs in February 2014. That Review concluded there was a need for the continued post-conviction review of cases utilising DNA technology, but that this could be achieved by adding a number of ‘enhancements’ to other existing review mechanisms available under the *Crimes (Appeal and Review) Act*, rather than through the continuation of the Panel, and new provisions to this effect are scheduled to come into force in February 2014.⁴⁵

In 2010, Queensland also implemented measures for DNA innocence testing through the *Guidelines for applications to the Attorney-General to request post-conviction DNA testing*.⁴⁶ The Queensland provisions do not incorporate a DNA Review Panel but are guidelines by which the Attorney-General will make a decision as to whether or not a post-conviction DNA test will be allowed – with a great deal of discretion involved as to that decision. This is one of the major concerns associated with the guidelines. In a politically charged environment it is difficult for such an office to remain independent. For that reason, it is unsuitable for it to act as the sole decision-maker in regards to whether DNA innocence testing should take place.

DNA innocence testing can be the tool that exposes flaws in evidence otherwise considered highly probative of guilt. In the United States, examination of the volume of DNA exonerations has unmasked significant causal factors involved in wrongful convictions there; such as incorrect eyewitness identification, unreliable scientific evidence, false confessions and police and prosecutorial misconduct.⁴⁷ While causative factors may vary between jurisdictions, it is important that any DNA innocence-testing regime implemented in Australia does not ignore the lessons learned from the DNA exonerations to date. Evidence used at trial to secure convictions beyond reasonable doubt can subsequently be shown to be completely unreliable following post-conviction DNA testing. A wider legislative framework for DNA innocence testing is necessary if DNA testing is to be utilised as a tool for exposing wrongful convictions in Australia.

⁴⁴ Ibid 30.

⁴⁵ See, *The DNA Review Panel – Review of Division 6 of Part 7 of the Crimes (Appeal and Review) Act 2001*, Department of Attorney-General & Justice <http://www.lpcrd.lawlink.nsw.gov.au/agdbasev7wr/lpcrd/documents/pdf/2013_statutory_review_dna.pdf>, at 28 November 2013; Crimes (Appeal and Review) Amendment (DNA Review Panel) Bill 2013 (NSW).

⁴⁶ Department of Justice and Attorney-General (Qld), *Guidelines for Applications to the Attorney-General to Request Post-Conviction DNA Testing* (5 August 2010) <http://www.justice.qld.gov.au/__data/assets/pdf_file/0008/58283/dna-guidelines-august2010.pdf>.

⁴⁷ Innocence Project, *The Causes of Wrongful Conviction* (2013) Yeshiva University <<http://www.innocenceproject.org/understand/>>.

B: *New Appeal Avenue*

On 5 May 2013, new legislation came into force in South Australia allowing for a second or subsequent post-conviction appeal avenue where there is ‘fresh’ and ‘compelling’ evidence in a matter.⁴⁸ The new South Australian appeal development is important, due to the otherwise restricted appellate avenues applying throughout the country.⁴⁹

Appellants in Australia are typically limited to one appeal to the state appellate court without a right to a second appeal.⁵⁰ Moreover, the High Court has determined that fresh evidence cannot be heard, no matter how compelling it’s strength.⁵¹ Former High Court judge, the Honourable Michael Kirby has even referred to this fact as ‘a definite blemish on our system of justice.’⁵² This leaves wrongful conviction applicants reliant on pardon provisions alone. As noted by the Law Council of South Australia, the Executive Government is not the ‘appropriate gatekeeper’ for appeal referrals to the Court:

there is a significant risk that the government will only exercise its discretion to refer a matter where there is community pressure for the referral. Persons convicted of certain types of offences, such child sex offences, are unlikely to be able to garner such support even where the evidence of a miscarriage of justice in their case is relatively compelling. In all cases, the result is likely to be that a convicted person, in addition to gathering evidence to support the referral, will also be compelled to engage in a public relations campaign in order to build the type of community support which might help persuade the relevant Minister to refer the matter.⁵³

One of the major benefits of the new appeal avenue is that the decision, regarding whether or not to hear the fresh and compelling evidence, is left to the judiciary as opposed to the government. The Honourable Michael Kirby suggested the new appeal avenue ‘be quickly considered in other Australian jurisdictions because the risks of miscarriage of justice arise everywhere and they need more effective remedies than the law of Australia presently provides.’⁵⁴ It may be that the Rule of Law, and in particular the principle of equality under the law, requires other states to adopt such a measure so that wrongful conviction claimants across Australia, have equal appellate court access.⁵⁵

⁴⁸ See, *Statutes Amendment (Appeals) Act 2013* (SA).

⁴⁹ For a full discussion of these provisions, see, Lynne Weathered, ‘Pardon Me: Current Avenues for the Correction of Wrongful Conviction in Australia’ (2005) 17 *Journal of the Institute of Criminology* 203; Bibi Sangha and Robert Moles, ‘Post-Appeal Rights: Australia, Britain and Canada’ (2012) 36 *Criminal Law Journal* 300; Bibi Sangha and Robert Moles, ‘Mercy or Right? Post-Appeal Petitions in Australia’ (2012) 14 *Flinders Journal of Law Reform* 293.

⁵⁰ *Grierson v The King* (1938) 60 CLR 431.

⁵¹ *Re Sinanovic’s Application* (2001) HCA 40 (11 July 2001); *Mickelberg v The Queen* (1989) 167 CLR 259.

⁵² SBS, *Historic Reform to SA’s Criminal Appeals Laws*, World News Australia, (15 May 2013) <<http://www.sbs.com.au/podcasts/Podcasts/radionews/episode/267258/Historic-reform-to-SA-s-criminal-appeals-laws>>.

⁵³ Law Council of Australia, *Policy Statement on a Commonwealth Criminal Cases Review Commission* (2012), [11.ii] <<http://www.lawcouncil.asn.au/lawcouncil/index.php/library/policies-and-guidelines>>

⁵⁴ South Australia, *Parliamentary Debates*, Legislative Council, 19 March 2013, 3460 (Anne Bressington).

⁵⁵ Sangha and Moles, ‘Post-Appeal Rights’, above n 49; Sangha and Moles, ‘Mercy or Right?’, above n 49.

V: INTERNATIONAL OBLIGATIONS AND THE NEED FOR FURTHER REFORM

As the problem of wrongful conviction becomes more widely accepted, attention is being brought to the issue of whether Australia's current appellate provisions meet international obligations in regards to the review of claims.⁵⁶ Article 14(5) of the International Covenant on Civil and Political Rights (ICCPR), states: 'Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.' In referring to Article 14, the Australian Human Rights Commission has stated:

The Commission is concerned that the current systems of criminal appeals in Australia, including in South Australia, may not adequately meet Australia's obligations under the ICCPR in relation to the procedural aspects of the right to a fair trial. More particularly, the Commission has concerns that the current system of criminal appeals does not provide an adequate process for a person who has been wrongfully convicted or who has been the subject of a gross miscarriage of justice to challenge their conviction.⁵⁷

Establishing a CCRC style body in Australia (or in Australian states) would address this concern. The topic was considered recently, originating from the debates in South Australia that ultimately led to the introduction of their new appellate avenue.⁵⁸ The creation of a CCRC had high-levels of support from the Australian Human Rights Commission,⁵⁹ the Law Society of South Australia⁶⁰ and the Law Council of Australia,⁶¹ and the Australian Lawyers Alliance, with submissions highlighting a number of serious difficulties posed for wrongful conviction applicants through the limited options for review that are currently available.⁶² While ultimately the South Australian Legislative Review Committee ('LRC') decided against the establishment of a CCRC at this time,⁶³ it nevertheless recognised the need for better post-conviction review processes.⁶⁴ To this end, the LRC not only recommended that the new appeal avenue be introduced, which as discussed has occurred, but that a Forensic Review Panel also be established to 'enable the testing or re-testing of forensic evidence which may cast reasonable doubt on the guilt of a convicted person, and for these results to

⁵⁶ Letter from the President of the Law Society of South Australia to Committee Secretary of the Legislative Review Committee, 24 May 2012 (2012).

<http://www.lawsocietysa.asn.au/submissions/120525_Inquiry_Criminal_Cases_Review_Commission_Bill.pdf>; Australian Human Rights Commission, Submission to Legislative Review Commission of South Australia, *Inquiry into the Criminal Cases Review Commission Bill 2010* (25 November 2011) <http://www.humanrights.gov.au/legal/submissions/2011/20111125_criminal_case_review.html>; Parliament of South Australia, above n 32, 82.

⁵⁷ Australian Human Rights Commission, above n 56, [2.6].

⁵⁸ Legislative Review Committee (SA), above n 32.

⁵⁹ Australian Human Rights Commission, above n 56, [30][32].

⁶⁰ Letter from the President of the Law Society of South Australia to Committee Secretary of the Legislative Review Committee, 4 January 2012.

<http://www.lawsocietysa.asn.au/submissions/120104_Inquiry_into_the_Criminal_Cases_Review_Commission.pdf>; Law Society of South Australia, above n 56.

⁶¹ Law Council of Australia, above n 53, [13].

⁶² For comments regarding the Australian Lawyers Alliance support see Tim Dornin, 'Lawyers Back SA Criminal Review Watchdog' *Sydney Morning Herald* (Sydney), 26 May 2011.

⁶³ Legislative Review Committee (SA), above n 32, 81 [Recommendations 1- 2].

⁶⁴ *Ibid* 81 [9].

be referred to the Court of Criminal Appeal.⁶⁵ They further recommended that a review be undertaken of the process of discovery and the way in which scientific evidence is presented.⁶⁶

Incorrect science has the potential to cause miscarriages of justice, as evidenced in the Lindy Chamberlain case and the recent Farah Jama case in Australia.⁶⁷ Unvalidated or improper forensic science has been shown to be a contributing casual factor in approximately fifty per cent of the DNA exonerations in the United States.⁶⁸ While it cannot be assumed that a similar percentage would be applicable in Australia, the LRC did state:

The Committee notes that the area of scientific evidence is one which has given rise to the most concern regarding the safety of convictions. This is due to the changing nature of opinions about the basis and reliability of science, and the rapid development of new technologies for the testing of evidence. Given the fluidity in the area of scientific research and development, the Committee is of the view that the legal system should allow for a further opportunity for a person to have evidence tested if it may reveal new information that casts reasonable doubt on the guilt of a convicted person.

Even if a convicted person believes that evidence exists that may tend to exonerate them, there is no formal way they can have access to such information or have their case re-investigated.⁶⁹

The South Australian Government did not adopt the LRC's additional recommendations in this regard. Without a supporting investigative body such as a CCRC or the more limited measure of a Forensic Review Panel to supplement the new appeal avenue, substantial issues remain for the effective review of wrongful conviction claims. To be successful in the new appeal avenue, 'fresh' and 'compelling' evidence is required – in the same way that fresh evidence is typically required for those petitioning for a pardon. In both situations, without a CCRC style body that has extensive powers to investigate claims of wrongful conviction, potentially exonerating evidence may very well remain hidden. In consideration as to whether a CCRC should be established, the Law Council of Australia outlined some of the difficulties with the current system, namely:

The Executive Government makes a decision on whether to refer a matter to the appeal court based on the material submitted by the petitioner, that is, the convicted person. The Executive rarely conducts its own inquiry. Further, if a matter is referred to the court for review, the appeal court reviews the case based on the material submitted by the parties. It does not conduct its own inquiry.

The result is that post-conviction the entire burden, including the financial burden, of identifying, locating, obtaining and analysing further evidence rests entirely with the convicted person.

⁶⁵ Ibid 84 [Recommendation 5].

⁶⁶ Ibid 83 [Recommendation 4].

⁶⁷ *R v Chamberlain* (Unreported, Supreme Court of the Northern Territory, Muirhead ACJ, 13 September 1982) and *R v Jama* (Unreported, County Court of Victoria, 21 July 2008).

⁶⁸ Innocence Project, above n 36.

⁶⁹ Legislative Review Committee (SA), above n 32, 84.

He or she has no particular power or authority to compel the production of information, interview witnesses or conduct scientific testing on relevant materials.

Even where preliminary evidence becomes available which casts doubt on the original conviction, the Executive rarely assumes responsibility for any further inquiry. Effectively, the convicted person must conduct his or her own inquiry and then petition for review based on the material uncovered.⁷⁰

Two major components contributing to the effectiveness of the CCRC (and necessary elements for any system adopted in Australia) are its (i) independence⁷¹ and (ii) investigatory powers. Such investigatory powers include interviewing witnesses, obtaining expert reports, interviewing informants and information from informant files, and DNA testing amongst other things. While errors on the face of case materials available to applicants can sometimes be found and corrected, it is often the evidence that is buried underneath the surface review of documents or missing from the file, which is key to the ultimate uncovering of innocence. As the then outgoing CCRC Commissioner, David Jessel explained:

This is why the act that set us up gave us huge powers to dig for information usually denied to the defendant at trial – all the secrets of the police and the Crown Prosecution Service, information from medical and social services files, access into criminal records – including the records of people who may have made false accusations in the past.

Our powers are not a magic key to the chest which holds the smoking gun, but they are critical to the pursuit of new evidence which, sometimes alongside other evidence which didn't convince the original jury – might give our applicants a second chance for justice.⁷²

Without such investigatory or discovery provisions, many wrongful conviction applicants will be unable to access potentially exculpatory material necessary to support either a pardon, petition or the new appeal avenue in South Australia. These issues must be addressed if there is a real commitment to rectifying wrongful convictions.

VI: CONCLUSION

The conviction of innocent people is nothing new in our society. What is changing though, is a slow but growing global acknowledgement of the problem of wrongful conviction as an international human rights issue, challenging criminal justice systems across the world to ensure that effective post-conviction review procedures are in place. Notable reforms have occurred in the United Kingdom, Norway, Canada and the United States through mechanisms such as the introduction of independent bodies to investigate and refer claims of wrongful conviction to the courts or comprehensive DNA innocence testing regimes.

⁷⁰ Law Council of Australia, above n 53, [9.ii].

⁷¹ *Criminal Appeal Act 1995* (UK) s 8(2) provides that the CCRC 'shall not be regarded as the servant or agent of the Crown...?'

⁷² David Jessel, 'Innocence or Safety: Why the Wrongly Convicted are Better Served by Safety', *The Guardian* (London), 15 December 2009.

Other countries are also considering possible options for identifying and correcting wrongful convictions, with particular focus centring on the CCRC.

Reviews undertaken in Australia highlight major challenges for wrongful conviction applicants in having the errors of their conviction uncovered and corrected. As noted by the Australian Human Rights Commission and others, post-conviction review provisions may not currently meet international obligations. Australia has played on the fringes through the limited reforms that have been introduced to date, such as the implementation of DNA testing regimes in New South Wales and Queensland, and the new appeal avenue in South Australia. They are important steps forward, but wrongful conviction applicants still currently face significant, often impossible, obstacles in attempting to prove their innocence.

Expectations exist that modern criminal justice systems will provide measures to rectify wrongful convictions and ideally a co-operative approach can be reached in addressing the problem, as wrongful conviction is also public safety issue. Establishing a Forensic Review Panel, a legislative framework for DNA innocence testing, adopting an additional appeal avenue similar to that in South Australia in combination with additional post-conviction discovery powers, or bolstered and transparent pardon provisions are some of the potential options for officially responding to the problem of wrongful conviction nation-wide. Creating a CCCRC would be the most comprehensive measure – though not a panacea to the problem of wrongful conviction. Front-end protections will always be of paramount importance in reducing the risk of wrongful convictions. Whatever identification and correction measures are implemented, they need to contain mechanisms allowing for fully empowered and independent investigations and access to the courts of appeal. Without this, evidence will remain hidden and wrongful convictions uncorrected.