INVESTIGATING INNOCENCE
The Emerging Role of Innocence Projects in the Correction of Wrongful Conviction in Australia

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DNA technology has uncovered the significant problem of wrongful conviction in the United States. Australians tend to have great faith in our criminal justice system; however, innocent people have also been wrongly convicted in this country. As a society, we must never become complacent about our criminal justice system: we must continually address areas likely to be relevant to the incidence of wrongful conviction, and we need mechanisms for the proper review of claims of innocence. Following in the footsteps of Innocence Projects in the United States, Innocence Projects in Australia are emerging as a resource for the investigation of claims of wrongful conviction with the aim of freeing innocent persons from incarceration. The majority of wrongful conviction claims will not involve DNA evidence, making the investigative work of Innocence Projects more complex and time-consuming, but also a task in which student resources are particularly valuable. To enhance the effectiveness of addressing claims of wrongful conviction, adoption of legislation or procedures is required. This would include changes requiring the preservation of evidence and expanded access to the courts of appeal for persons who have exhausted their one appeal prior to investigations uncovering evidence of innocence.

Introduction

Wrongful conviction is a fact of life in Australia, just as it is in other sophisticated criminal justice systems. The enormous faith that existed in our systems of law enforcement has meant that, until recently, claims of wrongful

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conviction almost always went unheeded.[1] The advent of DNA technology has changed that. In the United States, DNA testing has unveiled with disturbing frequency the wrongful conviction and imprisonment of an innocent person. It must now be accepted that guilt beyond reasonable doubt in the courtroom does not always equate to actual guilt.

This article initially reviews the international problem of wrongful conviction and argues that the first step in correction of wrongful conviction in this country is the recognition of its occurrence. The second part of the paper outlines the causal factors likely to be relevant to Australia, by looking to those that are known to be significant in contributing to the conviction of innocent persons in this jurisdiction and in the United States, England and Canada. The next section reviews the role that the Innocence Project in the United States has played in correction of wrongful conviction. The recent extension of Innocence Projects to Australia signals a new development in addressing wrongful conviction in this country. Accordingly, the final section considers the current activities of Innocence Projects, and the potential role they will play in the correction of wrongful conviction in Australia. It also overviews some immediate issues for Innocence Projects in this country, sometimes drawing on lessons learned from the US experience. The article concludes with a brief review of issues and recommendations relevant to enabling Australian Innocence Projects to emerge as an effective resource — albeit a limited and last resort, for persons seeking to prove their innocence after being wrongly convicted.

Wrongful Conviction: An International Overview

Wrongful conviction is an international problem, most notably highlighted through the recent spate of DNA exonerations in the United States. The actual incidence of wrongful conviction is virtually impossible to calculate. Estimates in the United States range between 0.5 and 5 per cent of all incarcerated persons.[2] With close to two million Americans in prison, this amounts to thousands of innocent people in incarceration.[3] The often quoted estimate in Australia and elsewhere in the world is that around 1 per cent of innocent persons who are tried for an offence are convicted.[4] If this estimate is true, there are approximately 200 innocent persons in prison throughout Australia at any given time.[5]

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1 Marshall (1998).

2 For example see estimates produced in Huff et al (1996), pp 53–67.

3 The Federal Bureau of Justice Statistics report (Glaze, 2003) indicates that 1 962 220 adult persons were incarcerated in the United States in 2001.

4 See, for example, Whitton (1998), p 11. This is considered a conservative estimate in the United States: see Huff, Rattner and Sagarin (1996), pp 53–67.

5 As of the June Quarter 2003, the average daily number of prisoners incarcerated within Australian prisons was 22 507. See Australian Bureau of Statistics (2003).

To date, the use of DNA technology has shown 138 persons in the United States to be innocent of the crime of which they were convicted,[6] including at least 13 who had been sentenced to death.[7] It is estimated that wrongful conviction has resulted in the execution of 23 innocent persons in the United States, due to the imposition and carrying out of the death penalty in those cases.[8]

There are other wrongfully convicted persons whose exonerations are not included in the above exoneration figures, as their cases did not involve DNA evidence.[9] One man, Anthony Porter, had already been fitted for his coffin and was hours away from his scheduled execution when journalism students at Northwestern University in Chicago, with the assistance of a private investigator, not only uncovered proof of his innocence but also helped to find the real perpetrator of the crime.[10] Innocence Projects in the United States have been the fundamental resource for the investigation and exoneration of the majority of these innocent but convicted persons in both DNA and non-DNA cases.

In January 2003, Governor Ryan of the state of Illinois in the United States exonerated four individuals on death row on the grounds of innocence following investigation of their cases, and commuted all other death row sentences.[11] A former supporter of the death penalty,[12] Governor Ryan is now one of its ardent critics. He discovered the risk of executing an innocent person was much too high.[13]

The devastating impact of wrongful conviction is not limited to criminal justice systems that incorporate the death penalty. Nor is the impact restricted to the more obvious consequences such as the loss of freedom, family, friends and income. Early studies into the psychological impact of wrongful conviction are now taking place and are beginning to document the complex and continuing traumas associated with wrongful conviction that affect individuals well beyond actual incarceration.[14] Some of the potential symptoms suggested by the findings to date include an enduring personality

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6 As at 3 November 2003. See the Innocence Project website statistics: www.innocenceproject.org

7 Neufeld (2002).

8 Griffin (2001).

9 This number is likely to exceed 200 if one includes non-DNA exonerations over the last decade. A list incorporating non-DNA exonerations is yet to be completed: Innocence Project Conference, New Orleans, March 2003.

10 Marshall (2002), p 85.

11 This occurred on Governor Ryan's last two days in office. It received significant media attention in the United States. The four men exonerated were Aaron Patterson, Madison Hobley, Stanley Howard and Leroy Orange: Governor's Commission on Capital Punishment (2002); Ryan (2003).

12 Ryan (2002).

13 Governor's Commission on Capital Punishment (2002); Ryan (2003).

14 Grounds (2002).

change, severe post-traumatic stress disorder, and other additional disorders.[15] To those working with the wrongfully convicted, the immense suffering is clear. Their mere survival, and their ability to incorporate grace and forgiveness into their lives, are the more surprising aspects.[16]

Rubin 'Hurricane' Carter's wrongful imprisonment was immortalised in the Bob Dylan song, 'Hurricane' and in the more recent movie of the same name. Rubin Carter is now the executive director of the Association in Defence of the Wrongly Convicted (AIDWYC) in Toronto, Canada. In this role, he actively works to help others who are still, or who have been, wrongfully convicted. This organisation is responsible for the exoneration of several other wrongfully convicted Canadians.[17]

England has witnessed its own high-profile and highly publicised wrongful convictions.[18] But many other wrongful convictions have occurred in that country, whose stories we do not hear, such as that of Patrick Nicholls. In his words:

> It was a nightmare. A long extended 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 that's how it carried on for twenty-three years. And nobody understood; only the other innocent people in prison — and there are a number of them in prison …
>
> You never give up hope. I never gave up hope in twenty-three years.[19]

Derek Bentley provides another example. Bentley was executed in England when he was 19 years old for the murder of a police officer. His mental age at the time of the murder was that of an 11-year-old. He was at the scene at the time of the murder. The incident, the fatal shooting of a police officer, took place on 2 November 1952. By 28 January 1953, less than three months later, Bentley had been convicted, his appeal had been turned down and he was hanged.[20] His niece, Maria Dingwall-Bentley, and her family spent the 40 years fighting to prove his innocence. Bentley's conviction was finally quashed and a full posthumous pardon granted by the Court of Appeal in England, on 30 July 1998.[21]

Australia is not immune to the tragedy of wrongful conviction, though it still appears to be generally regarded as a problem that occurs in rare and isolated events in this country. Great faith resides in our criminal justice

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15 Such as 'permanent loss of joy': Grounds (2002); Manitoba Justice (2001).

16 Neufeld and Scheck (2003), p 9.

17 For more information on AIDWYC, see www.aidwyc.org.

18 For example, the Birmingham Six and the Guildford Four.

19 Statements by Patrick Nicholls in Criminal Cases Review Commission, *Open to Question*, Video recording, viewed 2 September 2002.

20 Campbell (1998).

21 Campbell (1998).

system. Yet Australia's criminal justice system is not perfect. Recent examples of wrongful conviction in this country highlight this fact.

Much of the 2003 April headline news in Australia was devoted to the case of Natasha Ryan.[22] Leonard Fraser was on trial for her murder (along with the murder of three other women) when Ryan showed up alive and well. Police were alerted to the fact that she was alive in the weeks prior to the trial.[23] The case highlights, in the most dramatic of ways, the ability of our criminal justice system to potentially convict a person of the most serious crime of murder when they not only had no part in the crime, but in fact the victim was still alive.

John Button in Western Australia, convicted of the manslaughter of his girlfriend Rosemary Anderson, spent approximately five years incarcerated for this crime, and almost four decades fighting to prove his innocence. The Court of Appeal of Western Australia finally overturned his conviction in early 2002.[24] The Mickelberg brothers in Western Australia, convicted of stealing gold bars from the Perth mint, between them spent 15 years of their lives in prison. In 2002, a former police officer admitted to fabricating the evidence used to convict them.[25]

Flaws in Queensland's criminal justice system were earlier exposed during the Fitzgerald Inquiry, more recently with the exoneration of Frank Button and again with the Natasha Ryan incident. Frank Button was convicted of rape and spent almost a year in prison. DNA testing was undertaken prior to his trial, though it provided little insight into the case, with the spermatozoa tested from the complainant's swabs, failing to reveal a DNA profile of the donor.[26] Through the insistence of his appeal lawyers, additional DNA testing was undertaken prior to appeal. This additional testing included that of a bedsheet which had not originally been tested. The additional DNA tests excluded Button as a contributor to the seminal stains on the bedsheet. In addition, further testing of the complainant's swabs resulted in the conclusion that the same male was the donor of the sperm on the bedsheet and the swab, exonerating Button.[27] When the Court of Appeal asked why the testing of the bedsheet was not originally undertaken, the prosecutor responded that it was because it would not have been helpful in identifying the accused as the perpetrator of the crime.[28] As remarked by Mr Justice Williams of the Court of Appeal, scientific testing is meant to be performed not just for the purpose of

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22 Television and newspaper coverage of this case was extensive over the period 11–14 April 2003. For example, Doneman et al (2003a, 2003b); Allen (2003).

23 Willis (2003).

24 *Button v The Queen* [2002] WASCA 35 (25 Feb 2002). The wrongful conviction of John Button was explored in an episode of *Australian Story* (2002). See also Button (1998); Blackburn (2001).

25 Rule (2002).

26 See in Particular pages 1–2 of Crime and Misconduct Commission (2002).

27 *R v Button* [2001] QCA 133 (10 April 2001); Crime and Misconduct Commission (2002).

28 *R v Button* [2001] QCA 133 (10 April 2001), per Williams JA.

confirming the identify of suspects but for the possible exclusion of them.[29] The Court of Appeal described this case as a 'black day in the history of the administration of criminal justice in Queensland'.[30]

The Crime and Misconduct Commission in Queensland, following Frank Button's successful appeal, undertook an investigation into the wrongful conviction with a particular focus on forensic testing and procedures.[31] The Inquiry resulted in some recommendations for the improvement of forensic science service delivery in Queensland.

Summary

Australia's criminal justice system has much in common with those of the United States, Canada and England. All are based on adversarial systems. All rely on police for investigation of crimes. All have 'beyond reasonable doubt' as the standard for criminal conviction. All have prosecutors, defence lawyers, judges and juries playing vital roles within the system. This system is one in which only the guilty should be convicted. Yet innocent persons in all these jurisdictions have been proclaimed guilty beyond reasonable doubt. Acknowledging that wrongful conviction occurs is the first step in addressing its correction. Further, the incidence of wrongful conviction in other countries should remind us of the flaws in our own system, and provide examples of how we can act to prevent and address wrongful conviction in this country.

Causal Factors in Wrongful Conviction

> I studied every single detail on the rapist's face. I looked at his hairline; I looked for scars, for tattoos, for anything that would help me identify him. When and if I survived the attack, I was going to make sure that he was put in prison and he was going to rot …
>
> I knew this was the man. I was completely confident. I was sure … (Jennifer Thompson)[32]

By drawing on the known causal factors in the United States, England, Canada and Australia, the following overview speculates on the potential causal factors relevant to wrongful conviction in this country. The discussion below does not fully explore causation, nor claim to list the causes of wrongful conviction in Australia. Such an examination would be relevant to any discourse on prevention of wrongful conviction. Lobbying for reforms to prevent wrongful conviction is a major part of Innocence Project work in the United States.

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29 *R v Button* [2001] QCA 133 (10 April 2001), per Williams JA

30 *R v Button* [2001] QCA 133 (10 April 2001), per Williams JA.

31 See Crime and Misconduct Commission (2002).

32 Jennifer Thompson is a rape victim whose testimony helped wrongfully convict Ronald Cotton, an innocent man. Jennifer Thompson now campaigns to highlight the potential problem of eyewitness identification. This has been taken from her writings for the *New York Times*, reprinted in Scheck, Neufeld and Dwyer (2001), p 333.

However, for the purposes of this article, the following overview is limited to providing a basic framework from which the need for corrective mechanisms may be better understood. The primary known causal factors in wrongful conviction are explained below.[33]

Faulty Eyewitness Identification

Faulty eyewitness identification is a cause of wrongful conviction in up to 61 per cent of DNA exonerations in the United States.[34] Our memories are not like video recordings. They are often inaccurate. Memory is malleable and a myriad of factors impact on the accuracy of eyewitness identification.[35] These include the 'characteristics of the witness, characteristics of the witnessed event, characteristics of testimony, lineup content, lineup instructions, and methods of testing'.[36] DNA exonerations have highlighted the role of eyewitness identification in wrongful conviction; however, because the majority of convictions will not involve DNA evidence,[37] eyewitness identification is likely to remain significant factor in wrongful conviction.[38]

Investigative techniques used by police can play a vital role is either increasing or reducing the likelihood of error in this area.[39] For example, recent studies in the United States have shown that a double-blind sequential lineup will comprehensively reduce the chance of wrongful conviction through eyewitness identification.[40] In a sequential lineup, only one person or photo is shown to the eyewitness at a time, as opposed to the traditional procedures where lineup members or photos are shown to the eyewitness simultaneously.[41]

While Australian courts offer strong directions to juries on the potential hazards of eyewitness identification,[42] earlier measures such as the double-blind sequential lineup should be incorporated into police practices in Australia to reduce the incidence of faulty eyewitness identification coming before the courts.

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33 See generally, Scheck, Neufeld and Dwyer (2001); Huff, Rattner and Sagarin (1996); Innocence Project website: http://innocenceproject.org/

34 Innocence Project (2003a).

35 The following two articles highlight the phenomenon: Wells et al (1998); Wells and Olson (2003).

36 Wells and Olson (2003), p 277.

37 The role of DNA is discussed later in this article.

38 Wells and Olson (2003), p 278.

39 Wells and Olson (2003).

40 Wells and Olson (2003), pp 288, 289.

41 Wells and Olson (2003), p 288. Double-blind requires that the police officer conducting the eyewitness identification not know which one of the individuals present or photographs shown is the suspect.

42 See *Domican v R* (1992) 173 CLR 555.

Use of Informer Evidence

Informer evidence has been shown to be highly unreliable, as demonstrated by its recurrence in cases of known wrongful conviction.[43] Inquiries in Canada have uncovered the major role that informer evidence played in the wrongful convictions they were investigating.[44] In a related issue, it has been known in some cases for the actual perpetrator of the crime to give evidence that was used to convict an innocent person.[45]

Overzealous or Improper Police Investigation or Prosecution

Many aspects of police investigation and prosecution of cases can be incorporated into this category, such as suppression of exculpatory evidence, evidence fabrication and coercion of witnesses.[46] Failure of the prosecution to disclose all relevant information to the defence appears to be a concern in this country.[47] The prosecution in a criminal trial is supposed to provide full disclosure in Australia,[48] yet what amounts to full disclosure is still somewhat ambiguous.[49] Internationally, it has been suggested that a clearer understanding and mandatory sessions for police and prosecutors on what full disclosure actually requires of them may reduce the problem that still exists in this area.[50]

Tunnel Vision

Another aspect of the above category, though one not restricted to police and prosecution, is that of 'tunnel vision'.[51] Tunnel vision often occurs when police believe they know who the perpetrator of the crime is, and then fail to properly investigate other evidence that is inconsistent with their theory.[52] Exonerating evidence may be available but not investigated. The danger of tunnel vision is explained in the Thomas Sophonow Inquiry report, which was published following a major investigation into one of Canada's cases of wrongful conviction:

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43 Informer evidence played a significant role in the wrongful conviction of Rubin 'Hurricane' Carter. Informer evidence was a significant factor leading to wrongful convictions in 16 per cent of the 70 DNA exonerations examined: Innocence Project (2003a).

44 See, for example, Commission of Inquiry, Manitoba Justice (2001); Ministry of Attorney General (2000).

45 See, for example, Huff, Rattner and Sagarin (1996), pp 77–78.

46 See, for example, Innocence Project (2003b).

47 For example, this issue has been raised in a number of general Innocence Project discussions and at a recent forum: CAFSA (2002). See also *Easterday v The Queen* [2003] WASCA 69 (28 March).

48 See, for example, Director of Public Prosecutions Queensland (1995), p 21.

49 As raised in a number of general Innocence Project discussions.

50 As suggested by Steven Sheriff, AIDWYC Conference, 'Innocents Behind Bars', Panel, Canada, November 2002.

51 The Commission of Inquiry, Manitoba Justice (2001).

52 The Commission of Inquiry, Manitoba Justice (2001).

> Tunnel vision is insidious. It can affect an officer or, indeed, anyone involved in the administration of justice with sometimes tragic results. It results in the officer becoming so focused upon an individual or incident that no other person or incident registers in the officer's thoughts. Thus, tunnel vision can result in the elimination of other suspects who should be investigated. Equally, events which could lead to other suspects are eliminated from the officer's thinking. Anyone, police officer, counsel or judge can become infected by this virus.[53]

Investigative DNA testing may reduce (though it will not eliminate) tunnel vision as a primary cause of wrongful conviction because such testing can result in the early elimination of suspects. Studies in the United States have shown that approximately 25 per cent of primary suspects in sexual assault cases are now excluded as the perpetrator of the crime through pre-trial investigation utilising DNA testing. This gives rise to the question of how many of those excluded in this process would have been wrongly convicted prior to DNA investigative testing.[54]

Bad Defence Lawyering

The United States supplies the most famous examples of bad defence lawyering. Cases involve defence lawyers who have been either drunk or asleep, or both, through at least part of an accused person's trial. Such counsel is almost inevitably rendered to indigent accused, of whom some are ultimately sentenced to death.[55] Some such cases have been appealed in the Supreme Courts of the United States, where it was argued by counsel for the prosecution that sleeping or drunk counsel does not necessarily equate to inadequate counsel.[56]

In Australia, such level of disregard for the role of the criminal defence lawyer is unlikely. However, if poor defence lawyering has resulted in the conviction of an innocent person and is the ground for the appeal, laws in this country make it is difficult to succeed.[57] In addition, the interplay between

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53 The Commission of Inquiry, Manitoba Justice (2001).

54 Bernhart (1999), p 75: 'Every year since 1989, in about 25% of the sexual assault cases referred to the FBI… [pre-trial during the investigation of a criminal case] … where results could be obtained … the primary suspect has been excluded by forensic DNA testing. That is, in about 10 000 of sexual assault cases since 1989, approximately 2000 tests have been inconclusive and approximately 2000 have excluded the primary suspect …', citing Neufeld and Scheck (1996), p xxviii.

55 Bright (2001); Weinstein (2000).

56 See, for example, No Attribution (2002); BBC News (2001).

57 The basic requirements for a claim of inadequate counsel in Australia are 'flagrant incompetence' in the sense that the conduct of counsel was so far outside the standard of competency to be reasonably expected of counsel as to have caused or appear plainly likely to have caused a miscarriage of justice: *R v Birks* (1990) *A Crim R* 385, p 392. Case examples where a claim of inadequate counsel was unsuccessful include: *Ella v R* (unreported) CA 13 of 1990; *R v Paddon* (unreported) CA 122 of 1998.

poor defence lawyering and the restrictive provisions for appealing in Queensland and in other states can further an unjust conviction and incarceration. This aspect is discussed later in this article in relation to proving innocence.

Incorrect Scientific Evidence

The Lindy Chamberlain case highlights the role that incorrect scientific evidence has played in wrongful conviction in this country. The United States has uncovered some startling use of 'scientific' evidence presented in court. One scientist, who often testified in court on behalf of the prosecution, on many occasions never undertook the tests to which he was testifying in court.[58] His evidence ultimately resulted in the wrongful conviction of innocent persons.[59] Inaccurate scientific evidence also played a significant role in the wrongful conviction of Guy Paul Morin in Canada, as highlighted through the inquiry into that case.[60] Proficiency testing in the United States has highlighted significant problems with most scientific evidence, including hair and fibre testing, handwriting, bite marks and tool marks.[61] Even fingerprint evidence, once accepted as gospel by the criminal justice system, has been shown to be less than an exact 'science'.[62]

Hair 'matching' is one of the most problematic areas. Scientific evidence has often been presented purporting to identify the perpetrator of the crime, through the matching of the defendant's hair to that found at the crime scene. DNA testing is highlighting the fallibility of such evidence. For example, in 1987, Jimmy Bromgard was convicted of the rape of an eight-year-old girl and sentenced to 40 years' imprisonment.[63] Original test results relating to the spermatozoa found on the girl's underwear could not be typed so the forensic case against Bromgard came down to the hairs found on the bed sheets. Arnold Melnikoff, hair examiner and Laboratory Manager of the Montana Laboratory of Criminalistics, fraudulently testified that there was a one in 10 000 chance that the head and pubic hairs found on the bed sheets belonged to someone other than Bromgard.[64] The girl's underwear was later retested and the results indicated that Bromgard could not have been the contributor of spermatozoa found on the girl's underwear.[65] Bromgard spent 15.5 years in prison.

DNA testing has been significant in exposing and correcting wrongful conviction. DNA results can, however, also be a causal factor in wrongful

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58 The scientist identified, state trooper Fred Salem Zain was in charge of serology for West Virginia's crime laboratory: Scheck, Neufeld and Dwyer (2001), p 140.

59 Scheck, Neufeld and Dwyer (2001), pp 142–51.

60 Ministry of Attorney General (2000).

61 Saks (2001).

62 Cole (2001); *Four Corners* (2002), highlighting the case of Shirley McKie, a police officer wrongly accused based on incorrect fingerprint evidence.

63 Innocence Project (2003c).

64 Innocence Project (2003c).

65 Innocence Project (2003c).

conviction. At least two false DNA matches have occurred overseas.[66] Juries can be required to understand differing interpretations of DNA results if asked to comprehend what is often challenging statistical information.[67] False or misleading DNA testing results have the potential to result in wrongful conviction.[68] As noted earlier, the report of the Crime and Misconduct Committee in Queensland into the wrongful conviction of Frank Button recommended improvements in the delivery of scientific evidence in that state.[69]

Plea Bargaining

Plea bargaining often occurs in the lower courts where the wrongful conviction is unlikely to be investigated, uncovered or reported.[70] For those jurisdictions which incorporate the death penalty, the most obvious reason for an innocent person to plead guilty is the desire to ensure a life sentence, as opposed to the death penalty. However, there are many reasons why an innocent person may agree to plead guilty in jurisdictions such as Australia that do not impose the death penalty. These include the desire to have the matter dealt with quickly, the prospect of immediate release, the hope of a much lower penalty than otherwise anticipated, or where evidence may be considered difficult to combat at trial.[71] Plea bargaining is considered an essential component of the criminal justice system in processing cases expediently through our already overloaded courts.[72] It is also an area that requires awareness of the prospect of wrongful conviction, particularly from those involved in the process.

False Confessions

False confessions have featured in many of the DNA exonerations in the United States to date.[73] A recent case showed, 12 years after the event, that five teenage boys convicted of the horrific rape and assault of a female jogger in New York's Central Park were innocent. The boys had all confessed to the crime after being exposed to police interrogation for up to 20 hours.[74] DNA testing in 2002 not only excluded them, but assisted in identifying the real perpetrator.

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66 Both occurred in 1999, one in the United Kingdom and the other in New Zealand. For further information, see Gans and Urbas (2002), p 3.

67 Gans and Urbas (2002).

68 For further information, see for example: Gans and Urbas (2002); Wilson (2003).

69 CMC (2002).

70 See further, Huff et al (1996), pp 73–74.

71 Huff et al (1996).

72 For example, in the Australian context: 'Our research demonstrates unequivocally that plea discussions between prosecution and defence legal representatives are widespread and regarded by everyone interviewed as normal and appropriate.': Roach Anleu (1995), pp 233–37.

73 Innocence Project (2003e).

74 Innocence Project (2003d); Flynn and Dwyer (2002).

Australia's John Button falsely confessed during the police interrogation that followed his discovery of Rosemary Anderson lying wounded by the side of the road — and his race to the doctor to try to save her.[75] Button's counsel strongly, though unsuccessfully, objected to the admission of the confession at the trial, but it was held to be admissible and its role in his conviction operative.[76]

Community Pressure for Conviction/media

Community pressure for a conviction can encourage improper investigative techniques due to police officers themselves feeling the weight of that pressure.[77] This will often occur in high-profile cases, or with crimes which are considered particularly shocking.[78]

High-profile cases are often accompanied by a high level of pre-trial media coverage. Such media attention has the potential to improperly influence the jury's decision in the resulting trial. The criminal justice system therefore employs measures to attempt to decrease the impact on the jury of pre-trial publicity — for example, through warnings to the jury or delays in proceeding with the case.[79] The adequacy of these measures in ensuring media coverage does not adversely impact the accused at trial, is questionable.[80]

Race

Australia's disturbingly high over-representation of Indigenous persons in our prisons is well documented.[81] While there are other known and documented

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75 Button (1998), pp 29–31; *Australian Story* (2002).

76 *Button v The Queen* [2002] WASCA 35 (25 Feb 2002)

77 Huff et al (1996), pp 70–73, 75–76; Tanner (2002).

78 Logan (2002).

79 For example, the standard response would be for the trial judge to warn the jury to set aside any suspicions formed from pre-trial publicity. In a more difficult case, the proceedings could be adjourned to a later date or shifted to a different venue. Permanently staying proceedings would be a last resort in an extreme case: *R v Glennon* (1992) 173 CLR 592. See also *Jury Act 1995* (Qld), s 47 which relevantly provides:

'(1) If a judge who is to preside at a civil or criminal trial is satisfied, on an application by a party under this section, that there are special reasons for inquiry under this section, the judge may authorise the questioning of persons selected to serve as jurors and reserve jurors when the court reaches the final stage of the jury selection process. *Example* — Prejudicial … pretrial publicity may be a special reason (sic) for questioning persons selected as jurors or reserve jurors in the final stage of the jury selection process.'

80 Ardill (2000); Australian Broadcasting Corporation (2001); Browning (2001); Flint (1996).

81 As at 30 March 2003, Indigenous persons were 16 times more likely than non-Indigenous persons to be incarcerated, with an imprisonment rate of 1849 per 100 000 adult Indigenous population. The corresponding imprisonment rate for the

reasons for this over-representation, whether such over-representation also translates into higher levels of wrongful conviction is worthy of attention. The case of Kelvin Condren, though, provides one example of the potential problem. Condren was convicted and imprisoned for seven years for a murder before it was eventually brought to light that he could not have committed the crime as he was in police custody at the time it occurred.[82]

This case raises many issues, including the impact that cultural and linguistic differences present in the potential for wrongful conviction of Indigenous persons. The possibility of false confessions by Indigenous persons attributable to 'gratuitous concurrence' with persons in authority [83] is one of the potentially problematic areas; misunderstanding that can occur through interpretation of Aboriginal English, which is spoken by the majority of Indigenous persons in Australia, is another.[84]

Some measures and legislation have been enacted in jurisdictions across Australia in an attempt to address this problem.[85] There remains, however, the continuing over-representation of Indigenous persons in police custody, in our courtrooms and in our prisons; this alone suggests that further action is still required.

Summary

The causal factors in wrongful conviction explored above are not necessarily limited by geographical boundaries, but the incidence attributable to each factor is likely to vary in different jurisdictions, impacted by influences such as the legislation (or lack thereof) applying to the causal factors, police culture, and other distinctive features of the jurisdiction itself.[86] Legislation and

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general adult population was 147 per 100 000 persons: Australian Bureau of Statistics (2003).

82 Kelvin Condren falsely confessed to the murder. There was, however, evidence available at the time that a man in gaol in Darwin had confessed to the murder and that Kelvin Condren was in police custody at the time the offence was committed: Hulls (2003), p 4.

83 'Gratuitous concurrence is the tendency to agree with the questioner, regardless of whether or not you actually agree with, or even understand the question. It is a very common feature of Aboriginal conversations throughout Australia, and is customarily used to indicate a readiness for cooperative interaction, or resignation to the futility of the situation … You cannot "check" for gratuitous concurrence simply by putting more questions to the witness, such as 'Do you understand the questions I have asked you?', since these are likely to elicit the same response.': www.justice.qld.gov.au/courts/pdfs/handbook.pdf, 26 February 2003; Eades (1992).

84 Eades (1992).

85 In Queensland, for example, the relevant legislation is the *Police Powers and Responsibilities Act 2000* (Qld), s 251: 'Questioning of Aboriginal people and Torres Strait Islanders'.

86 Regarding legislative influences, for example, many states in the United States are still without legislation that requires the video recording of police interviews and

protocols enacted in Queensland, and those that generally apply throughout Australia — particularly those coming into force following criminal justice inquiries that have taken place in this country, have significantly reduced the chances of wrongful conviction in this country.[87] However, there is still more than can be done.

A better understanding of causal factors in wrongful conviction and improved legislation addressing these areas does reduce the risk of wrongful conviction, but it will not prevent it altogether. Humans are imperfect and error will inevitably occur in any system we control. There will always be those who 'slip through the cracks' and find themselves innocent but convicted. Luck is likely to account for continuing conviction of innocent persons — and their potential exoneration.[88] There will always, therefore, be the need for bodies designed to assist the wrongly convicted, such as Innocence Projects.[89]

Innocence Projects

Innocence Projects come in various forms, but are generally university-based, student-resourced bodies that investigate claims of wrongful conviction and, where possible, secure the release of wrongfully convicted persons. They have operated in the United States for over a decade in essentially three styles: the 'no representation' model; the 'full representation' model; and the 'limited representation' model.[90] The model adopted will impact on a variety of aspects of the Project's work — most importantly the creation or otherwise of a solicitor–client relationship and the confidentiality and duties that consequently attach.[91]

Innocence Projects in the United States

The original Innocence Project was established in 1992 at Benjamin N Cardozo Law School, Yeshiva University, New York through its co-founders, Barry Scheck and Peter Neufeld. There are now approximately 30 innocence projects operating in the United States.[92] In just over a decade, these projects have had a profound impact on the criminal justice system in that

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false confessions are therefore still a major factor in wrongful conviction: as raised at the Innocence Project Conference, New Orleans, 28–30 April 2003.

87 For example, the changes that occurred in Queensland following the Fitzgerald Inquiry, including the *Police Powers and Responsibilities Act 2000* (Qld), s 263 which prescribes electronic recording of police questioning of a relevant person where practicable, have noticeably reduced the chances that a person would be 'verballed'.

88 Bernhard (1999); Marshall (2002).

89 Please note that this article focuses on the role of Innocence Projects and does not review the role of other related institutions, such as the currently suspended (as at August 2003) New South Wales Innocence Panel. The Innocence Panel was originally established essentially to facilitate DNA innocence testing.

90 Suni (2002), pp 926–30.

91 For a full discussion of such issues in the United States, refer to Suni (2002).

92 See further, Innocence Project (2003f).

country. In addition to their role in the correction of approximately one hundred innocent persons, their work significantly contributed to the recent decision by Governor Ryan to commute all death penalty sentences in the state of Illinois.[93] The highest courts in the United States are questioning the constitutional validity of the death penalty due to the known risk of executing an innocent person.[94] Following Innocence Project recommendations, legislative reforms have occurred which allow convicted persons the opportunity for DNA testing and access to the courts, and other reforms recommended by the Innocence Project are currently being considered.[95] Lobbying for much-needed criminal justice reforms has become a major arm of Innocence Project work. The innocence movement is now emerging as the latest civil rights movement in the United States.[96]

The Innocence Project in New York limits its ambit to cases involving DNA, originally because of its specialisation in this area.[97] Even with this limitation, it works on 200 cases at any given time, and has over 1500 letters from inmates seeking representation which are yet to be reviewed as well as approximately 4000 more requests under active consideration.[98] It is estimated that exonerations have occurred in approximately 40 per cent of cases that the Innocence Project has been able to investigate to conclusion.[99]

A major role of the students at the Innocence Project in New York is to attempt to locate and access evidence. This in itself can be an arduous task. In some cases, the attempts by the Innocence Project to properly investigate claims of innocence have been actively blocked. For example, in the case of Larry Johnson, the Innocence Project made continuous requests and filed motions to verify the existence of, and gain access to, available biological evidence. Law enforcement authorities actively resisted these efforts until a state Supreme Court allowed testing to occur. The results of these tests exonerated the person convicted of the crime, who by the time of his release had spent 18 years of his life in prison, seven of these simply fighting to get access to the biological evidence.[100]

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93 In particular, the work of Northwestern Innocence Project in Chicago and the Innocence Project, New York.

94 See, for example, *United States of America v Quinones et al* (2002) S3 00 Cr 761 (JSR), www.nysd.uscourts.gov/rulings/quinones.pdf, 2 March 2003; The Constitution Project (2002).

95 One of the latest legislative reforms currently before the US government is the *Innocence Protection Act* of 2001, Senate Bill 486. Other suggested reforms include changes to eyewitness identification procedures as outlined earlier in this article, and the requirement to videotape all police interviews with suspects.

96 Neufeld (2003).

97 Barry Scheck, informal communication, 28 January 2003.

98 Neufeld and Scheck (2003).

99 Barry Scheck, informal communication, 28 January 2003.

100 Innocence Project (2003d).

Innocence Projects in Australia

In Australia, the first two Innocence Projects were established as recently as 2001 at Griffith University in Queensland and the University of Technology, Sydney (UTS) in New South Wales. Both Australian Projects had the advantage of drawing on the experience of the Innocence Project in the United States, with which they are affiliated. Their establishment did, however, require some modification of the US models for their effective transfer to the Australian context.

The Griffith University Innocence Project has jurisdiction to assess claims from around Australia, while the UTS Innocence Project operates for New South Wales. While using different modes of delivery, both Projects have the same essential aim: to free wrongfully convicted persons.[101] Features of the Griffith University Innocence Project are outlined below in order to demonstrate the ambit and type of work undertaken by Innocence Projects in this country.

The Griffith University Innocence Project is a combination of lawyers, students and academics working together to investigate the claims of wrongful conviction and, where possible, to secure the release of innocent persons. Applicants must have a claim of factual innocence and the permissible appeal period must have expired. The Project takes on cases where initial investigations support inmates' assertions that they have been wrongly convicted and where innocence may be established through the use of DNA technology or other fresh evidence. It does not accept cases where a conviction would be overturned through a technicality rather than innocence, or cases where defences are involved such as self-defence, provocation or lack of intent. Nor will it accept cases involving sexual offences where there is an admission of sexual contact.

The Project is more closely aligned with the 'no representation' model in the United States in that it does not take on the role of a solicitor. Weekly student instruction by specialist criminal lawyers, Nyst Lawyers, is a feature of the Project's investigative process, but this does not amount to legal representation.[102] Investigation is the predominant role of the Innocence Project, and new evidence of innocence is the aim of such investigation. Cases may take years of initial investigation prior to any decision being made on taking the case to the next step of engaging a lawyer. This would only occur if sufficient fresh evidence of innocence were uncovered to take the case to an appeal or pardon. When this transpires, the Griffith Project will engage a pro bono lawyer to act on behalf of the applicant and will itself remain with the case assisting that solicitor or barrister.

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[101] There are other important educational aspects to operating Innocence Projects; however, this article is only focusing on the impact of Australian Innocence Project work in the actual correction of wrongful conviction.

[102] This instruction comes from Chris Nyst and Jason Murakami of Nyst Lawyers, Southport, Queensland who are the co-founders of the Griffith University Innocence Project.

Over 200 people have applied to the Griffith Project for assistance (including six applicants from the United States) and approximately 80 active files are currently under review.[103] The Project actively investigates approximately a dozen cases at any one time. Students working in teams of between two and five trawl through trial transcripts and attempt to locate potentially relevant information, witnesses or other pieces of forensic evidence. Uncovering evidence of innocence is never quick or easy. Students are required to work through all the evidence presented at trial, consider the applicant's claim of innocence and determine what evidence might now be relevant in proving innocence. All investigative activities are undertaken via the instruction of lawyers and the supervision of academics.

The release of an innocent person is the ultimate aim of the Project. The experience in other jurisdictions is that exonerations will not occur in many cases (regardless of actual innocence). Early stocktake suggests that Australia will mirror this experience. Where exonerations do occur, it is likely to take years of investigation. There are exceptions to this rule, and the first successful overturning of a conviction for the Griffith Project occurred within one month of its operation.[104]

The Griffith Project will also investigate claims of innocence for persons long since released from prison. Several applicants have written to the Project having had their freedom restored to them up to 30 years earlier, but whose desire to have their innocence proven and their name cleared, for their sake and that of their family, is still one of their highest priorities. This may not be typical of Innocence Project work; however, it is in line with other like-minded organisations, such as AIDWYC in Canada and the Criminal Cases Review Commission in England.

Innocence Projects are likely to expand through the country with projects in Victoria and Western Australia in their formative stages.[105] For both current and future Innocence Projects in this country, the ability to most effectively undertake innocence work is reliant on the resolution of some current issues.

Immediate Issues for Innocence Projects

Preservation of Evidence

In approximately 70 per cent of cases investigated by the US Innocence Project, the evidence that could potentially prove innocence is simply not available.[106] Innocent but incarcerated persons whose futures rest on whether the forensic evidence is still available for DNA testing are more likely than not to be left empty handed and without redress.

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103 As at 19 August 2003.

104 In this case, a rape conviction was overturned through the combination of DNA and other fresh evidence.

105 Please contact the author for further information on these Projects.

106 Barry Scheck and Peter Neufeld estimate that in 75 per cent of old cases, evidence has been lost or destroyed: National Conference of State Legislatures (2000).

In the United States, the Innocence Project has been consistently lobbying for legislative reform on issues relating to wrongful conviction, including the need for preservation of evidence.[107] Several states in the United States have now legislatively addressed the need for both preservation of and access to evidence for DNA innocence testing. Many other states are still without such reform. The *Innocence Protection Act*, currently undergoing parliamentary review, is the latest proposed federal Act in that country which, if passed, will facilitate preservation and testing at the federal level and encourage the preservation of and access to forensic evidence for the purpose of DNA innocence testing in all states.[108]

In Australia, the same problem exists in that there is no system or requirement to preserve evidence beyond the appeal time limitations.[109] Therefore, evidence is usually discarded, returned to victims or witnesses, or destroyed within months of the original conviction or appeal. In other cases it is lost, forgotten or remains in a police locker. It highlights the urgent need for preservation of evidence in this country. Scientific developments will continue to develop and guilt, not just innocence will be revealed through these developments. It will assist the criminal justice system in both protecting the innocent and apprehending the guilty. Crime scene samples and exhibits must therefore be properly stored and relevant bodies must be given appropriate access to the evidence.

Proving Innocence

Investigation of claims of factual innocence may strongly indicate a wrongful conviction. However, uncovering sufficient evidence to overturn a conviction can be difficult. This is perhaps one of the main reasons that DNA technology is so appealing in innocence cases. However, experience in the United States has shown how difficult proving innocence post-conviction can be, even allowing for DNA evidence.[110]

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107 See, for example, Innocence Project (2003g).

108 *Innocence Protection Act* of 2001, Senate Bill 486.

109 Queensland has no effective legislation requiring police and other law enforcement agencies to preserve evidence. In late 2001, the New South Wales Commissioner for Police issued a temporary directive requiring all exhibits to be preserved: Nader (2002). The Victorian Parliament Law Reform Committee has held an Inquiry into Forensic Sampling and DNA Databases to consider the preservation of and access to DNA samples for purposes of both criminal investigations and potential exoneration: see Victorian Parliament Law Reform Committee (2001). The Australian Law Reform Commission has recommended that legislation be amended to require the permanent retention of crime scene samples: see ALRC (2002). The proposal states: '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." The issue is attracting attention around Australia due to the DNA legislation that now applies in many jurisdictions: See ALRC (2002), Proposal 38-2.

110 The following case which highlights the problem is summarised from SBS Television (2001). At the age of 20, Roy Criner was arrested and subsequently

With appeals based on questions of fact, as occurs most often in innocence appeals, the standard applied by Australian courts will be guided by the legislative provisions for overturning convictions on appeal, which essentially requires that the conviction is unsafe.[111] This level in practice does not amount to unquestionable innocence, though it does operate as a high threshold with appeal courts reluctant to overturn jury verdicts.[112] However, the major difficulty in Queensland, and generally in other parts of Australia, is attributable to limited appeal jurisdiction and restrictive appeal thresholds.

Appeal courts are usually concerned with procedural, rather than factual error.[113] With claims of innocence, the most likely opportunity to appeal is via

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convicted on the charge of aggravated sexual assault and sentenced to 99 years' imprisonment. The evidence at the trial was essentially that of statements of three friends who said Roy Criner told them he had sex with a girl. Their stories varied. Regardless of the unimpressive evidence, a jury found him guilty. Later DNA tests undertaken excluded him as the depositor of the semen found in the girl who was raped and murdered. Criner filed a writ of *habeas corpus*. His appeal was unsuccessful. Judge Sharon Keller, who wrote the majority opinion in that case, stated that in order for Roy Criner's appeal to be successful he was required to 'establish unquestionably that he is innocent' (SBS Television, 2001). When asked how one could meet this standard, Judge Keller replied that she did not know (SBS Television, 2001). If the DNA evidence in this case was insufficient, one struggles to imagine what evidence would satisfy such a threshold of unquestionable innocence. Roy Criner was eventually exonerated. This case was successfully appealed and a full pardon granted on 14 August 2000 after Mr Criner had spent 10 years in prison: Innocence Project (2003h).

111 For example, see: *Criminal Code Act 1899* (Qld), s 668E(1), 'Determination of Appeal in Ordinary Cases', which provides:

'The Court may on any such appeal against conviction shall allow the appeal if it is of the opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision on any question of law, or that on any ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal.'

112 In *R v Pryor* [2001] QCA 242, the Court of Appeal, Queensland outlined: 'The relevant test is that set out in *R v Jones* (1997) 191 CLR 439'. See also *M v The Queen* (1994) 181 CLR 487 at 493, which is in the following terms:

'whether [the Court of Appeal] thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty (at 36). But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence' and:

'If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that "even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence".' (at 40).

113 Appeals to the High Court are even more restrictive where they have a virtual inability to hear fresh evidence appeals. The High Court is therefore not analysed

fresh evidence. For the right to a 'fresh' evidence appeal, the convicted person must show that the 'fresh' evidence could not have been uncovered with due diligence at the time of the trial.[114] If the original lawyer did not uncover the evidence at this time, even though it was available because of a failure to act diligently, the wrongfully convicted person may be refused access to a fresh evidence appeal in our courts.[115] Therefore, incompetent counsel in the first place may be the reason the newly discovered evidence may not now furnish the applicant with the right to mount a fresh evidence appeal. Clear evidence of innocence, however, should generally be sufficient to displace this due diligence requirement.[116]

Combined with the threshold requirement is the jurisdictional limitation. In Australia, there is essentially only a right to one appeal and the appeal must usually be applied for within one month of the original trial.[117] It is highly unlikely that fresh evidence would have been uncovered at this early stage. Many known cases of wrongful conviction overseas involved persons who had unsuccessfully appealed their conviction.[118] Apart from some *obiter*, courts have consistently decided they do not have jurisdiction to hear second or additional appeals.[119] Appeal rights in Australia will therefore often be exhausted prior to the uncovering of fresh evidence. This will inevitably be the status of the vast majority of Innocence Project cases. The option to apply for a pardon is available, but this avenue is far from ideal.[120] This area is ripe for legislative reform.

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as a potential appeal avenue for innocence project applicants. See also Gans and Urbas (2002), pp 4–5.

114 *Ratten* v *The Queen* (1974) 131 CLR 510; *Gallagher v R* (1986) 160 CLR 392.

115 *Ratten v The Queen* (1974) 131 CLR 510.

116 *Ratten v The Queen* (1974) 131 CLR 510.

117 *Grierson v R* (1938) 60 CLR 431 per Dixon, Rich, McTierbnan, Starke JJ. In Queensland, notice of appeal or notice of application for leave to appeal against any conviction or sentence must be made within one calendar month of the date of such conviction or sentence: *Criminal Code Act 1899* (Qld), s 671.

118 The majority of exonerated individuals in the United States have appealed at least once depending on the access to appeal in the different jurisdictions. For examples, refer to the Innocence Project website, www.innocenceproject.org

119 *Grierson v R* (1938) 60 CLR 431 per Dixon, Rich, McTierbnan, Starke JJ; *R v Alexanderson & Ors* [2001] QCA 400 (24 September 2001), per Williams JA, Jones and Douglass JJ.

120 For example, some of the problems with the pardon process are the potential for political considerations to impact on the decision; the lack of guidelines that apply to any consideration or decision; and the general lack of transparency regarding the decision-making process. The relevant provision in Queensland is the *Criminal Code Act I899* (Qld), s 672A which provides: 'Nothing in sections 668 to 672 shall affect the pardoning power of the Governor on behalf of her Majesty, but the Crown Law Officer, on the consideration of any petition for the exercise of the pardoning power having reference to the conviction of any person or to any sentence passed on a convicted person, may —

The Limitations of DNA in the Correction of Wrongful Conviction

DNA cases are only the tip of the wrongful conviction iceberg. The role of DNA in exoneration is important but not exclusive, in the evidence it provides, the cases to which it applies and its role in the process of exoneration. DNA tests which can identify the perpetrator or exclude the suspect are estimated to apply in only 20 per cent of serious offences in the United States.[121] Even in DNA exonerations in the United States, many that proceed to appeal are supported by other evidence of innocence.[122] More than re-testing or original testing of DNA on evidential items is required to investigate of claims of wrongful conviction, to present a case before the appeal courts, to prove innocence in the criminal justice system and to address the problem of wrongful conviction.

The Future of Innocence Projects in Australia

While DNA has highlighted the reality of wrongful conviction, the majority of claims of wrongful conviction will not involve DNA evidence. The traditional re-investigation of cases is a long and arduous task, particularly in non-DNA cases. The work of Innocence Projects in Australia may be particularly valuable for this reason.[123] For the vast majority of applicants, Innocence Projects may represent the only avenue open for the re-investigation of their case. Students work for course credit, not a fee. The hours or potential years that students are able to spend investigating claims of innocence, at no cost to the applicant, are generally attributable to the fact that they are students.

Innocence Projects are still relatively new in Australia. They have been able to learn from US experience, but the relationship between the Projects and other organisations in the criminal justice system continues to evolve. Early experience has highlighted the need for support from government agencies, including those responsible for the testing and storage of biological evidence. In some instances, the introduction of legislation or procedures which facilitate a more efficient interaction between the Innocence Projects and other relevant

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(a) refer the whole case to the Court, and the case shall be heard and determined by the Court as in the case of an appeal by a person convicted;

(b) if the Crown Law Officer desires the assistance of the Court on any point arising in the case with a view to the determination of the petition, refer that point to the Court for its opinion thereon, and the Court shall consider the point so referred and furnish the Crown Law Officer with its opinion thereon accordingly.'

The court, however, does not readjudicate upon any ground of appeal that has been already heard and disposed of on the merits unless some new matter has come to light which makes a reconsideration of the ground necessary or desirable: *R v Gunn (No2)* (1942) 43 SR (NSW) 27. Only admissible evidence will be considered: *R v Young (No 2)* [1969] Qd R 566, and whether or not fresh evidence will be admitted on a reference under this section is a matter which depends on the merits of each case: *R v Sparkes* [1956] 2 All ER 245.

121 Neufeld and Scheck (2003).

122 Barry Scheck, informal communication, 28 January 2003.

123 As noted in a number of general Innocence Project discussions.

bodies within the criminal justice system, whose work has not traditionally involved the reopening of cases to assist with Innocence Project investigations, will enhance the ability of Innocence Projects in this country to effectively investigate claims of innocence on behalf of their applicants.

Existing and proposed Innocence Projects in Australia will have the opportunity to assist some of those persons who are wrongfully convicted. Exonerations are likely to be few and take years to bring about. Many innocent persons will no doubt still be without redress due to the typically limited ambit and resources of Innocence Projects. However, regardless of the success rate, the investigation of these cases does matter. In itself, even if it does not lead to an exoneration, this is at least an avenue that has been explored. Innocence Projects are not themselves the answer to wrongful conviction. The problem is much bigger than this solution. They do, however, offer a practical way to help a limited number of wrongly convicted persons. For those who are exonerated, the work of the Projects may finally provide the truth in justice that wrongfully convicted persons desperately seek.

Conclusion

This article has argued that, despite the enormous faith Australians tend to have in our criminal justice system, wrongful conviction is an international problem and a reality of our criminal justice system. Similar faith applied in the United States before DNA technology uncovered so many wrongful convictions. Acknowledging that it is imperfect does not mean that the system has failed or is broken. It is a reminder that, as a society, we must never become complacent about our criminal justice system, must continually address areas likely to be relevant to the incidence of wrongful conviction, and need mechanisms for the proper review of claims of innocence.

This article has attempted to highlight the crucial role that DNA has played in uncovering the problem of wrongful conviction, while also noting its limitations. To address the problem of wrongful conviction, it must be recognised that the majority of wrongful conviction cases, including those that come to the Innocence Projects for assessment and investigation, will not involve DNA evidence. While the investigation and potential correction of non-DNA cases is more complex and time-consuming, it is essential to address the overall problem of wrongful conviction and it is here that student resources are particularly valuable. DNA testing does not, in and of itself, solve the problem of wrongful conviction. At the same time, mechanisms that enable DNA testing for claims of innocence will ideally be complemented by Innocence Projects (or other organisations) whose role is to investigate claims of wrongful conviction with the aim of freeing innocent persons from incarceration. In addition, the adoption of legislation or procedures that promote more effective interaction between Innocence Projects and other government agencies should enhance the efficiency of Innocence Project investigation in Australia.

Preservation of and access to evidence are urgent and necessary for the proper investigation of current and future claims of innocence. Further, expanded access to the courts of appeal for persons who have exhausted their

one appeal prior to investigations uncovering the evidence of innocence is a central issue for the effective ultimate correction of wrongful convictions. It is one area currently requiring legislative reform.

For too long, the voices of the innocent in our prisons have been lost amongst the common catch-cry that 'everyone in prison says they are innocent'. However, not everyone in prison does claim to be innocent. Amongst those who do, there will be those who truly are innocent but convicted. The exoneration of over a hundred innocent persons in the United States, essentially brought about by the work of the Innocence Projects, has necessitated a wider reflection and examination of the criminal justice system in that country. It would be too grand to presume Australian Innocence Projects will achieve such eminence within the criminal justice system of this country. However, if Australian Innocence Projects to some small degree reflect the experience of Innocence Projects in the United States, they will emerge as a limited but real resource — albeit a last resort — for individuals who are innocent but convicted.

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