Invisible innocence
It happens here too
Lynne Weathered

It is hard for most people to imagine being convicted of a crime they did not commit. Yet this scenario is not only possible, but far more likely than it should be. Sometimes it is just a matter of being in the wrong place at the wrong time, or witnesses mistaking what they thought they saw. Perhaps you were the last person to see the victim alive, and the police suspected you and did not follow other leads, or your lawyer did not provide an adequate defence, or the prosecution did not inform the defence of contrary evidence. Or perhaps the evidence was flawed. Many circumstantial cases still result in a conviction, despite the criminal justice system demanding guilt beyond reasonable doubt.

Systemic factors regularly result in the conviction of innocent people: incorrect eyewitness identification, tunnel vision, bad lawyering, withholding exculpatory evidence, incorrect scientific evidence, false confessions, informant/anitch testimony. Eyewitness identification, which can so convincingly influence a jury, is the major factor in wrongful convictions later corrected by DNA evidence in the United States.

Imagine if this happened to you. You know the truth: you are innocent; someone else is not. At least two people know the truth — the perpetrator and you — but to the rest of the world the case is closed and you are guilty. Your innocence is invisible. You can shout and scream to those who will listen but, even if they believe you, what can they do — how can they correct a
terrible mistake in a system that has concluded through detailed, sophisticated processes that you are guilty?

The Griffith University Innocence Project was established a decade ago to assist wrongly convicted people in Australia. It is part of an international movement that involves more than fifty pro-bono organisations. Hundreds of innocent people have now been exonerated, most from the United States, but also from England, Canada and elsewhere.

The stories are compelling and heart-wrenching — stories of lives marred away for years, sometimes decades. Patrick Nicholls told the English Criminal Cases Review Commission: ‘It was a nightmare…It lasted twenty-three years. Looking back, I don’t know how I’m still here. I used to wake up at night, bathed in sweat, stuck to my mattress…And nobody understood; only the other innocent people in prison — and there are a number of them…You never give up hope, I never gave up hope in twenty-three years.’

Rubin ‘Hurricane’ Carter was released from prison in 1985, after serving almost twenty years — many of them spent in solitary confinement, for refusing to act like a guilty man — for a triple-murder he did not commit. His story became the film The Hurricane, starring Denzel Washington, and it highlighted not only the tragic circumstances of the conviction and incarceration, but Carter’s incomparable spirit. That spirit has been devoted to working for other wrongly convicted people since his release. Rubin endorsed the Griffith University Innocence Project in 2003, and his haunting statement, ‘Freedom is something that can be taken for granted. Until it’s taken away,’ reminded us that the nightmare of being wrongly convicted can happen here.

On 4 January 2011, Cornelius Dupree from Texas was declared innocent after thirty years in prison for rape and robbery — crimes he did not commit. DNA testing finally highlighted his wrongful conviction, thanks to the long-term preservation of the evidence in his case. About a dozen fellow ‘exonerates’, following a new tradition, waited outside the prison gates to greet Dupree. Another 266 American exonerates have been released with the help of DNA innocence testing. Their experiences have enabled the criminal justice system to learn what went wrong in specific cases, and identify systemic causes of wrongful conviction.

The voices of the wrongly convicted are powerful, and they remind us not to ignore those who claim innocence. They remind us that the system needs to examine claims of wrongful conviction, so that innocent people do not languish in prison or live with the stigma of a wrongful conviction for the rest of their lives. They remind us that they too have been victims of a system that got it wrong.

IN APRIL 2002, I attended a wrongful-conviction conference at Harvard University. It was the first time I had heard the stories of the wrongly convicted. I listened to a father, wrongly identified and convicted of rape, who constantly read and researched the law, and eventually obtained a DNA test to prove his innocence. ‘Are you sure you have enough blood?’ he asked when they finally came to take a sample for the test. He met his daughter when she was fourteen. He had been in prison since she was a baby. Every exoneree has a horror story. As I listened I marvelled at their ability to withstand the injustice and their ability to forgive.

I remember listening to the beautiful Jennifer Thompson describe how she was horrifically raped, survived the vicious attack, and how her eyewitness testimony and incorrect cross-racial identification resulted in the conviction of an innocent man, Ronald Cotton. She described her apology to Cotton, his forgiveness, and the firm friendship they and their families now share. I think of the mother who fought for twenty years to prove her son’s innocence, while raising her other children, who had to endure the tormenting comments of others.

I remember speaking to the remarkable Betty Anne Waters, whose story became the Hollywood movie Conviction, released in Australia in February this year. Waters told me of the lengths she went to in her efforts to prove her brother, Kenny, was innocent — putting herself through law school and gaining admission as a lawyer before, with the Innocence Project in New York, achieving her brother’s exonerations eighteen years later. He died six months later. She emphasised that no one wins when the wrong person is convicted, and the issues last long after release. The 267 American DNA exonerees spent approximately 3,471 years in prison; seventeen were
on death row — and this is the tip of the iceberg. When they are released, many face financial, emotional and psychological trauma and distress, in addition to the practical difficulties of re-entering a world that has significantly changed.

As I listened to these stories, it was apparent just how much time and effort it takes to achieve exonerations. Many won’t succeed. I remember thinking that Australia would be different. I was certain that the battle for DNA innocence testing in the United States would not be repeated in Queensland, in Australia. That our more conciliatory system would be reflected in a co-operative approach to uncovering wrongful convictions. That Australia’s approach to correcting wrongful convictions would be a model for other countries to emulate.

I was wrong.

WHEN CHRIS NYST and Jason Murakami from Nyst Lawyers suggested the Griffith Law School create an innocence project, I was excited. It appealed to my ideals of justice; I was young and idealistic. None of us imagined how difficult it would be to have post-appeal reviews of innocence claims properly considered, or that it would take a decade to establish guidelines to make it possible.

From the outset we were thwarted as we sought information about cases where DNA evidence existed. It took almost seven years after our investigations began into two cases before we were even told whether evidence existed.

Semester after semester, year after year, I told my students about countless letters; numerous meetings with government authorities; exhausted Freedom of Information avenues; meetings with Attorneys-General — five since the project began; briefs prepared for counsel; project advisory board meetings and the board’s support for DNA innocence testing; and formal submissions for law reform prepared and presented to gain information. Inevitably at least one student would ask, ‘Why won’t they tell you whether evidence exists? Why won’t they do a DNA test?’ I would attempt to explain the complexities involved as I understood them, but felt I never satisfactorily answered their questions, as even today I am unsure exactly what the full answers are.

WRONGFUL CONVICTION IS an almost impossible predicament. It is not meant to occur in a civilised society with a sophisticated criminal justice system. But it does. And effecting even a minor change in a criminal justice system that is respected and well established is never easy.

Australia is different to the United States. The problem is not the same, for our systems are different. In many cases we have greater protections to help prevent wrongful conviction in the first place — audio or video recording of interrogations, time limits on how long a suspect can be held in custody. Our judges are appointed and not elected. But we can make terrible mistakes — Lindy Chamberlain, John Button, Edward Splatt and Andrew Mallard are just a few Australians who have endured wrongful convictions.

Commissions of Inquiry in Australia have long highlighted the potential for wrongful conviction through overzealous policing or police corruption. ‘Verbally’ of suspects was found to be commonplace by the 1980s Fitzgerald Inquiry in Queensland. The Wood Royal Commission in 1997 in New South Wales highlighted flaws in police practice there. There is no easy answer to the problem of wrongful conviction. It requires vigilance — by politicians, lawyers, journalists, and all others who care about the rule of law and criminal justice.

Because our criminal justice system is not perfect, wrongful convictions will continue to occur. YouTube and the Internet more broadly have made footage readily available of severely inappropriate manhandling of suspects by police officers. One 2010 recording shows a police officer assaulting a man and a woman, including chopping a hose into the man’s bloodied face. Acceptance of the system’s imperfections does not equate to complacency. It moves us to recognise something must be done and the disempowered position of our applicants adds to our sense of responsibility.

ONE OF THE clear lessons from the US innocence movement was how DNA testing shed new light on old cases. Innocence projects were
highlighting how much could be achieved by law students working under the supervision of experienced criminal lawyers and academics. They became a unique resource, able to undertake much of the time-consuming case review for course credit. The applicants have someone to review their case free of charge; the students gain a much better understanding of the strengths and weaknesses of the criminal justice system, work on real cases where principles of justice are highlighted, and become skilled in managing files. For many, it is a return to the ideals that attracted them to the study of law in the first place.

The Griffith Innocence Project, modelled on and adapted from these projects, focuses on cases where DNA has the potential to uncover a wrongful conviction. Each semester students learn a great deal about the criminal justice system, work on real cases and, as a result of their experiences, seemingly further develop the desire to add their fingerprint to the efforts for justice.

Before it can be determined whether DNA testing could highlight a wrongful conviction, a thorough review of the material used at trial to secure the conviction is needed. Consideration of witness statements, records of interviews with police, brief of evidence, committal and trial transcripts, and any other available scientific evidence are also part of the review. The key question becomes: what biological material could be DNA tested that might show a wrongful conviction, to exclude the applicant and potentially provide the DNA profile of the real perpetrator?

To be probative, the biological material to be DNA tested needs to be sufficiently connected to the crime. For example, DNA testing of a rape kit has the potential to confirm the correctness of the conviction. If the DNA profile obtained not only excludes the person convicted but matches another on the criminal database, it also possibly identifies the perpetrator. In 117 of the US DNA exonerations, the true suspect or perpetrator has been identified.

The next step is to determine what biological material is available for DNA innocence testing and to gather any other scientific information. Queensland Health Forensic and Scientific Services, commonly known as the John Tonge Centre, is where most DNA tests in the state are undertaken, and was the starting point for the further investigation and requests for information on cases after our initial review. Early on we wrote letters requesting specific information about cases. But when the information was not forthcoming, we realised that pursuing information on behalf of our applicants was not going to be easy.

We were undertaking activities beyond the traditional legal avenues, and newness was one of our obstacles: there were no precedents for providing this information. Meetings and discussions failed, and we could not obtain information about what evidence existed for potential DNA testing.

Freedom of Information also failed, despite requests and payments by applicants who had so little money. Selected information was provided but it became clear that Freedom of Information would not provide a full review. Not only was the known available information not fully provided, but also the possible unknown documents that could make a difference. The Andrew Mallard case showed that when exonerating documents not disclosed to the defence at trial became available, new light was shed on the case. But you cannot request a document through Freedom of Information if you do not know it exists.

REFORM WAS NEEDED if claims of wrongful conviction were to be effectively reviewed. The Attorney-General would have to intervene to access information and DNA innocence testing. We have had support from five Attorneys-General since the project commenced but the process was never easy. Rod Welford was the first we met in 2002. His office subsequently began considering two cases, but while the extra information he sought was being prepared a new Attorney-General was appointed. Because no legislation or protocols formally existed, with each new Attorney-General we essentially started again – gaining support and then satisfying the additional requirements of each. Four barriers, including two QCs, provided pro-bono briefs, stating that after reviewing the cases, they considered them suitable for DNA innocence testing. From initial investigations, the process took almost seven years before we were informed whether the evidence for such testing even existed.

The answer was no. There was no evidence that could be tested in either case. We were very disheartened. It was devastating for the applicants. We
reminded ourselves that despite all the setbacks we were still pursuing a just
cause, and that the students were learning important lessons, including the
significance of undertaking work to the best of their abilities and the most
ethical way in whatever area of law they chose — they were seeing the conse-
quences of potential failures in the system.

Knowledge of the existence or not of evidence to test is essential and
seemingly non-controversial. Our experience highlighted the need for informa-
tion about the evidence to be provided in a timely fashion, and the need to
preserve evidence for possible future testing.

Knowing that some American innocence projects had been told there
was no evidence, and evidence was later found, we asked when the biological
evidence in the two cases we were pursuing had been destroyed. Six months
later we were told that biological material from one case still existed.

Immediately afterwards, Cameron Dick became our fourth Attorney-
General, and our advisory board, which includes prominent and highly
respected judges and lawyers, among them at that time the former High
Court Justice Mary Gaudron, began to push for DNA testing. The media got
wind of the investigations, and — while we had never publicly discussed cases,
out of respect for victims and their families — this increased the pressure.

In December 2009, Attorney-General Dick allowed DNA restesting to
take place on one piece of the biological evidence collected and tested for the
original trial. The DNA testing used on this piece of evidence at the time
is now considered highly subjective and new technology has dramatically
improved the accuracy of testing, assuming the now twenty-year-old evidence
still has integrity. The restesting in 2010 provided a remarkably perfect match
to the DNA of the suspect — yet aspects of the collection, handling and labell-
ing of samples and evidence two decades ago unfortunately call into question
its true probative value today. It is likely that other, significantly more proba-
tive evidence exists in this case that has never been DNA tested.

There are multiple dilemmas in the use of DNA in criminal courts, at
the juncture between law, science and the media. DNA can absolutely exclude
someone as the donor of the crime scene biological sample — but when it is
used to demonstrate a person’s guilt, calculations are employed to estimate the
likelihood of the DNA profile obtained from the sample originating from the
accused compared with the chance of it coming from another person selected
at random. Such calculations might suggest billion-to-one odds in a country
of about 22 million people, and could easily lead to an inflated impression of
a defendant’s connection to the crime. DNA ‘matches’ can be reported or
construed by juries as conclusive evidence of guilt without their having
considered interpretative error, contamination, or planting of evidence,
among other things.

Even today, with more stringent procedures for the collection, trans-
fer, storage and testing of biological evidence, errors still occur. Recently,
in Victoria, contaminated DNA evidence resulted in Farah Jama spending
approximately fifteen months in prison before his conviction was overturned.
Despite this, Jama was fortunate. If the mistake had not been corrected at
appeal he might well have languished in prison, yet another of those inmates
claiming innocence but with no opportunity to prove it.

After almost a decade of lobbying, on 5 August 2010 Queensland Attor-
ney-General Cameron Dick introduced guidelines that allow, for the first
time, an official avenue for DNA innocence testing for wrongful-conviction
applicants. These guidelines alone will not be sufficient to correct wrongful
convictions, or address the systemic issues surrounding wrongful conviction.
Much more needs to be done — possibly including a body to review all claims
of wrongful conviction, akin to England’s more wide-reaching Criminal
Cases Review Commission. For the small number of wrongful convictions
in which DNA will be probative, these guidelines are limited and require
further expansion.

Yet the guidelines are a substantial step forward in promoting justice. In
the US, forty-eight states have DNA innocence-testing legislation; in Austra-
lia only Queensland and New South Wales have guidelines. More must and
will be done, and these guidelines have started us on the right path.

Time is of the essence. The Queensland guidelines tacitly acknowledge
that despite the state’s sophisticated criminal justice system, wrongful con-
victions occur — and no one wins when an innocent person is incarcerated. These
guidelines will finally allow some of the wrongly convicted people in Queens-
land to use DNA to prove their innocence.

Our students are a success, too. A system is made up of rules, but people
make those rules. I am confident some of our students will be among those who will make a difference for the better when they join the workforce.

As the film Conviction highlights, exonerations are never easy and almost always involve a long, hard-fought battle. Prisoners are some of the most disadvantaged and disempowered people in society, and those who claim innocence are easy to ignore. The project will continue to fight for proper investigation of claims, to correct errors and support reforms to reduce the potential for wrongful convictions. It will work to assist those who are wrongly convicted to make visible their innocence.

Lynne Weathered is a lecturer and convenor of the Griffith University Innocence Project, initiated and supported by Nyet Lawyers partners Chris Nyet and Jason Mushakami. She is also a member of the board of the International Innocence Network. The views expressed in this article are hers, and not necessarily those of the project or network.