RIGHTING WRONGFUL CONVICTIONS WITH DNA INNOCENCE TESTING: PROPOSALS FOR LEGISLATIVE REFORM IN AUSTRALIA

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I INTRODUCTION

Much has changed in the fight to correct wrongful convictions since Ned Kelly and his gang attempted to avenge Ned’s mother’s wrongful conviction for attempted murder, at the Stringybark Creek gunfight in October 1878.¹ Gunfights are hopefully not so common now. However, the ability to correct wrongful convictions in Australia is still severely hampered by a lack of investigative and legal avenues available to those who have failed at their appeal. Australia has been slow to act but an important law reform opportunity now exists in this country for the correction of wrongful convictions.

In the United States DNA evidence has exonerated over 230 people who were innocent but convicted. Not a single post-appeal DNA exoneration has occurred in Australia. The question must be asked: why? It is not suggested that the Australian experience would mirror that of the United States in terms of the numbers of wrongly

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¹ Ned Kelly, Jerilderie Letter (1879) State Library of Victoria Treasures Website: <http://www.slv.vic.gov.au/collections/treasures/jerilderieletter/> at 26 March 2009. ‘It will pay Government to give those people who are suffering innocence, justice and liberty. if not I will be compelled to show some colonial stratagem which will open the eyes of not only the Victoria Police and inhabitants but also the whole British army...’
convicted, but nor is Australia somehow immune to the problem of wrongful conviction. We have experienced our own cases of wrongful conviction, as have our common law counterparts in England, Canada and New Zealand.

A major contributor as to why there are no DNA post-appeal exonerations in Australia is that the mechanisms required to facilitate such exonerations do not exist. Only New South Wales has DNA innocence testing legislation in place. Outside of that State no legislative framework exists, placing Australia well behind in regard to international reform addressing wrongful conviction that has occurred in England, Canada and the United States.

In 2003 the Australian Law Reform Commission (ALRC) recommended that the Commonwealth should establish a process to consider applications for post-conviction review from any person who alleges that DNA evidence may exist that calls his or her conviction into question. However, no progress on this is evident to date. Further, because the Commonwealth’s criminal jurisdiction is limited to federal offences (with each state and territory administering its own criminal justice system) the impact of any federal reform will be limited. Thus, it is Australian states that need to enact legislation to facilitate such a process.

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5 This is explained further in Lynne Weathered, ‘Does Australia Need a Specific Institution to Correct Wrongful Convictions?’ (2007) 40(2) The Australian and New Zealand Journal of Criminology, 179-198.
New South Wales recently enacted legislation and Queensland has initiated a working party to consider law reform in this area. This article extends previous discourse on the need for DNA innocence testing by focusing on the specific issues and provisions necessary in any future DNA legislation that is implemented in Australia and in doing so, also raises issues of concern regarding the New South Wales legislation. This article presents principles considered fundamental to DNA innocence testing legislation. Through a review of legislation in the United States and that in New South Wales, the authors have formulated what are – in their view – essential aspects of any DNA innocence testing legislative reform for Australia.

The term ‘wrongful conviction’ in this article refers to cases where people remain falsely convicted, despite having exhausted the traditional appeal avenues. In other words, people who are ‘factually innocent’ but have not had their conviction corrected at the appellate level.

Wrongful conviction is an injustice wherever and however it occurs. DNA innocence testing legislation could offer a relatively simple method of correcting wrongful convictions, utilising modern technology. At the same time it is important to be cognisant that DNA innocence testing in itself will not comprehensively address the problem of wrongful conviction, as many cases do not involve biological material that could be DNA tested. DNA innocence testing is however, an immediate and highly probative tool that could provide, at least in some cases – as Ned Kelly said - ‘...those people who are suffering innocence, justice and liberty’.

7 Personal correspondence between the Queensland Attorney-General and the Griffith University Innocence Project. See also: Griffith University, ‘Queensland moves closer to a fairer justice system’ (Press Release 29 April, 2008); Angela Priestly, ‘QLD moves to avert wrongful convictions’, Lawyers Weekly, 2 May 2008, 1; ‘The Wrong Man’, Brisbane Legal, (Brisbane, Australia), 22 May 2005, 10.
8 Kelly, above n 1.
II DNA – CHANGING THE FACE OF THE CRIMINAL JUSTICE SYSTEM

DNA technology has had a significant impact on the criminal justice systems in Australia and internationally, particularly in its use as evidence to convict suspects of crime. DNA evidence used in wrongful conviction cases has the potential to provide both evidence of innocence and evidence as to who actually committed the crime. For example, if a single-perpetrator rape is committed and a rape-kit is taken and preserved, DNA testing may not only exclude an individual as the perpetrator of the crime and thereby uncover a wrongful conviction, the same testing may also provide a profile of the actual perpetrator. For example, Ronald Cotton (who had always maintained his innocence) was convicted of the rape of Jennifer Thompson and spent over 10 years in a U.S. prison, prior to DNA innocence testing confirming not only his innocence, but the identity of the true perpetrator.\(^9\) Thompson and Cotton now travel the United States together, informing others about the potential dangers involved with eyewitness identification – the leading cause of wrongful convictions in the United States.

The ability to correct wrongful convictions post-appeal is important not only for the exonerated individual but also for the delivery of justice. DNA innocence testing can improve a criminal justice system by:

- potentially providing the most conclusive proof of innocence available;
- ending the injustice for the wrongly convicted; and
- possibly identifying the real perpetrator.

Further, if DNA exonerations are examined for causative factors involved in the wrongful convictions, they have the potential to shed light on inherent weaknesses within our criminal justice system, thereby providing the impetus and opportunity for reform that will improve the delivery of justice. Chester Porter QC submits that

\(^9\) [Know the Cases: Ronald Cotton, Innocence Project](http://www.innocenceproject.org/Content/72.php) at 19 March 2009.
Reform is necessary to correct errors. In Australia DNA evidence is used pre-trial, at trial and to a lesser extent at the appellate level. Queensland’s case of Frank Button is often referred to as Australia’s only DNA exoneration. Button was convicted of rape in 2000. DNA testing undertaken prior to trial did not reveal a profile so importantly, it was the additional testing prior to appeal that ultimately resulted in the quashing of his conviction and Button’s release from prison. This however, needs to be distinguished from using DNA testing post-appeal to correct wrongful convictions, which is the focus of this article and of which as stated, there are none. Outside of New South Wales, there are no legislative provisions to preserve evidence, rights to access relevant information or enable the DNA testing or re-testing of biological material, compared with some overseas jurisdictions that have enacted significant legislative reforms to utilise DNA technology in the investigative and trial stages of conviction and importantly, post-appeal to correct wrongful convictions. Some form of DNA innocence testing legislation exists in 46 of the 50 states within the United States. Other overseas jurisdictions also have legislation in place that allows for post-conviction DNA tests to be undertaken.

Post-conviction DNA innocence testing legislation could therefore play a vital role in the correction of wrongful conviction.
and provide a more comprehensive understanding of Australia’s criminal justice system. In light of international developments and given the sophistication of Australia’s criminal justice system, our general lack of legislative response to correct wrongful convictions is conspicuous.

III INTERNATIONAL REFORMS IN OVERSEAS JURISDICTIONS

A variety of alternative mechanisms are currently being used to correct wrongful convictions in various other common law jurisdictions. For example, government funded administrative bodies specifically designed to review claims of wrongful conviction operate in:

- the United Kingdom - through the Criminal Cases Review Commission;¹⁷
- Scotland – through the Scottish Criminal Cases Review Commission;¹⁸
- Norway – through the Norwegian Criminal Cases Review Commission;¹⁹
- Canada – through the Criminal Conviction Review Group.²⁰

Each of these bodies has wide ranging investigative powers enabling them to review a broad range of potential miscarriages of justice. The first Criminal Cases Review Commission was established in 1997 in the United Kingdom (UK) with an ambit empowering them to review a broad range of miscarriages of justice relating to both convictions and sentences.²¹ Since its inception, the Commission has

²¹ CCRC Home Page, above n 17.
facilitated the quashing of 272 convictions.\textsuperscript{22} The Scottish and Norwegian Commissions are modelled on the UK’s commission. Canada considered adopting the UK model but instead opted for legislative reform, introducing more detailed and transparent ‘mercy’ provisions\textsuperscript{23} in conjunction with a Criminal Conviction Review Group (CCRG) created in 2002 to investigate applications for ministerial review.\textsuperscript{24}

In contrast to the above administrative bodies, reform in the United States has predominantly focused on the use of DNA innocence testing legislation incorporating regulations for the preservation of, and access to, evidence containing biological material for potential DNA innocence testing. Only four of the 50 states have not introduced some such legislation.\textsuperscript{25} To date, 234 people have been exonerated in the United States following post-conviction DNA testing.\textsuperscript{26}

The U.S. federal government’s DNA initiative – ‘Advancing Justice Through DNA Technology’ was launched in 2003\textsuperscript{27} with the landmark Justice For All Act 2004 (H.R. 5107), enacted in 2004. This initiative and associated legislation covers, inter alia, DNA collection and analysis with a view to clearing backlogs in testing facilities. The Innocence Protection Act 2004 provided US$25 million in incentive grants to states with post-conviction DNA testing legislation.\textsuperscript{28}

\begin{itemize}
\item \textsuperscript{22} Case Statistics, Criminal Cases Review Commission \textless http://www.cccr.gov.uk/cases/case_44.htm\textgreater at 26 March 2009.
\item \textsuperscript{23} Irwin Cotler, Applications for Ministerial Review – Miscarriages of Justice, Annual Report 2004 Minister of Justice, (2004).
\item \textsuperscript{24} Ibid.
\item \textsuperscript{25} See map at http://www.innocenceproject.org/news/LawView2.php highlighting the states that have or do not have DNA Access Laws in the USA.
\item \textsuperscript{26} Innocence Project Home Page \textless http://www.innocenceproject.org/index.php\textgreater at 26 March 2009.
\item \textsuperscript{27} For further information about the initiative see, US Government, Advancing Justice Through DNA Technology President’s DNA Initiative \textless http://www.dna.gov/info\textgreater at 26 March 2009.
\end{itemize}
With appropriate legislative frameworks in place, Innocence Projects and other lawyers or individuals working to help the wrongly convicted in the United States have been able to assist in achieving this large number of exonerations. One of the recently exonerated is Willie Otis ‘Pete’ Williams. In February 2007 Williams was exonerated after post-conviction DNA testing proved he was innocent of the crimes for which he had been convicted nearly 20 years earlier. Convicted of rape, kidnapping and aggravated sodomy, he was sentenced to 45 years imprisonment. After his trial and appeal, Williams’ lawyer identified three similar rapes that had occurred shortly after Williams’ arrest. The police arrested Kenneth Wicker who pleaded guilty to these subsequent rapes. The Georgia Innocence Project became involved in the case. An intern at the Project found the first victim’s rape kit, re-testing of which proved that Williams could not have been the perpetrator. The rape kit from Kenneth Wicker’s 1985 rape case was also re-tested. The profiles in both these rape kits matched, confirming Wicker as the real perpetrator of the crime. Without the evidence being retained and without the appropriate legislation governing access to and retesting of this evidence, Williams would almost certainly still be in prison.  

The widespread state-based DNA innocence testing legislation in the United States allows for the exposure and correction of wrongful conviction cases across the country. Without a framework or legislative right to test crime-scene evidence post-appeal, the innocent but convicted are forced to languish in prison (and possibly be rejected for parole because of their insistence of their innocence). Even eventual freedom from prison will not remove the stain of a wrongful conviction - but DNA innocence testing exposing the truth of the injustice, would help cleanse it.

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29 Know the Cases: Willie Williams, Innocence Project

IV DNA INNOCENCE TESTING LEGISLATION IN NEW SOUTH WALES

The Crimes (Appeal and Review) Amendment (DNA Review Panel) Act 2006 (the NSW DNA Act) was passed in October 2006. It was debated and passed jointly with the Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006 in New South Wales. Following the Council of Australian Governments meeting on 13 April 2007, all other states and territories in Australia – with the exception of ACT and Victoria - agreed to follow New South Wales in reforming their double jeopardy laws. In late 2007 Queensland Parliament passed the Criminal Code (Double Jeopardy) Amendment Act 2007 and amendments are being considered by the other states that agreed to the COAG recommendations.31

As noted above, New South Wales jointly considered issues relating to the correction of wrongful conviction and double jeopardy principles. In light of this approach a brief word on double jeopardy and its perceived correlating link to correcting wrongful convictions is warranted. It is submitted that DNA innocence testing and double jeopardy principles involve discrete issues and consequently do not necessarily need to be considered together. As stated by Griffith and Roth:

'As a matter of legal drafting, the use of 'fresh' DNA or other evidence to retry certain verdicts of acquittal could be accomplished without amending the law on post-conviction review where a wrongful conviction is claimed. Likewise, a statutory process to consider applications for post-conviction review could be established without reference to the double jeopardy rule. Logically and legally, the two matters are distinct'.32


However, it remains arguably unconscionable to amend double jeopardy laws relating to acquittals without facilitating the revisiting of convictions, particularly those upon which DNA evidence could shed new light, especially as DNA has already been used in investigating thousands of ‘cold’ cases for the purpose of prosecuting previously unsolved crimes. 33

The 2006 New South Wales DNA Act differs from the original provisions made in that state. Previously, in 2001 New South Wales had established a body known as the "Innocence Panel. The Panel’s primary role was to facilitate DNA testing for applicants claiming innocence where they had been convicted of serious crimes. 34 However, after only a short time of operation the Panel was suspended following DNA innocence testing in a high profile case, 35 leaving its applicants in prison and again without redress.

Issues relating to the defunct Innocence Panel were subsequently considered by Professor Mark Findlay as part of his review of the Crimes (Forensic Procedures) Act 2000. In his review Professor


Findlay made recommendations for the Panel’s re-enactment under a new statutory basis and with other amendments. With respect to the Innocence Panel, the Review recommended that:

‘at the very least’ the Panel is brought ...within the Attorney General’s portfolio, and that the Panel be provided with a power to refer cases to the Court of Criminal Appeal. In our view, however, it would be preferable for the Attorney General to extend the role of the Panel in the direction of a wider Criminal Cases Review Commission... to examine all cases of wrongful conviction of innocent people, irrespective of whether DNA evidence formed part of the case. ... What the Government can do here, we advise, is to create a wider institutional framework that can adjudicate on innocence claims brought before it and provide the resources for the appropriate testing of any such worthy claims.

In line with the Findlay Review initial recommendation, the new legislation essentially re-establishes the former Panel under a new statutory footing within the Attorney-General’s portfolio. However, rather than create a wider review commission or a wider institutional framework, able to adjudicate claims brought before it, the newly created ‘DNA Review Panel’ is more restricted than any administrative body anticipated by the Findlay Review.

According to the explanatory notes, the New South Wales DNA Act was designed to:

(a) ‘establish a DNA Review Panel to deal with an application from a person who was convicted of an offence before the introduction of this Bill into Parliament and whose claim of innocence may be affected by DNA information obtained from biological material, and to refer appropriate cases to the Court of Criminal Appeal for review, and

(b) impose a duty of members of NSW Police and other State authorities to retain, in certain circumstances, evidence containing biological material in connection with the investigation or prosecution of serious offences in respect of which convicted persons may make applications to the DNA Review Panel, and


37 Ibid 89.
(c) transfer from the Crime Act 1900 some related provisions dealing with the review of convictions.\(^\text{38}\)

The New South Wales DNA Review Panel commenced operation ‘quietly’ in June 2007 and according to media reports has already received a number of applications.\(^\text{39}\) The Panel consists of six members appointed by the Governor, and is constituted by:

- a former judicial officer appointed as Chairperson
- a representative of victims of crime, appointed by the Premier
- the Director-General of the Attorney General’s Department (or their nominated officer)
- the Senior Public Defender (or nominated officer)
- the Director of Public Prosecutions (or their nominated officer)
- a former police officer, nominated by the Commissioner of Police.\(^\text{40}\)

The DNA Review Panel has referral powers to the Court of Appeal if they consider there is ‘reasonable doubt as to the guilt of the convicted person’.\(^\text{41}\) The Panel’s powers under s 91(1) of the Act are:

(a) to consider any application under this Division from an eligible convicted person and to assess whether the person’s claim of innocence will be affected by DNA information obtained from biological material specified in the application,

(b) to arrange, if appropriate, searches for that biological material and the DNA testing of that biological material,

(c) to refer, if appropriate, a case to the Court of Criminal Appeal under this Division for review of a conviction following the receipt of DNA test results,

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\(^{40}\) Crimes (Appeal and Review) Act 2001 (NSW) s 90.

\(^{41}\) Crimes (Appeal and Review) Act 2001 (NSW) s 94(1).
(d) to make reports and recommendations to the Minister on systems, policies and strategies for using DNA technology to assist in the assessment of claims of innocence (including an annual report of its work and activities, and of statistical information relating to the applications it received).

The essence of the latest New South Wales DNA Act is to provide convicted persons the opportunity to make an application to the Panel, 'if, and only if, the person's claim of innocence may be affected by DNA information obtained from biological material specified in the application.'

The New South Wales legislation therefore offers a major and important development for this country. However, a major concern expressed by the New South Wales Bar Association in relation to the DNA Act is that it does not fully implement the recommendations of the Findlay report. The president of the New South Wales Bar Association, Michael Slattery QC, has generally referred to the DNA Act and Panel as a 'toothless tiger'. Further, areas within the legislation (explored below) diminish the value of this legislation by being overly restrictive and narrow. Other Australian states, if they were to implement reform in this area, could make important improvements upon the legislation adopted in New South Wales.

V ANALYSIS OF DNA INNOCENCE TESTING PRINCIPLES AND ISSUES

This section analyses specific issues that require consideration in order to support and provide the necessary framework for DNA innocence testing legislation in this country. It considers amongst

42 Crimes (Appeal and Review) Act 2001 (NSW) s 89(2).
other things, findings within the survey of post-conviction DNA testing legislation in the United States conducted by the American Society of Law, Medicine & Ethics, a similar survey in relation to preservation laws undertaken by the New England Innocence Project, the current situation in Australia for wrongful conviction applicants and the provisions within the New South Wales DNA Act. While drawing on a number of US legislative examples, the following recommendations and issues have been formulated to specifically apply to the Australian context.

Foundational principles which The Innocence Project in New York recommends for DNA innocence testing legislation provide a solid basis from which more specific provisions can be constructed. These are to:

- Include a reasonable standard to establish of proof of innocence;
- Allow access to post-conviction DNA testing wherever it can establish innocence, including cases where the defendant pled guilty;
- Exclude 'sunset provisions,' or absolute deadlines, for when access to post-conviction DNA evidence will expire;
- Require state officials to account for evidence in their custody;
- Require proper preservation of biological evidence properly for a reasonable period of time;
- Disallow procedural hurdles that stymie DNA testing petitions and proceedings that govern other forms of post-conviction relief;
- Allow convicted persons to appeal orders denying DNA testing;

• Require a full, fair and prompt response to DNA testing petitions;
• Avoid unfunded mandates by providing funding to DNA testing statutes; and
• Provide flexibility in where, and how, DNA innocence testing is conducted.\textsuperscript{47}

Many of these principles can be easily adopted into the Australian context. DNA innocence testing legislation requires a range of areas to be covered, including preservation of evidence, access to that evidence and criteria for applicants seeking DNA innocence testing or re-testing of crime scene evidence, as set out below.

A Preservation of evidence

The Australian Law Reform Commission earlier recommended that:

‘Forensic procedures legislation should require the permanent retention of forensic material found at crime scenes to ensure the preservation of crime scene material for post-conviction analysis’.\textsuperscript{48}

Preservation of evidence is an essential feature of DNA innocence testing legislation. DNA samples and crime scene evidence containing biological material must be retained and properly stored to enable future DNA testing and the subsequent use of this evidence in court proceedings. Retaining DNA samples and physical evidence allows for testing of evidence not previously tested and also the re-testing of DNA samples or crime scene evidence when DNA technology improves or there is concern about the interpretation or correctness of the original evidence provided.

There may be difficulties associated with storage of some types of crime scene evidence however it is only the portion of the evidence that contains biological material that needs to be preserved,

\textsuperscript{47} Innocence Project, above n 15.
rather than the full item of evidence. Further, storage issues are resolvable and should not take precedence over the delivery of justice. A significant number of states in the USA have either automatic or 'qualified' preservation statutes or preservation-related authority.49 Australia’s prison population of approximately 27,00050 compared with over 2 million people imprisoned across the United States51 should mean our storage requirements are much more manageable than in the United States where the need to preserve evidence appears to have been accepted, evidenced by the statutory provisions.

For Australia, the experience of the now defunct New South Wales Innocence Panel is illustrative of the need for legislation regarding the retention of evidence. In 2002, the New South Wales Deputy Commissioner for Police at the time, Mr Ken Moroney, issued an informal moratorium against the destruction of crime scene exhibits. In 2003, after discovering that the order had not been complied with in two cases considered by the Innocence Panel, it was reissued.52 Of the 13 applications that the Innocence Panel received during its operation, only two had crime scene evidence still in existence, one of which contained a DNA profile.53 The Review recommended legislation providing for the long-term preservation of, and access to crime scene evidence.54 It should also contain protocols for the provision of chain of custody ensuring its evidential capability in the courts.55

52 Finlay, above n 34, 19.
53 Ibid 10.
54 Ibid 51.
55 Griffith and Roth, above n 32, 37 noting recommendations of UTS Innocence Project.
Section 96(1)(a) of the New South Wales DNA Act requires preservation of evidence after 19 September 2006 (when the Bill was introduced). However the Act restricts applicants to the Panel to those convicted prior to 19 September 2006. It appears therefore that anyone convicted after this date will not be eligible for DNA innocence testing under this Act and as such, the preservation requirement in the New South Wales DNA Act does therefore not apply to its potential applicants.

B Offences for which evidence should be preserved

Review of the United States’ legislation has shown that some preservation statutes are offence specific while others remain open. Californian preservation legislation is unrestricted and is phrased in the following terms:

‘[T]he appropriate governmental entity shall retain all biological material that is secured in connection with a criminal case for the period of time that any person remains incarcerated in connection with that case’.

The New South Wales DNA Act provides for the preservation of evidence that contains ‘relevant biological material’ only in cases where the offence is punishable by imprisonment for life or for 20 years or more. As discussed in more detail later, this is unnecessarily restrictive as it will deny many people convicted of offences not punishable at this level, the opportunity to prove their innocence.

It is also a major concern that under 96(2)(d), the evidence does not need to be preserved if ‘the material has already been subject to DNA testing and the testing indicates that it relates only to the eligible convicted person concerned’. This wrongly assumes the infallibility of DNA evidence, presupposing that additional testing could not uncover additional profiles or contradict previous results. Recent events in Victoria where an apparent contamination error

56 Crimes (Appeal and Review) Act 2001 (NSW) s 89(3).
57 Cal. Penal Code s 1417.9(a).
with DNA evidence from unrelated offences, led to the dropping of murder charges in a high profile cold case, highlights this point. It is reported that it resulted in a review of more than 7,000 cases involving DNA in Victoria. Errors with DNA testing can occur and therefore the evidence must be preserved if those mistakes are to be rectified.

Finally, in regard to this issue it is recommended that preservation of evidence provisions should be stated in general terms and not be restricted to specific offences. If it is necessary to limit the amount of evidence retained it is suggested that evidence relating to indictable offences should be preserved.

C Period of preservation

Experience both internationally and in Australia has demonstrated that correcting wrongful convictions is almost always a long and arduous task. The average length of time for the U.S. exonerations is 12 years, many taking much longer. Evidence should therefore be preserved for as long a period as possible. If a limitation is required to overcome storage problems, it is suggested that preservation occur for a minimum of 10 years following the period of conviction.

Arkansas’ statute provides an example of legislation drafted in relatively broad terms that could, with modification, be adapted to Australia:

(a) In a prosecution for a sex offense or a violent offense, the law enforcement agency shall preserve, subject to a continuous chain of custody, any physical evidence secured in relation to a trial and sufficient official documentation to locate that evidence.

(b) 1. After a trial resulting in conviction, the evidence shall be impounded and securely retained by a law enforcement agency.


2. Retention shall be the greater of:

(A) Permanent following any conviction for a violent offense;

(B) For twenty-five (25) years following any conviction for a sex offense; and

(C) For seven (7) years following any conviction for any other felony for which the defendant's genetic profile may be taken by a law enforcement agency and submitted for comparison to the State DNA Data Base for unsolved offenses.61

D Provisions for premature disposal of evidence

The U.S. legislation varies on this point. Some states prohibit any premature disposal (eg, Georgia62) while others do not make any specification (eg, Michigan63). The vast majority provide for premature disposal of samples under certain circumstances. This is usually stated by reference to the type of sentence, and with conditions regarding notification of all parties. For example, the Illinois legislation provides as follows:

(c) ...the law enforcement agency required to retain evidence ...may petition the court with notice to the defendant or, ...his estate, ... his attorney ... for ...an order allowing it to dispose of evidence if, after a hearing, the court determines ... that:

1. it has no significant value for forensic science analysis and should be returned to its rightful owner, destroyed, used for training purposes, or as otherwise provided by law; or

2. it has no significant value for forensic science analysis and is of a size, bulk, or physical character not usually retained ... or

3. there no longer exists a reasonable basis to require the preservation of the evidence because of the death of the defendant; ... 

(d) The court may order the disposition of the evidence if the defendant is allowed the opportunity to take reasonable measures to remove or preserve portions of the evidence in question for future testing.64

61 Ark Code Ann s 12-12-104(a).
64 725 ILCS 5/116-4(c)-(d10).
E Location and storage of evidence

The location and storage of crime scene evidence containing biological material will be a matter for each States’ relevant departments to determine, taking into consideration the parties involved with the collection, testing and currently the destruction of such evidence. All procedures for the preservation and storage of evidence must protect the continuity of evidence for later use in court.

The US Innocence Project’s model legislation, Section 9, states:

(A) Notwithstanding any other provision of law, every appropriate governmental entity shall retain and catalogue each item of physical evidence that contains biological material secured in connection with a criminal case in the amount and manner sufficient to develop a DNA profile from the biological material contained in or included on the evidence for the period of time that any person is incarcerated; civilly committed; on parole or probation; or subject to sex offender registration.

(B) This requirement shall apply with or without the filing of a petition for post-conviction DNA testing.65

The imposition of sanctions where evidence is intentionally destroyed is recommended. In this regard, criminal sanctions have been incorporated into the New South Wales legislation.66 Sanctions are also imposed under Section 9(C)(1) and 9(C)(2) of the model legislation of the US Innocence Project:

1. If biological evidence is destroyed after the filing of a petition under this Act, the Court may impose appropriate sanctions on the responsible party or parties.

2. If the court finds that biological evidence was destroyed in violation of the provisions of this statute, it shall consider appropriate remedies.67

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66 Crimes (Appeal and Review) Act 2001 (NSW) s96(5).
67 Innocence Project, above n 65.
The appropriate government departments should retain all physical evidence containing biological material, preserving the integrity of the evidence so that it can later be used in court. Furthermore, sanctions should be imposed where evidence is intentionally destroyed.

F  Access to and disclosure of information

Section 92(2) of the New South Wales DNA Act requires that applicants ‘specify the biological material from which DNA information may be obtained to support the convicted person’s claim of innocence’, thereby placing responsibility on the applicant to supply information about what is available for testing at the initial stages of their application.68

In reviewing claims of wrongful conviction it is imperative to ascertain what DNA tests, if any, have previously been undertaken and what DNA samples or crime scene evidence remain in existence for the purpose of testing or re-testing. Confirming the existence of crime scene evidence is a purely administrative task and should not be controversial. However, it is still problematic in this country because rights of access to information in place during trial and appeal cease once these hearings are concluded. Therefore, in attempts to access information about their case, wrongful conviction applicants may resort to Freedom of Information (FOI) requests.69 This legislation is not designed, nor adequate for the investigation of wrongful conviction claims. Investigation requires access to all relevant documents known to exist and access to other information that may not have been initially disclosed. Problems with FOI applications include that firstly, confirmation of the existence of evidence does not come within FOI parameters as this information is not itself a ‘document’; secondly, one must know of the existence of a specific document to be able to request it, so potentially exculpatory evidence that has been previously withheld is likely to remain that way; and thirdly, information identified as in existence

68  Crimes (Appeal and Review) Act 2001 (NSW) s 92(2).
69  Under Freedom of Information legislation in each state, see, eg, Freedom of Information Act 1992 (Qld).
can be either withheld altogether or only partially provided because it will be deemed as unavailable to the applicant within that legislative framework.\(^{70}\)

Therefore, any legislation introduced should not demand that claimants provide relevant information but instead offer the supporting legislation to allow applicants access to it. Disclosure requirements already apply to the trial and appeal stages under the Code and DPP guidelines.\(^{71}\) It is submitted that such disclosure should extend to wrongful conviction applicants.

The US Innocence Project’s model legislation under Section 9 incorporates the following requirement:

\[(C) \text{In cases where a petition for post-conviction DNA testing has been filed under this Act, the state shall prepare an inventory of the evidence related to the case and submit a copy of the inventory to the petitioner and the court.}^{72}\]

For effective investigation of cases, an inventory of evidence and all other relevant information including full access to all scientific documents, should be prepared and provided to the relevant persons and organizations, following an appropriate request.

\section{G Eligibility criteria for post-conviction DNA testing}

Appropriate criteria for DNA innocence testing is recognised as a necessary element of any legislation. Already, DNA is only available in a small percentage of cases. Identity of the perpetrator is the central issue going to the heart of the use of DNA technology in exposing wrongful convictions. DNA test results can either ensure the safety of the original conviction or demonstrate that the wrong person has been convicted (and potentially provide concrete

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\(^{72}\) Innocence Project, above n 65.
evidence of the identity of the real perpetrator). Restricting DNA innocence testing to cases where identity is at issue further reduces the number of potential applications and should assuage any concerns about a floodgate of applications.

Eligibility restrictions under section 89(3) of the New South Wales DNA Act are concerning. Although involving some discretion, it generally restricts eligibility to those convicted of a 'relevant offence'. A relevant offence is defined under section 89(3) as:

(a) an offence that is punishable by imprisonment for life or for a period of 20 years or more or,
(b) any other offence punishable by imprisonment in respect of which the Panel considers that there are special circumstances that warrant the application.

A person’s life can be devastated by a wrongful conviction whether or not it is one punishable by life imprisonment or 20 years. If DNA testing is available to shed light on a wrongful conviction, there appears no reasonable basis to exclude its applicability.

The reported New South Wales case of Colin Murphie who was convicted of molesting a minor under the age of 10 and sentenced to six years in prison provides an example.\(^{73}\) Maintaining his innocence and now on parole, he is seeking to clear his name through DNA innocence testing but will not be eligible for that unless it is deemed there are special circumstances to warrant the application, under 89(3)(b) of the Act.

In further restricting eligibility, section 89(5), the New South Wales DNA Act excludes as applicants, people who have completed their prison sentence. It states:

'A convicted person is not eligible to make an application to the Panel unless the person:

(a) continues to be subject to the sentence imposed on conviction (whether the person is in custody or has been released on parole), or

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(b) is subject to supervision or detention under the *Crimes (Serious Sex Offenders) Act 2006* in connection with the offence for which the person was convicted.\(^{74}\)

Proving innocence is important to those who have been convicted of a crime they did not commit and the impact of wrongful conviction can remain long after release from prison, affecting potential employment amongst other things.\(^{75}\) This restriction should not be included in any future DNA innocence testing legislation.

As noted earlier, the New South Wales legislation also only applies to persons convicted prior to 19 September 2006.\(^{76}\) This again falls prey to the notion that because current DNA technology is available, it will always be used pre-trial or trial to ensure the safety of the conviction. It suggests that all relevant evidence will be tested when there is much discretion in what is or is not tested. It also enhances the fallacy that current DNA evidence presented at trial is infallible and will never need to be questioned. With DNA evidence, there is always potential for incorrect interpretation, cross-contamination, laboratory errors and the failure to test certain evidence prior to trial and appeal amongst other things - all of which could lead to the need for future DNA testing or retesting of evidence.\(^{77}\) Furthermore, testing technologies are always changing, improving and becoming more accurate.

To distinguish between groups of people eligible for DNA innocence testing without a solid foundation for doing so, could be seen to breach principles of equality under the law. The New South Wales Legislative Review Committee raised concerns that some of the limiting provisions within the New South Wales Act may breach the principle of equality before the law and impinge on a person’s

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\(^{74}\) *Crimes (Appeal and Review) Act 2001 (NSW)* s 89(5).

\(^{75}\) Life After Exoneration Program, <http://www.exonerated.org> at 26 March 2009 for further information on the difficulties experienced by the exonerated, following their release from prison.

\(^{76}\) *Crimes (Appeal and Review) Act 2001 (NSW)* s 89(3).

\(^{77}\) See Kirsten Edwards, ‘10 things about DNA contamination that lawyers should know’ (2005) 29 *Criminal Law Journal*, 71.
right to claim compensation. The New South Wales Legislative Review Committee has particularly noted that:

‘the different treatment of similarly situated persons based on the date of their conviction (before or after 19 September 2006) without compelling justification violates the right to equality before the law as well as impacting on the right to a fair trial. There is no basis in law to make a distinction between a person convicted on the 18 September 2006 and a person convicted on or after the 19 September 2006’.

The Committee noted Article 14 of the International Covenant on Civil and Political Rights (ICCPR) which provides that ‘All persons shall be equal before the courts and tribunals’. They questioned whether the new panel (that might broadly be defined as a ‘tribunal’) potentially:

‘fails to achieve this minimum human rights standard with respect to access to the Panel. If the opportunity, in already limited circumstances, to obtain and present DNA evidence in support of a claim of innocence is to be provided to convicted persons by the DNA Review Panel, it should be available to all persons convicted of a ‘relevant offence’ irrespective of the date of their conviction’.

It is therefore recommended that post-conviction DNA testing should be made available to as broad a category of convicted persons as possible, including those who initially pleaded guilty and those who have completed their sentence.

The majority of US states do not have a time limit for applications and we recommend Australia adopt the same approach. For example section (3) of the Innocence Project model statute provides that:

Persons eligible for testing shall include any and all of the following:

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79 Ibid.

80 Ibid.
(A) Persons currently incarcerated; civilly committed; on parole or probation; or subject to sex offender registration;
(B) Persons convicted on a plea of not guilty, guilty or nolo contendere;
(C) Persons deemed to have provided a confession or admission related to the crime, either before or after conviction; and
(D) Persons who have finished serving their sentences.  

The Californian legislation provides eligibility criteria as follows:

The court shall grant the motion for DNA testing if it determines all of the following have been established:

(a) All of the evidentiary criteria have been met.
(b) The identity of the perpetrator of the crime was, or should have been, a significant issue in the case.
(c) The requested DNA testing result would raise a reasonable probability that, in light of all the evidence, the convicted person's verdict or sentence would have been more favorable if the results of DNA testing had been available at time of conviction. The court in its discretion may consider any evidence whether or not it was introduced at trial.
(d) The testing requested employs a method generally accepted within the relevant scientific community.
(e) The motion is not made solely for the purpose of delay.
(f) The evidence sought to be tested meets either of the following conditions:

(A) The evidence was not tested previously.
(B) The evidence was tested previously, but the requested DNA test would provide results that are reasonably more discriminating and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results. 

Following similar criteria in Australia, it is recommended that access to crime scene evidence and DNA testing should be granted wherever:

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81 Innocence Project, above n 65.
82 Cal. Penal Code s1417.9(f)(1-6).
• the identity of the perpetrator is in issue; and
• DNA testing, if undertaken, would be relevant to the case, including cases where the applicant confessed or entered a plea of guilty.

Further, that DNA testing can be carried out on evidence where either:
• the evidence was not tested previously.
• the evidence was tested previously, but the requested DNA test could provide results that are reasonably more discriminating and probative of the identity of the perpetrator or accomplice or may contradict prior test results.

H Should there be a sunset provision in the legislation?

The New South Wales DNA Act includes a sunset provision whereby the Panel will only operate for 7 – 10 years.83 As raised by the New South Wales Bar Association:

The duty for police to retain biological samples that might permit DNA testing, and the Innocence Panel itself, only have a life of seven to ten years under the sunset clause in the legislation: sections 96 and 97. This means that samples may be intentionally destroyed by police after that time and no-one will be able to make claims to the panel.84

As noted in the foundational principles, sunset provisions should not be incorporated into DNA innocence testing legislation.

I Which laboratory tests the evidence?

An applicant’s option to undertake the DNA testing at an alternative appropriately accredited forensic laboratory to the one that undertook the original testing is particularly important to alleviate any real or perceived conflict of interest. As noted by Griffith and Roth when commenting on issues raised in respect to the New South Wales Innocence Panel:

84 New South Wales Bar Association, above n 43.
'One conflict of interest issue concerned the role played by the Division of Analytical Laboratories, NSW Health (DAL), where the process involved DAL retesting samples they had previously tested - 'It is not inconceivable that a DAL scientist would be embarrassed to discover that his or her earlier results, or those of a colleague, were inaccurate'.

The United States’ legislation varies in this regard but most stipulate that it is at the Court or State’s discretion to choose an appropriate testing facility. In California the testing facility is either mutually agreed between the prosecutor and applicant or, where there is a dispute, at the court’s discretion.

J Who should pay for DNA testing?

It is likely that with the small number of applicants expected to have evidence available for DNA testing in Australia, that the cost of the testing should not be a major issue. In terms of what DNA innocence testing would cost, the figures highlighted by the New South Wales Bar Association suggest a DNA test would cost roughly $300 in comparison to the $60,000 it costs the state to keep a person imprisoned for one year. In Queensland in 2004-05 the cost was approximately $54,000 per prisoner per year.

K Access to Court of Appeal following the DNA testing

After DNA innocence testing has been undertaken the issue of gaining access to the Court of Appeal remains. Once new evidence of innocence is uncovered, a wrongful conviction applicant needs access to appellate proceedings. The challenges in accessing current

85 Griffith and Roth, above n 32, 32.
86 Cal. Penal Code s1405(g)(2).
appellate and pardon provisions for both DNA and non-DNA based wrongful conviction applicants in Australia, are discussed in other articles and as such are not a feature of this submission. In essence, outside of New South Wales, wrongful conviction applicants in Australia must still follow the traditional pardon process. In light of reforms in England and Canada which have amended the pardon provisions under which Australia still fundamentally operates, such provisions must be considered outdated and inadequate to address the problem of wrongful conviction. Legislation for DNA innocence testing in Australia should therefore include an appellate avenue to receive DNA based claims of wrongful conviction, once new and relevant DNA evidence has been obtained.

The New South Wales DNA Review Panel has the power to refer cases to the Court of Criminal Appeal for review after the DNA test results have been received. As such, the Panel has wide decision making powers. However, the New South Wales Bar Association has raised concerns about the considerations the Panel takes into account, noting:

The considerations that the Panel must take into account under section 91 in exercising its functions are grossly inadequate. The legislation does not even mention the most important consideration of all – the need to ensure that innocent people are released from jail as soon as possible.

Under the New South Wales DNA Act, the Panel will refer cases to the Court of Criminal Appeal where it is of the opinion that there is

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90 For further information on the reforms that have taken place in England, please see the Criminal Cases Review Commission <www.ccrc.gov.uk> at 26 March 2009 and in Canada, please see the Criminal Conviction Review, Department of Justice Canada <http://www.justice.gc.ca/eng/pi/ccrc-rc/index.html > at 26 March 2009.

91 Crimes (Appeal and Review) Act 2001 (NSW) s 94(1).

92 New South Wales Bar Association, above n 43.
reasonable doubt as to the guilt of the convicted person. The decision to refer must be made at a meeting that includes the Chairperson, the Senior Public Defender or their nominated person and the Director of Public Prosecution or their nominated person. The Act does not state however, how many members of the Panel need to agree before the referral will be made.

If an appropriate legislative framework is established, there may be no need for a Panel to exist. If applicants meet relevant criteria, then arguably they should not be refused access or required to have the approval of a Panel before access to the Court is granted. Moreover, if a Panel is instituted, then it is suggested that as per the Findlay report, it have wider investigative powers so that all claims of wrongful conviction can be reviewed, not just those involving DNA evidence.

The United States appellate framework differs significantly from the approach in Australian jurisdictions. In some states in the US, appropriately worded legislation grants automatic access to the appellate courts following new DNA evidence of innocence. For example, North Carolina legislation states:

'Notwithstanding any other provision of law, upon receiving the results of the DNA testing conducted under G.S. 15A-269, the court shall conduct a hearing to evaluate the results and to determine if the results are unfavorable or favorable to the defendant. If the results of DNA testing conducted under this section are favorable to the defendant, the court shall enter any order that serves the interests of justice, including an order that does any of the following:

(a) Vacates and sets aside the judgment.
(b) Discharges the defendant, if the defendant is in custody.
(c) Re-sentences the defendant.
(d) Grants a new trial.'

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93 Crimes (Appeal and Review) Act 2001 (NSW) s 94(1).
94 Findlay, above n 36.
For Australia, it is essential that first access to DNA innocence testing become available post-appeal, and second, that access to the courts in appropriate circumstances follow.

VI SUMMARY OF RECOMMENDATIONS

1. That all DNA samples and physical evidence possibly containing biological material collected during investigations and/or prosecution be preserved indefinitely or for a minimum 10 years following release from incarceration.

2. That appropriate measures be established to ensure the continuity and integrity of any biological evidence or DNA samples for its later use in court.

3. That an inventory of evidence and all information regarding DNA and other information held by the forensic laboratories and other relevant departments in relation to the applicant’s case, be made available to the applicants or those working on their behalf.

4. That access to crime scene evidence and DNA testing be granted wherever:
   a. The identity of the perpetrator is in issue; and
   b. DNA testing, if undertaken, would be relevant to the case, including cases where the applicant confessed or entered a plea of guilty.

5. That DNA testing can be carried out on evidence that meets either of the following conditions:
   a. the evidence was not tested previously.
   b. the evidence was tested previously, but the requested DNA test could provide results that are reasonably more discriminating and probative of the identity of the perpetrator or accomplice or may contradict prior test results.

6. That DNA innocence testing is conducted at an appropriately accredited forensic centre or laboratory in Australia or overseas.
7. That a new appeal avenue be established to receive DNA based claims of wrongful conviction, once new and relevant DNA evidence has been obtained.

VII CONCLUSION

The question of whether a potentially innocent person should have a right to DNA innocence testing is one that goes to the heart of justice in any modern criminal justice system. If the Federal, State and Territory Governments are determined to deliver a truly ‘innovative, responsive and efficient justice system’ they must acknowledge and respond to the increasing impact of DNA technology on the administration of criminal justice.

There is no reason to deny DNA testing that may demonstrate a wrongful conviction. It can expose a wrongful conviction and potentially identify the real perpetrator of the crime. As such, everyone except the real perpetrator of the crime stands to benefit. Most notably this would be those who are wrongly convicted and their families but it also importantly includes victims of crime who receive only false relief from having the wrong person in prison. Further, the public will ultimately be protected if the real perpetrator is also brought to justice and therefore not free to commit further crimes and finally it is the criminal justice system itself that is also improved from correcting a wrongful conviction.

DNA exonerations, particularly in the United States, have highlighted the problem of wrongful conviction and have shown how the incorporation of a legislative framework for DNA testing can remedy a significant number of wrongful convictions. In Australia, without appropriate legislation for DNA innocence testing, wrongly convicted people and those who work on their

96 Strategic Plan 2006-10, Queensland Department of Justice and Attorney-General
behalf, face insurmountable difficulties obtaining justice. The New South Wales DNA Act offers an important development in this area, however, it is too restrictive to effectively enable the proper investigation and correction of DNA-based claims of wrongful conviction and its wholesale adoption by other states is not recommended.

In the broader sense, the absence in Australia of any DNA exonerations post-appeal reflects at least in part, the lack of effective legislation or protocols in this area. The choice for our criminal justice system is this: implement DNA innocence testing legislation or leave potentially innocent people to languish in prison or live out their lives with a criminal conviction.

As Chester Porter QC says in his recent book, The Conviction of the Innocent,

Deciding the guilt or innocence of our fellow citizens is probably the most important and difficult task we undertake. We do not get it right because we say we do. We only succeed in this task if we are constantly alert to avoid mistakes, and to correct them if they do occur.97

This article is essentially a call for effective DNA innocence testing legislative reform to be introduced into Australian states – so that current technology can expose past mistakes and allow us the opportunity to correct them. To bring Australia in line with international developments, measures must be adopted to correct wrongful convictions. The incorporation of DNA innocence testing into our criminal justice system is one such mechanism - one that is long overdue. Justice demands the implementation of DNA innocence testing legislation in order to right, wrongful convictions.

97 Porter, above n 10, 277.