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## WRONGFUL CONVICTION IN AUSTRALIA

*Lynne Weathered\*†*

### I. INTRODUCTION

Australia's criminal justice system is modern and sophisticated. A combination of common law and legislative provisions in each state aims to find an appropriate balance between police investigative powers and individual liberty. Similarly, many mechanisms exist in an attempt to ensure the fundamental right to a fair trial in Australia's adversarial system. Appellate avenues enable consideration of potential errors at trial and judges are concerned to correct miscarriages of justice. The system is good, but it is by no means perfect. One of the areas where the Australian criminal justice system lags behind the United Kingdom, Canada, Norway and the United States is in facilitating the effective investigation and correction of wrongful conviction. While a relatively small number of demonstrated wrongful convictions have occurred in Australia, there are undoubtedly others yet to be uncovered and rectified. More unfortunately, there are wrongful convictions that will never be corrected, and even for those no longer in prison, the pain and stigma of a wrongful conviction can last a lifetime.

In the United States, the work of innocence projects and other organizations have highlighted the problem of wrongful conviction for over twenty years.<sup>1</sup> The number of DNA exonerations in the United States has grown at a rapid pace. According to the Innocence Project website, between 1989 and 1999 there were sixty-seven DNA exonerations. This number increased to 234 in the thirteen years from 2000 to 2012. In 1995, a Criminal Cases Review Commission (CCRC) was established for England, Wales, and Northern Ireland to address the

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1. Reportedly 307 exonerations occurred between 1989 and 25 May 2013. See INNOCENCE PROJECT, <http://www.innocenceproject.org/index.php>. Other early organizations to undertake this wrongful conviction work include Centurion Ministries, Inc., founded by Jim McCloskey in Princeton, New Jersey in 1983. See <http://www.centurionministries.org/about/> (last visited 3 December 2012).

problem of wrongful conviction.<sup>2</sup> Norway has also now established a CCRC. Canada edged closer to its own CCRC style body when, in 2002, Canada expanded its pardon avenues and subsequently established the Criminal Conviction Review Group to investigate and refer wrongful conviction claims to Canadian courts.<sup>3</sup> Australia, on the other hand, has remained largely resistant to reform of its investigation and correction of wrongful conviction.

That is not to say no change has occurred. In New South Wales and Queensland, DNA innocence testing has been introduced in either legislative or guideline form. In 2013, South Australia passed legislation allowing for a second or subsequent post conviction appeal if the court is satisfied that in the interests of justice, fresh and compelling evidence should be considered. However, it is unclear why such reform has been sluggish in its appearance and further, why there has not been more significant reform in this area across the country. Whatever the reason, the relative stagnation in this area has ultimately impacted the Australian system's ability to address, with adequacy, the needs of those who are convicted but are innocent. The problem of wrongful conviction is now being more widely acknowledged at an international level.<sup>4</sup> While the prevalence of wrongful conviction may differ, no one country is immune to the problem, certainly not Australia.

To broadly address some of considerations in regard to wrongful conviction in Australia, this Essay begins by briefly outlining the structure of the Australian criminal justice system. This Essay then considers aspects of Australia's criminal justice processes that may influence the prevalence of wrongful conviction. Then, this Essay discusses some known cases and causes of wrongful conviction. In its final Part, this Essay details a number of difficulties associated with the currently available mechanisms for the investigation and correction of wrongful conviction, and makes some recommendations in this regard.

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2. *Criminal Cases Review Commission*, MINISTRY OF JUSTICE, <http://www.justice.gov.uk/about/criminal-cases-review-commission> (last visited May 25, 2013).

3. *Criminal Conviction Review*, DEPARTMENT OF JUSTICE CANADA, <http://www.justice.gc.ca/eng/pi/ccr-rc/index.html> (last updated Apr. 30, 2013).

4. For example, twenty countries were represented at the 2011 Innocence Network in Cincinnati, Ohio. Nancy Petro, *Wrongful Conviction and Innocence Work Have No Boundaries*, THE WRONGFUL CONVICTIONS BLOG (Nov. 1, 2012), <http://wrongfulconvictionsblog.org/2012/11/01/wrongful-conviction-knows-no-boundaries/>. Examples of international perspectives on wrongful conviction include: MIRANDA JOLICOEUR, INTERNATIONAL PERSPECTIVES ON WRONGFUL CONVICTIONS: WORKSHOP REPORT, NAT'L INST. OF JUSTICE, 2010, available at <http://www.nij.gov/nij/topics/courts/sentencing/international-perspective-on-wrongful-convictions.pdf>; C. RONALD HUFF & MARTIN KILLIAS, *WRONGFUL CONVICTION: INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE* (2008); BIBI SANGHA ET AL., *FORENSIC INVESTIGATIONS AND MISCARRIAGES OF JUSTICE* (2010).

## II. SOME FACETS OF THE AUSTRALIAN CRIMINAL JUSTICE SYSTEM

Following colonization (and the controversial classification of Australia as a ‘settled’ country) Australia’s criminal justice system was—both substantively and procedurally—inherited and adapted from England. Australia today remains a common law nation with an adversarial criminal justice system. Australia’s constitution, the Commonwealth of Australia Constitution Act 1900, in combination with the state and territory constitutions, provide the boundaries under which the six states, two territories, and the federal government can legislate in regard to criminal matters. The Commonwealth Constitution provides the federal government with extremely narrow areas of jurisdiction to legislate with regard to criminal matters. Specifically, the Commonwealth Constitution requires that criminal matters fall within the specific categories of section 51 of the Constitution, which includes areas such as importation and exportation of drugs. As such, criminal law is largely a matter for each state or territory to determine. The states have an extremely wide ambit to legislate criminal law and are, essentially, empowered to make laws for the “peace, welfare and good government” of the state.<sup>5</sup> Therefore, the states and territories fundamentally govern the criminal justice system in Australia, though in areas where there is conflict, federal law will prevail.

### *A. Over-Representation of Indigenous Australians*

The over-representation of Aboriginal and Torres Strait Islanders in Australian prisons is an unfortunate feature of Australia’s criminal justice system. Australia’s population is approximately 23 million. As of June 2010, the prison population was approximately 29,700.<sup>6</sup> While representing approximately 2.5% of the Australian population,<sup>7</sup> Australia’s indigenous population represents almost 26% of the prison population.<sup>8</sup> This over-representation is a long-standing problem. Moreover, recent statistics show that just over half of the juvenile prison

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5. QUEENSLAND CONSTITUTION, 2001, OFFICE OF THE QUEENSL., PARLIAMENTARY COUNSEL (May 18, 2012), *available at* <http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/C/ConstofQA01.pdf>.

6. AUSTRALIAN BUREAU OF STATISTICS, PRISONERS IN AUSTRALIA, 2010—PRISONER SNAPSHOT, 4517.0 (2010), *available at* <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0> (follow “Prisoner characteristics, Australia”; then follow “Prisoner snapshot”).

7. AUSTRALIAN BUREAU OF STATISTICS, NATIONAL ABORIGINAL AND TORRES STRAIT ISLANDER SOCIAL SURVEY, 4714.0 (2008), *available at* <http://abs.gov.au/AUSSTATS/abs@.nsf/mf/4714.0/> (follow “Population Context”).

8. AUSTRALIAN BUREAU OF STATISTICS, PRISONERS IN AUSTRALIA 4517.0 (2009), *available at* [http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/A570D4363D75FE30CA257687001D5128/\\$file/45170\\_2009.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/A570D4363D75FE30CA257687001D5128/$file/45170_2009.pdf).

population is indigenous, with indigenous juveniles being “28 times more likely than non-indigenous juveniles to be detained in a juvenile justice centre.”<sup>9</sup>

While the reasons for the over-representation of Aboriginal and Torres Strait Islanders are wide-ranging and complex, one contributing factor has been their incarceration for minor crimes, commonly known as the “trifecta”—offensive language, resisting arrest, and assaulting a police officer.<sup>10</sup> The outcome of imprisonment can be devastating. Deaths in custody have been a disturbing feature of the criminal justice system.<sup>11</sup> Australia no longer has the death penalty,<sup>12</sup> but death has nevertheless too often resulted following incarceration. In 1987, a major inquiry into the deaths of ninety-six Aboriginal and Torres Strait Islander people who died while in police custody, resulted in the Indigenous Deaths in Custody 1989–1996 Report, which many hoped would herald a much greater understanding of this problem and instigate reforms aimed at reducing it.<sup>13</sup> More recent statistics demonstrate that the problem persists.<sup>14</sup>

### B. Investigative Practices

Earlier official inquiries into police practices in Australia uncovered systemic and deep-rooted corruption within some of its police forces.<sup>15</sup> In Queensland, the Fitzgerald Inquiry had far reaching implications for the police force and criminal justice system. The inquiry ultimately resulted in the then police commissioner, Sir Terrence Lewis, being convicted and jailed on corruption charges, and the former Premier of Queensland, Sir Joh Bjelke-Petersen, being charged, though not

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9. NATALIE TAYLOR, AUST. INST. OF CRIMINOLOGY, JUVENILES IN DETENTION IN AUSTRALIA, 1981–2007, 05 AIC MONITORING REPORT 6 (2009).

10. OFFICE OF THE ABORIGINAL & TORRES STRAIT ISLANDER SOC. JUSTICE COMM’R INDIGENOUS DEATHS IN CUSTODY 1989–1996, (1996).

11. *Id.*; see also QC ELLIOTT JOHNSTON, ROYAL COMM’N INTO ABORIGINAL DEATHS IN CUSTODY (1991), available at <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/>.

12. *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) 2010* (Cth) (Austl.).

13. See Jens-Uwe Korff, *Royal Commission into Aboriginal Deaths in Custody*, CREATIVE SPIRITS, <http://www.creativespirits.info/aboriginalculture/law/royal-commission-aboriginal-deaths-in-custody.html> (last visited Aug. 6, 2011).

14. See AUSTL. INST. OF CRIMINOLOGY, PRISON CUSTODY DEATHS 1982–2003 (2005), available at <http://www.aic.gov.au/publications/current%20series/cfi/81-100/cfi088.aspx>.

15. See, e.g., JRT WOOD, ROYAL COMM’N INTO THE N.S.W. POLICE SERVICE, FINAL REPORT, (1997); G. A. KENNEDY, ROYAL COMM’N INTO WHETHER THERE HAS BEEN ANY CORRUPT OR CRIMINAL CONDUCT BY W. AUSTL. POLICE OFFICERS, INTERIM REPORT, (2002); G. E. FITZGERALD, COMMISS’N OF INQUIRY INTO POSSIBLE ILLEGAL ACTIVITIES AND ASSOCIATED POLICE MISCONDUCT, REPORT (1989) [hereinafter FITZGERALD INQUIRY].

convicted, of giving perjured evidence to the inquiry.<sup>16</sup> Importantly, the inquiry resulted in significant legislative reform, implemented into the state, in respect to policing practises, namely the Police Powers and Responsibilities Act. This act outlines and consolidates both police powers and the limitations or safeguards that accompany those powers. The act aims to find an appropriate balance between providing sufficient powers to allow police to fully investigate crime in modern society, while ensuring fairness and protecting fundamental rights of individuals exposed to those policing powers.

The Fitzgerald Inquiry exposed one former police practice that would have contributed to wrongful convictions in this country: that of “verballing”—the fabrication of confessions supposedly made by the defendant, either verbally or in writing. Presented against the defendant in court, the jury was then faced with believing the police officer or the defendant before them. Among the reform measures recommended and implemented following the Fitzgerald Inquiry was the requirement to audiotape or videotape police interviews with suspects—a measure the Innocence Network calls for to help prevent false confessions. Queensland legislation in this area generally demands that, where practicable, the whole of the interrogation, including the warnings given to suspects, be recorded and not just the confession. For example, section 436 of the Police Powers and Responsibilities Act (Qld) 2000, states:

Recording of questioning etc.

This section applies to the questioning of a relevant person.

The questioning must, if practicable, be electronically recorded.

If the person makes a confession or admission to a police officer during the questioning, the confession or admission is admissible in evidence against the person in a proceeding only if it is recorded as required by subsection (4) or section 437.

If the confession or admission is electronically recorded, the confession or admission must be part of a recording of the questioning of the person and anything said by the person during questioning of the person.<sup>17</sup>

This requirement now typically applies throughout Australia and was often welcomed by police, who were then able to utilize the video recordings in court to support the accusations against the defendant, to

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16. The Crime and Misconduct Commission provides a concise summary of events surrounding the Fitzgerald Report. See CRIME & MISCONDUCT COMM’N QUEENSLAND, THE FITZGERALD INQUIRY (1987–89) (2011), available at <http://www.cmc.qld.gov.au/asp/index.asp?pgid=10877>; FITZGERALD INQUIRY, *supra* note 15.

17. *Police Powers and Responsibilities Act 2000* (Qld) section 436.

dispute claims of police malpractice made against them, or both. While this reform is likely to have significantly reduced the problem of verballing and the related issue of false confessions, this reform does not eliminate either possibility. Research has uncovered many reasons why people may falsely confess, reasons that may have nothing to do with whether or not the interrogation is being recorded. Moreover, there are always times prior to the police interview, or breaks in the police interview, that remain susceptible to threats, to inducements, or even to verballing itself. For example, in *Coates v. The Queen*, unrecorded confessions were allegedly made to police officers while the suspect was on a “toilet break.”<sup>18</sup> There was no reference to the alleged confession in any of the tape-recorded interviews that followed the break. By a four–three majority, the confession was excluded by the Australian High Court.<sup>19</sup>

Disturbingly, undercover “Mr. Big” operations—whereby police create situations or stage criminal activity to obtain or induce confessions from suspects—have recently crept into Australian investigative practices.<sup>20</sup> This is concerning, as Canadian experience of this activity has highlighted the potential unreliability of evidence gained in this manner.<sup>21</sup>

A 2009 Queensland Crime and Misconduct Commission report, *Dangerous Liaisons: A report arising from a CMC investigation into allegations of police misconduct (Operation Capri)*, noted concern over another recent technique used for confession extraction, consisting of prisoners being given leave from prison for “private time” with their wives or partners, in exchange for admitting to unsolved crimes.<sup>22</sup>

### III. CASES AND CAUSES OF WRONGFUL CONVICTION

In August 1980, a baby girl disappeared from a family campsite in outback Australia. Her torn and bloodied jumpsuit was later found. Her frantic parents told of how a dingo took their baby girl from their campsite tent; however, suspicion immediately fell upon the parents, in particular the baby’s mother, Lindy Chamberlain who was charged with her baby’s murder. Dinner table conversations around Australia

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18. *Nicholls v. The Queen, Coates v. The Queen*, [2005] HCA 1, 7 (Austl.).

19. *Coates*, [2005] HCA 1 (Austl.).

20. *See, e.g., Tofilau v. The Queen*, [2007] HCA 39 (Austl.).

21. For more information on Mr. Big operations in Canada, see *Kyle Unger: Five Year Wait Over, Another Wait Begins*, 10 ASS’N DEFENCE WRONGLY CONVICTED 14 (2009); *MR. BIG* (Eagle Harbour Entertainment 2009).

22. CRIME & MISCONDUCT COMM’N QUEENSLAND, *DANGEROUS LIAISONS: A REPORT ARISING FROM A CMC INVESTIGATION INTO ALLEGATIONS OF POLICE MISCONDUCT (OPERATION CAPRI)* 22–26 (2009).

revolved around whether or not Lindy Chamberlain had killed her child. The nation was divided as to the parents' guilt or innocence. No doubt the extensive media coverage at the time, conveying Lindy Chamberlain as acting other than as a grieving mother should, played a role in her conviction. More damning at trial, though, was the scientific evidence presented against Ms. Chamberlain.<sup>23</sup> A forensic biologist testified at the Chamberlain trial that a significant amount of fetal blood was present in the Chamberlain's car. This blood—a central feature of the prosecution theory of how and where Lindy Chamberlain killed Azaria—was later found to be a “sound deadening compound,” which is a fluid used in car batteries.<sup>24</sup> The inquiry also found significant support for the proposition that a dingo had taken the baby.<sup>25</sup> Lindy Chamberlain and her husband, Michael, who was also convicted as an accessory after the fact, ultimately had their convictions quashed six years later, following a Royal Commission inquiry and recommendation.<sup>26</sup> However it was not until June 2012, almost thirty-two years after the incident, that a fourth inquest finally resolved the matter with an official finding from the Coroner that a dingo was responsible for the baby's death.<sup>27</sup>

To date, the vast majority of wrongful conviction research into causative factors contributing to the conviction of the innocent has stemmed from the United States, in particular because of the comparatively large number of DNA exonerations there. These exonerations have enabled an insight into just how innocent people can be convicted of a crime of which they had no part. Caution needs to be applied before automatically attributing these same causative factors to Australia. While both criminal justice systems operate on common law adversarial foundations, some marked differences, such as cultural, procedural, trial, evidential difference, and appeal aspects of each criminal justice system, are likely to impact the causation factors at play. For example, the honourable Mervyn Finlay QC, while noting that any number of miscarriages of justice is too many, suggested that Australia could expect remarkably fewer wrongful convictions than in the United States. Some of the reasons cited were that:

[O]ther things in the Justice system are not equal, eg:

Unlike in NSW, most American trial Judges and all prosecutors are

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23. *R v. Chamberlain*, Transcript of proceedings, (1982) 69 FLR 445 (NT) (Austl.).

24. T.R. MORLING, ROYAL COMM'N OF INQUIRY INTO CHAMBERLAIN CONVICTIONS, REPORT (1987).

25. *Id.*

26. *Re Conviction of Chamberlain* (1988) 93 FLR 239 (Austl.).

27. *See As it happened: Azaria Chamberlain inquest*, ABC NEWS (last updated June 14, 2012, 10:17AM), <http://www.abc.net.au/news/2012-06-12/azaria-chamberlain-inquest-findings/4065466>.



elected.

Most of the United States do not require the videotaping of alleged confessions . . . .

There is generally a higher level of legal aid available to persons accused of crimes in NSW than in the States of America.<sup>28</sup>

Clearer similarities within criminal justice systems, including conviction rates, procedural protections, evidential, trial, and appeal provisions exist between the criminal justice systems in Australia, England, and Canada. Interestingly, at this early stage of causal comparative analysis, several of the systemic causes of wrongful conviction coming out of the United States appear to be reflected in the exonerations in England, Canada, and Australia. In Australia, for example, withholding of exculpatory evidence,<sup>29</sup> faulty scientific evidence,<sup>30</sup> and false confessions<sup>31</sup> have all contributed to the known cases of wrongful convictions. No doubt the differences in the manner of investigation and prosecution, among other things, in the various international jurisdictions will have a major impact on the likely causes of wrongful conviction in each country. However, at this stage one must at least entertain the possibility that many of the same causes are applicable at an international level, albeit to differing statistical degrees. While these causes may occur less often in Australia as compared to the United States, there is also the potential that some factors might be equally or more problematic in Australia.

For example, false confessions and false admissions are known to be a major contributor to wrongful convictions in the United States, found in approximately 25% of the DNA exonerations to date. Despite the procedural safeguards in Australia—for example, those found in the Police Powers and Responsibilities Act, which determine how long a suspect can be questioned and require that the questioning be recorded in some fashion (audio or video)—the Australian criminal justice system also has another factor integrated into the false confession and admission dynamic that may make it more problematic when it comes to some members of our Indigenous population. “Aboriginal English,” being a language variant on Standard English, and a cultural

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28. MERVYN FINLAY QC, REVIEW OF THE NSW INNOCENCE PANEL 14 (2003).

29. See *Mallard v. The Queen*, [2005] HCA 68 (Austl.); *Button v. The Queen*, [2002] WASCA 35 (Austl.).

30. See *Re Conviction of Chamberlain*, (1988) 93 FLR 239 (Austl.); MORLING, *supra* note 24.

31. See generally JOHN BUTTON, WHY ME LORD! (1998); *Murder He Wrote Part 1* (Austl. Broad. Corp. television broadcast July 29, 2002); *Murder He Wrote Part 2* (Austl. Broad. Corp. television broadcast Aug. 5, 2002); ESTELLE BLACKBURN, BROKEN LIVES (2002); *Button v. The Queen*, [2002] WASCA 35 (Austl.); *Condren v. R.*, (1991) 49 A Crim R 79; *Mallard v. The Queen*, [2005] HCA 68 (Austl.).

phenomenon known as “gratuitous concurrence,” (defined as an indigenous cultural reaction to agree with white people, particularly to agree to statements made and questions posed by white authorities, such as police) may increase the risk of false confessions. Eades, who has undertaken extensive research in this regard, describes gratuitous agreement in part as an Aboriginal person’s way of being socially obliging and amenable, believing this will result in a better relationship between the parties.<sup>32</sup>

Aboriginal English may result in a misunderstanding between parties, particularly in a police interview. A misunderstanding is even more likely if combined with gratuitous concurrence.<sup>33</sup> Other cultural specific, non-verbal communication differences can also be interpreted as guilt, such as silence or the avoidance of eye contact.<sup>34</sup> These issues are not limited to interaction with police but extend into the courtroom.<sup>35</sup> The criminal justice system has acknowledged the potential for miscarriages of justice to occur due to these differences and has implemented measures to address them to some extent. Procedurally, police are required to ensure a support person or legal aid officer be contacted before any questioning of Aboriginal Australian persons.<sup>36</sup> Other courtroom measures include those outlined in the *Equal Treatment Benchbook, Supreme Court of Queensland*.<sup>37</sup> However, considering that false confessions are, generally speaking, a significant causal factor in the United States, and recognizing these additional cultural and linguistic pitfalls for some members of the Aboriginal community in the context of the criminal justice system, false confessions should remain an area of particular concern within the context of wrongful conviction in Australia.

Conversely, other known causes of wrongful conviction frequently occurring in the United States may be less prevalent in Australia. In the United States, eyewitness identification is the leading contributor to wrongful convictions, being involved in up to 75% of DNA

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32. See DIANA EADES, ABORIGINAL ENGLISH AND THE LAW, COMMUNICATING WITH ABORIGINAL ENGLISH SPEAKING CLIENTS: A HANDBOOK FOR LEGAL PRACTITIONERS (1992); ABORIGINAL & TORRES STRAIT ISLAND SOCIAL JUSTICE COMM’R, AUSTRALIAN HUMAN RIGHTS COMM’N, SUBMISSIONS OF THE ABORIGINAL AND TORRES STRAIT ISLANDER SOCIAL JUSTICE COMMISSIONER ON COMMON DIFFICULTIES FACING ABORIGINAL WITNESSES (2005), available at [http://www.humanrights.gov.au/legal/submissions\\_court/amicus/giblet\\_aboriginalwitnesses20mar07.html](http://www.humanrights.gov.au/legal/submissions_court/amicus/giblet_aboriginalwitnesses20mar07.html).

33. *Id.*

34. *Id.*

35. *Id.*; see also, CRIMINAL JUSTICE COMM’N, ABORIGINAL WITNESSES IN QUEENSLAND’S CRIMINAL COURTS (1996).

36. See *Police Powers and Responsibilities Act 2000* (Qld) section 420.

37. SUPREME COURT OF QUEENSLAND, EQUAL TREATMENT BENCHBOOK (2005).

exonerations.<sup>38</sup> Research is required, however, before assuming the same is true for Australia.<sup>39</sup> Social science research in the United States and elsewhere has suggested that new procedures for collecting eyewitness identification, such as incorporating double-blind sequential showing of photographs, will significantly reduce the possibility of incorrect identifications while maintaining a similar degree of correct identifications. Such measures should be incorporated into Australian police practices.

The problem of verballing, as discussed earlier, was involved in the convictions of three brothers in Western Australia, Ray, Peter, and Brian Mickelberg, who were convicted of stealing over half a million dollars worth of gold bullion from the Perth mint in Western Australia in 1982.<sup>40</sup> In 2002, a former police officer admitted to fabricating the evidence used to convict them.<sup>41</sup>

The following three cases: Easterday, Button, and Mallard, further highlight causes of wrongful conviction in Australia. This Essay more fully explores the Mallard case, being the most recent of these three.

#### A. The Easterday Case

In 1993, three amateur gold prospectors were convicted of defrauding a gold mining company out of six million dollars. It was alleged that Clark Easterday, Len Ireland, and Dean Ireland had “salted,” or tampered with, their soil tests. Specifically, the prosecution alleged that the defendants placed gold dust in their soil sample, resulting in a false reading of the proportion of gold contained within the soil.<sup>42</sup> Always protesting their innocence, each of the men served thirteen months of three and one-half year terms in prison before having their convictions

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38. *Understand the Causes—Eyewitness Misidentification*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited Aug. 10, 2011).

39. Some research in this area is being undertaken. For example, see *Ms Serena Nicholls*, GRIFFITH UNIV., <http://www.griffith.edu.au/criminology-law/griffith-law-school/research/research-higher-degrees/events/colloquia/colloquium-1-2011/colloquium-1-2011-schedule/serena-nicholls> (last visited May 25, 2013).

40. See Andrew Rule, *How the West Was a State Where Police Ran Wild*, AGE (June 15, 2002), <http://www.theage.com.au/articles/2002/06/14/1023864347078.html>; Charlie Brady, *Mickelberg hopes to untie the stitch*, GREEN LEFT WEEKLY (Feb. 12, 1992), <http://www.greenleft.org.au/node/2222>; Selina Day & Liza Kappelle, *Brothers Plan Appeal No. 8 after Police Confession*, AGE (June 12, 2002), <http://www.theage.com.au/articles/2002/06/11/1022982845280.html>; Mark Russell, *Conscience Come Clean*, COURIER MAIL, June 13, 2002; *Mickelberg v. The Queen*, [2004] WASC 145 (Austl.); Jayne-Maree Sedgman, *Mickelberg Brothers Speak Out*, AUSTL. BROADCASTING CORP. ONLINE (July 6, 2004), <http://www.abc.net.au/pm/content/2004/s1148083.htm>.

41. *Id.*

42. Ross Coulthart, *Karpa Gold Fall Guys*, SUNDAY (May 18, 2003), [http://sgp1.paddington.ninemsn.com.au/sunday/cover\\_stories/article\\_1276.asp?s=1](http://sgp1.paddington.ninemsn.com.au/sunday/cover_stories/article_1276.asp?s=1).

quashed in March of 2003.<sup>43</sup> This followed, among other things, the discovery that the Crown had withheld important stock exchange documents from the defence and the court at trial.<sup>44</sup> These stock exchange documents indicated that other people, not exclusively the defendants, may have financially benefited from the salting and insider trading.<sup>45</sup>

### *B. The John Button Case*

Approximately forty-six years ago, John Button was celebrating his nineteenth birthday with his girlfriend, Rosemary Anderson, before things took a tragic turn. Following an insignificant quarrel, Anderson left the house to walk home. Button went looking for her and discovered her wounded by the side of the road, having been hit by a car. Anderson later died in hospital.<sup>46</sup>

Button was tried for murder and convicted of manslaughter. Although his prison term lasted just less than five years, the consequences of that conviction—including an inability to travel overseas to see his mother or attend her funeral after she died, remained for almost four decades.<sup>47</sup> Button took almost forty years to prove his innocence, despite a known and convicted serial killer, Eric Edgar Cooke, providing a detailed confession to police not long after Anderson's death and Cooke subsequently repeating his confession moments before he was hanged for the other murders he committed.<sup>48</sup> A false confession contributed to Button's wrongful conviction, and Button has spoken about the traumatic police interrogation that led to his signing of the confession. The Court of Appeal of Western Australia finally overturned John Button's conviction in early 2002, and in 2003, John Button eventually received some financial compensation.<sup>49</sup>

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43. Selina Day, *WA—Trio's Gold Fraud Conviction Quashed*, AAP GEN. NEWS (Mar. 28. 2003); see also *Easterday v. The Queen*, [2003], WASCA 69.

44. *Easterday v. The Queen*, [2003] WASCA 69.

45. Coulthart, *supra* note 40.

46. BLACKBURN, *supra* note 31.

47. See BUTTON, *supra* note 31; *Murder He Wrote Part 2*, *supra* note 31.

48. BLACKBURN, *supra* note 31. This was at a time when Australia still incorporated the death penalty. As noted in *Broken Lives*, John Button was in the prison yard, when Eric Cooke was hanged and the prisoners knew the time of the execution, as the sound made all the rooftop pigeons take flight.

49. *Button v. The Queen*, 35 [2002] WASCA 35 (Austl.). The wrongful conviction of John Button was explored in *Murder He Wrote Part 2*, *supra* note 31; see also BUTTON, *supra* note 31. Further, compensation was awarded to another exoneree in June 2011, Darryl Beamish, a deaf-mute who was also wrongly convicted for a murder for which Eric Edgar Cooke was responsible. See *Beamish v. The Queen*, [2005] WASCA 62; Amanda O'Brien, *\$425k Payout 'Miserly' for Deaf-Mute's Jail Hell*, AUSTRALIAN (June 3, 2011), <http://www.theaustralian.com.au/national-affairs/k-payout-miserly-for-deaf-mutes-jail-hell/story-fn59niix-1226068250577>; Kathryn Shine, *Cleared at Last After*

### C. *The Andrew Mallard Case*

Pamela Lawrence was murdered in her Perth jewellery shop, having been beaten on the head with a blunt object. Andrew Mallard, already known to police for petty crime, became a prime suspect early in the investigation, despite the little, if any, evidence to arouse such targeted suspicion. As part of the on-going investigation, the police established an undercover operation. Mallard was befriended by an undercover officer, “Gary,” who secretly recorded their conversations but these conversations in no way implicated Mallard as being involved in the murder. However, during an official police interview undertaken at a time in which it appears Mallard’s mental health was impaired, Mallard hypothesized about how the victim was killed and “confessed” at times to the murder. This, among other evidence presented by the police and prosecution, including Mallard’s drawing of the murder weapon (the wrench), resulted in his conviction for murder. Mallard spent twelve years in prison before being exonerated when he successfully appealed to the High Court.<sup>50</sup>

Mallard’s fight to prove his innocence was a long battle. Mallard’s initial appeal was rejected. He was later able to return to the Western Australia Court of Appeal via a reference of the attorney general, however, he was again unsuccessful at this appeal. Mallard was fortunate however, to then be one of a relatively small number of criminal matters to be heard by the High Court of Australia.<sup>51</sup> There, his conviction was finally overturned. Despite the corrected conviction, the prosecution still initially considered Mallard the prime suspect. The prosecution decided, however, not to retry the case when subsequent investigations discovered evidence implicating another man who was already in prison, and who committed suicide shortly after receiving this news.<sup>52</sup> Following this series of events, the Corruption and Crime Commission of Western Australia (CCC) officially investigated the matter.

While the CCC investigation focused, as their ambit required, on

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44 years, AUSTRALIAN, Apr. 2, 2005.

50. Mallard v. The Queen, [2005] HCA 68 (Austl.).

51. For example, figures available from the High Court of Australia library show that in the 2009/2010 financial year, there were 57 criminal law applications for a hearing in the High Court and of those, 9 were successful (16%).

52. CORRUPTION & CRIME COMM’N, REPORT ON THE INQUIRY INTO ALLEGED MISCONDUCT BY PUBLIC OFFICERS IN CONNECTION WITH THE INVESTIGATION OF THE MURDER OF MRS PAMELA LAWRENCE, THE PROSECUTION AND APPEALS OF MR ANDREW MARK MALLARD, AND OTHER RELATED MATTERS 133-136 (2008); see also Amanda Banks, *Suicide Note Left by Convicted Murderer*, AUSTRALIAN, May 23, 2006; Amanda Banks, *Jailed Murder Suspect Dead*, AUSTRALIAN, May 20, 2006.

whether there had been misconduct by the public officials in the case, the CCC identified key aspects as to why this wrongful conviction occurred. For example, the CCC report found that the police had requested an expert report be amended so that the portion of the report relating to saltwater testing of Mallard's clothes (which determined that Mallard had not rinsed his clothes in the river as Mallard claimed the murderer would have done in order to remove any traces of blood), be excised. Further, the CCC found that the prosecution proceeded with the case based on Mallard's drawing of a wrench as the murder weapon, despite evidence showing that the injuries to Lawrence could not have been inflicted by such a wrench.<sup>53</sup>

The CCC noted aspects of the police investigation that were improper and amounted to "misconduct." For example, the CCC discovered that some witnesses the police interviewed on a number of occasions changed their statements during the course of the investigation. The later statements strengthened the case against Mallard, but the police included only the final statements in the brief of evidence. Further, the police did not supply the earlier statements to the defense.<sup>54</sup> The CCC commented in their executive summary:

[43] The Commission is satisfied that the changes were brought about either by persistent and repeated questioning and/or by deliberately raising doubts in the witnesses' minds until they became confused, uncertain or possibly open to suggestion, and demonstrates a pattern which cannot have been an accident or coincidence.<sup>55</sup>

The CCC's comments in this case suggest that the problems regarding the eyewitness identification were more attributable to the police interplay with the witnesses and their evidence, rather than with the original eyewitness identification.<sup>56</sup> The wrongful conviction also involved tunnel vision, as can be noted through various points of the CCC report:

#### 6.7 Andrew Mallard as a Suspect

[178] By the beginning of June 1994, Andrew Mallard was under active investigation. All the available material points to him being, at that time, the only person actively being considered responsible for the homicide. The investigation files do not reveal any other person who had been interviewed in a formal manner and under criminal caution. The various detectives in their evidence before the Commission, said that there were other "persons of interest," but they appear to have all been written off or

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53. REPORT ON THE INQUIRY INTO ALLEGED MISCONDUCT, *supra* note 52, at 83–84.

54. *Id.* at xxii–xxiv and at 85–100.

55. *Id.* at xxii.

56. *Id.* at 98–100.

discounted by about 1 or 2 June.

[179] On the other hand:

- there was no forensic evidence linking Andrew Mallard to the crime;
- he had denied committing the offence, and had said nothing by way of admission;
- he had given a variety of different accounts for his movements upon the assumption that he had to account for a period of 90 minutes, in circumstances where he was being interviewed in a psychiatric hospital and was demonstrating quite fanciful behaviour; and
- the murder weapon had not been identified. Not only had no weapon been found, but some of the injuries to the deceased's skull had a distinctive shape and contained traces of something blue.

[180] The various police witnesses denied Mr Mallard was already a suspect at that stage and sought to draw a distinction between the use by them of the terms "suspect" and "person of interest," maintaining that in police jargon a "suspect" meant a person in respect of whom there was sufficient evidence to charge, and that other persons being investigated were merely "persons of interest[.]" The Commission rejects this supposed distinction...

[324] If, as they now claim, the police officers had doubts, the appropriate course was to review all the material and all the witness' statements to see if there could be anyone else who might be a possible suspect, and to re-examine the evidence they had to see if any possible leads had been overlooked. This is the very thing they did not do, but rather they focused their efforts on seeking to build a case against Andrew Mallard, and the manner in which they did it reflects no credit on the police involved.

[351] The only weapon specified by Mr Mallard in his alleged confession was shown to have been incapable of inflicting the injuries to Mrs Lawrence. This alone therefore cast grave doubts on the reliability of his confession, yet its significance was either overlooked or ignored. This was not the only test where results which did not advance the case against Mr Mallard, or which tended to exonerate him, were cast aside.<sup>57</sup>

Full disclosure of evidence is vital for a fair trial, as the wrongful convictions discussed in this Essay demonstrate. The CCC inquiry also noted that despite statutory requirements demanding full disclosure, there appears to be a continuing problem in this regard.<sup>58</sup> The Mallard

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57. *Id.* at 38, 77, 83.

58. *Id.* at 108–09. The CCC also reported the following:

8.4 A Continuing Problem

[476] Disclosure has continued to be a problem notwithstanding the 1993 Guidelines. Section 42 (1) of the Criminal Procedure Act 2004 which commenced on 2 May 2005, set out in statutory form, those items which the Prosecution must disclose to the defence prior to the trial. It includes:

case alone involves a myriad of relevant contributing causal factors to wrongful convictions, including many known to occur elsewhere: a false confession, withholding of exculpatory evidence, official misconduct, tunnel vision, and eyewitness identification.<sup>59</sup>

While the number of exonerations that have occurred in Australia are greater than those discussed in this Essay, this number does not justify robust claims regarding systemic causes. The cases do, however, enable insight into the problem and allow initial consideration as to what similarities or differences appear to be operational. Australian cases to date reflect, at least to some degree, those systemic causes known to cause wrongful convictions in other countries, such as the United States, Canada, and England. If and when more exonerations occur, Australia will have the opportunity to explore more fully the causal factors contributing to wrongful convictions. For further exonerations to occur, however, expanding the current corrective mechanisms is required. In a catch-22 situation, one reason for the comparatively small number of exonerations to date is likely, at least in part, due to the lack of investigative and corrective mechanisms for wrongly convicted people.

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a) a copy of every statement . . . by any person who may be able to give evidence that its relevant to the charge, irrespective of whether or not it assists the prosecutor's case or the accused's defence . . . .

e) a copy of every other document or exhibit which may assist the accused's defence.

[477] The same year the DPP issued a fresh Statement of Prosecution Policy and Guidelines 2005, to give effect to the statutory requirements, Paragraphs 111 and 112 expressly required the police to furnish to the Office of the DPP . . . .

[A]ll other documentation, material and other information held by any police officer concerning any proposed prosecution witness which might be of assistance or interest to either the prosecution or the defence, and to certify that such had been done.

[478] Notwithstanding this, problems continued, and by letter dated 7 December 2006, the current DPP, Robert Cock QC, wrote to the Commissioner of Police advising that in a number of recent prosecutions relevant material had not been disclosed to the defence, let alone to the prosecutor, prior to trial. He went on to explain in some detail the nature and extent of the obligations of the Police in respect of disclosure. He also attached a list of "Items not Commonly Disclosed" which included, "all typed or handwritten statements of witnesses both signed and unsigned, including draft statements and statements of witnesses not included in the brief, any and all negative enquiries from potential witnesses, any and all negative results of any forensic testing, running sheets (including those of surveillance and undercover operations) and any photo boards shown to witnesses including negative and incorrect identifications[.]"

[479] By a General Broadcast to all police on 17 January 2007, authorised by the Deputy Commissioner Specialist Services, police were reminded of their obligations in this regard and the DPP's list of "Items not Commonly Disclosed" was set out in full.

[480] There can no longer be any excuse for police to claim they are unaware of their obligations relating to disclosure. Whether police are currently fulfilling their obligations in this regard, the Commission is unable to say; but if they understand and comply with their obligations as described, there should be no further problems in this regard." *Id.*

59. See generally REPORT ON THE INQUIRY INTO ALLEGED MISCONDUCT, *supra* note 52.



#### IV. CORRECTION OF WRONGFUL CONVICTION

Australia's trial and appeal provisions were adopted from England in the early 20th century. Australia's criminal procedure processes have naturally evolved; however, England's originating influence remains particularly evident in the appeal and pardon provisions still operative in Australia. Wrongful conviction applicants in Australia remain heavily reliant on the traditional pardon provisions for access back into the courts of appeal. England moved away from this over a decade ago, with the creation of the Criminal Cases Review Commission. As such, modern Australia is more reliant on now usurped English provisions to correct wrongful conviction than England itself. This old framework is not conducive to identifying and correcting wrongful convictions.

Innocence projects have operated in Australia for over ten years now. With a prison population of approximately 30,000, it is not expected that Australia will see the volume of exonerations as have occurred in the United States. Other differences, such as the comparatively shorter sentencing periods in Australia, will also impact innocence project activity and the likelihood of exonerations occurring, particularly exonerations occurring prior to release. Statistics from the Innocence Project in the United States show the average time spent in prison before exoneration is thirteen years.<sup>60</sup>

One of the major hurdles for innocence project work in Australia, however, is the legal framework within which projects operate. When the Griffith University Innocence Project commenced operation in 2001, the rights, or lack thereof, regarding prisoner access to information, biological material, and DNA testing were ambiguous at best. This led to a long and exhaustive process of requests, meetings, and submissions, from which it became clear that numerous obstacles prevented effective investigation of wrongful conviction claims. Access to basic information—as simple and seemingly uncontroversial as whether biological evidence existed in an applicant's case for potential DNA testing—was not forthcoming. The experience ultimately confirmed an essential need for reform.

Discovery of information vital to uncovering a wrongful conviction is difficult, as there are no powers available to projects to access such information. The system tends to shut down following the exhaustion of a defendant's appeal. Further, the absence of a framework for the wider discovery of documents and the limited availability of mechanisms for DNA innocence testing will no doubt result in the inability for some ever to prove their innocence.

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60. *Facts on Post-Conviction DNA Exonerations*, INNOCENCE PROJECT, <http://www.innocenceproject.org/Content/351.php> (last visited Aug 10, 2011).

Some advances have been made. Queensland introduced DNA innocence testing guidelines into its criminal justice system in August 2010, following years of lobbying by the Griffith University Innocence Project.<sup>61</sup> These guidelines for the first time in Queensland, enable an outlined procedure and process for DNA based wrongful conviction claims. However, the limited measures specified within the guidelines fail to provide the opportunity for a full range of potential DNA innocence cases to be properly investigated and resolved.

New South Wales is the only Australian state with DNA innocence testing legislation. The state's initial foray into this area was the creation of an Innocence Panel, which was short-lived when it was shut down not long after its commencement following DNA testing in a high profile case which excluded the applicant.<sup>62</sup> Under the ambit of the police department, the then-New South Wales police minister John Watkins, stated the Panel's suspension was required due to insufficient "checks and balances to protect anyone other than the applicant."<sup>63</sup>

Subsequently, in 2006 legislation was adopted by New South Wales to facilitate DNA innocence testing to applicants.<sup>64</sup> In essence, this legislation gives convicted people the opportunity to make an application to the Panel if "the person's claim of innocence may be affected by DNA information obtained from biological material specified in the application."<sup>65</sup> The Panel has referral powers to the court of appeal if the Panel considers that there is "reasonable doubt as to the guilt of the convicted person."<sup>66</sup> It is a positive reform, in that it introduced into Australia the first DNA innocence testing legislation, but concerns about its effectiveness have also been expressed. These concerns include the restrictions and limitations contained within the Act, which make it available to only a small number of convicted persons who have been convicted of the most serious offences.<sup>67</sup>

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61. QUEENSLAND DEPT. OF JUSTICE & ATTORNEY-GEN., GUIDELINES FOR APPLICATIONS TO THE ATTORNEY-GENERAL TO REQUEST POST-CONVICTION DNA TESTING (2010), available at [http://www.justice.qld.gov.au/\\_\\_data/assets/pdf\\_file/0008/58283/dna-guidelines-august2010.pdf](http://www.justice.qld.gov.au/__data/assets/pdf_file/0008/58283/dna-guidelines-august2010.pdf).

62. *Stateline NSW: Innocence Panel Lost* (Austl. Broad. Corp. television broadcast Aug. 15, 2003), available at <http://www.abc.net.au/stateline/nsw/content/2003/s926344.htm>.

63. *NSW Innocence Panel, Which Reviews Criminal Cases Using DNA Evidence, Suspended*, PM (Austl. Broad. Corp. television broadcast Aug. 11, 2003), available at <http://www.abc.net.au/pm/content/2003/s922027.htm>.

64. In October 2006, the New South Wales Parliament passed the *Crimes (Appeal and Review) Amendment (DNA Review Panel) Act 2006* (NSW) [hereinafter the DNA Act] and the *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006* 69 (NSW).

65. *Crimes (Appeal and Review) Act 2001* 120, § 89 (2).

66. *Id.* § 94 (1).

67. See, e.g., *DNA Review Panel a 'Toothless Tiger,'* ABC NEWS ONLINE (Oct. 19, 2006), <http://www.abc.net.au/news/newsitems/200610/s1768341.htm>. For a fuller discussion regarding the restrictive nature of the NSW DNA Innocence Testing provisions, see Lynne Weathered & Robyn

The potential for incorrect interpretation, cross-contamination, and laboratory errors, among other things, seems ignored in both the New South Wales and Queensland DNA testing provisions. Queensland allows testing only where Profiler Plus was not already used (which has been used for many years in this state). The NSW legislation applies only to convictions prior to 2006. The situation in Victoria in December 2009 highlighted the need for DNA innocence testing, despite investigative DNA testing having already been utilized. The conviction of a schoolboy for rape was corrected when it was discovered the DNA evidence against him, being the only condemning evidence in that case, had likely been contaminated.<sup>68</sup> For months following that revelation, no DNA results were allowed in court with a temporary moratorium placed on the results' use.<sup>69</sup>

Most recently, South Australia debated whether to create a CCRC style body. While that Bill was turned down following its second reading in June 2011,<sup>70</sup> the issue was then referred to the South Australian Legislative Review Committee (LRC). While the LRC concluded against the establishment of a CCRC at this time, it nevertheless determined that better post-conviction review processes were required.<sup>71</sup> To this end, the LRC proposed the establishment of a Forensic Review Panel to "enable the testing or re-testing of forensic evidence which may cast reasonable doubt on the guilt of a convicted person, and for these results to be referred to the Court of Criminal Appeal."<sup>72</sup> The proposed Panel was not taken up in South Australia, but would have been a significant step in the right direction, though fall short of a CCRC in that it is restricted to forensic issues.

South Australia has however adopted another of the LRC's recommendations, establishing a second or subsequent statutory right of appeal if the court is satisfied that it is in the interests of justice to consider fresh and compelling evidence.<sup>73</sup> This is an important

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Blewer, RIGHTING WRONGFUL CONVICTIONS WITH DNA INNOCENCE TESTING: PROPOSALS FOR LEGISLATIVE REFORM IN AUSTRALIA IN AUSTRALIA, 11 FLINDERS J. L. REFORM 1 (2009).

68. FRANK H.R. VINCENT, VICTORIAN DEPARTMENT OF JUSTICE, REPORT: INQUIRY INTO THE CIRCUMSTANCE THAT LED TO THE CONVICTION OF MR FARAH ABDULKADIR JAMA § 2006-10 (2010).

69. Milanda Rout & Rick Wallace, *Police Put Ban on DNA Evidence*, AUSTRALIAN (Dec. 10, 2009), <http://www.theaustralian.com.au/news/nation/police-put-ban-on-dna-evidence/story-e6f6n-1225808820951>; Steve Butcher, *DNA Doubts Force Review of Cases*, AGE (Nov. 26, 2009), <http://m.theage.com.au/national/dna-doubts-force-review-of-cases-20091125-jrjf.html>; Milanda Rout, *DNA in the Dock*, AUSTRALIAN (Dec. 11, 2009), <http://www.theaustralian.com.au/news/features/dna-in-the-dock/story-e6f6n-1225809214024>.

70. See *Criminal Cases Review Commission Bill 2010 (SA)* (Austl.).

71. LEGISLATIVE REVIEW COMMITTEE, REPORT OF THE LEGISLATIVE REVIEW COMMITTEE ON ITS INQUIRY INTO THE CRIMINAL CASES REVIEW COMMISSION BILL 2010 81 (2012).

72. *Id.* at 84.

73. See *Statutes Amendment (Appeals) Act 2013 (SA)* (Austl.).

additional avenue as new evidence of innocence will almost always come to light following (and often many years after) the applicant's appeal right has been exhausted and an appellant generally has only one opportunity to appeal at the state level and no right for fresh evidence to be heard in the High Court, regardless of the strength of the fresh evidence.<sup>74</sup> Wider reform is necessary, as the effective investigation and correction of wrongful conviction cases in Australia has been generally fraught with difficulties and obstacles, and while these continue to exist, the chance for many convicted but innocent people to prove their innocence is limited, as further explained below.

#### *A. Preservation of Evidence*

Preservation of evidence is generally a cornerstone of recommended DNA innocence testing legislation.<sup>75</sup> Yet, for the most part in Australia, the destruction of evidence is often required once the appeal has been heard. Preservation of evidence is not mentioned within the Queensland post-conviction DNA testing guidelines. As already demonstrated in the United States, many wrongful conviction applicants will be unable to prove their innocence because the evidence upon which DNA testing could take place no longer exists. Reform is required to ensure DNA samples and crime scene evidence that contain biological material are retained and properly stored. Also, reform is necessary to enable future DNA testing and the subsequent use of this evidence in court proceedings. If the United States can manage the preservation of evidence with a prison population of over two million, surely Australia, with a tiny percentage of that number in prison, can adopt measures to preserve appropriate evidence.

#### *B. Discovery Powers*

Access to information is the essential starting point for the proper investigation of wrongful conviction claims. In Australia, a significant amount of information is likely to be available from the applicants themselves, including the trial transcript, committal transcript, and brief of evidence, among other things. However, accessing additional

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74. Lynne Weathered, *Pardon Me: Current Avenues for the Correction of Wrongful Conviction in Australia*, *Current Issues in Criminal Justice*, 17 (2) J. OF THE INST. OF CRIMINOLOGY 203 (2005); Lynne Weathered, *Does Australia Need a Specific Institution to Correct Wrongful Convictions?*, 40 (2) *AUSTRAL. AND N. Z. J. OF CRIMINOLOGY* 179 (2007).

75. *Fix the System: Model Legislation—Model Statute for Obtaining Postconviction DNA Testing*, INNOCENCE PROJECT, <http://www.innocenceproject.org/fix/Model-Legislation.php> (last visited Aug. 10, 2011).

documents relevant to the initial case investigation, or potentially undisclosed exculpatory material, is difficult to uncover, as no real discovery rights exist beyond the traditional legal avenues.

Discovery powers, such as those given to the CCRC in the United Kingdom, would significantly increase the opportunity for proper investigation of cases. One of the key beneficial aspects of having a CCRC style body introduced would be the associated investigatory powers that enable the discovery of relevant material and documents, thereby allowing for a significantly more comprehensive investigation of claims of wrongful conviction.

Sadly, this is lacking in the post-appeal Australian criminal justice system. Currently, innocence projects or others can work for many years on wrongful conviction applications, where ultimately there may be no evidence available for DNA testing. Prior to the introduction of the DNA innocence testing guidelines in Queensland in August 2010, it took almost seven years for the Griffith University Innocence Project to be told if evidence existed in two matters they were investigating.<sup>76</sup> Unfortunately, the Queensland DNA Guidelines have not fully rectified this situation, as applications need to be sent to the attorney general showing how DNA innocence testing can provide evidence of innocence prior to the government deciding whether to undertake a search for evidence that may still exist. If such evidence is available, no Australian state offers rights to ensure that testing will take place.

### *C. DNA Innocence Testing*

The Queensland DNA guidelines and the NSW legislation offer criteria under which a decision will be made as to whether DNA testing will occur. This significantly improves the situation compared to other states, where the process remains undefined and ambiguous. If the LRC recommendations for a Forensic Review Panel had been enacted in South Australia, it would have allowed for DNA and other scientific testing. At the date of writing, there have been no post-appeal DNA exonerations in Australia. The former absence, in any state, of any real framework for DNA innocence testing as outlined above and the continued difficulties in accessing relevant information are significant reasons as to why no DNA exonerations have occurred in Australia to date.

The case of Frank Button,<sup>77</sup> convicted of the rape of a teenage girl,

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76. Lynne Weathered, *Invisible Innocence: It Happens Here Too*, 32 GRIFFITH REV. 189, at 195 (2011).

77. *The Queen v. Button*, [2001] QCA 133.

perhaps best illustrates the difficulties of obtaining an exoneration. Sometimes referred to as Australia's only DNA exoneration, Frank Button's conviction was overturned in his first appeal, bringing him within the traditional appeal avenues and, therefore, outside the definition of wrongful conviction as used in this Essay. Despite the potential of highly probative DNA evidence being available before trial, that testing was inconclusive; the spermatozoa tested from the complainant's swabs failed to reveal a DNA profile of the donor.<sup>78</sup> Through the insistence of Button's appellate counsel, additional DNA testing was undertaken prior to appeal.<sup>79</sup> This additional testing included a bed sheet, not originally tested, which did not contain Button's DNA.<sup>80</sup> Further testing of the complainant's swabs proved that donor of the sperm was not Button, but the same person as the donor of the sperm on the bed sheet. Button's conviction was quashed.<sup>81</sup>

The court of appeal described this case as a "black day in the history of the administration of criminal justice in Queensland."<sup>82</sup> Importantly—for the purpose of understanding the position of wrongful conviction applicants in Australia—Frank Button's situation would have been daunting if the DNA retesting had not taken place prior to his appeal. That is, Button would have exhausted his one appeal right to the court of appeal. Additionally, he would not be entitled to a further appeal beyond the limited prospect of presenting a significant legal argument to be heard in the High Court or through being referred back to the court of appeal via a pardon application. Unfortunately for Button, he would have no new evidence to support a pardon application. Button would have difficulty satisfying the terms of the Queensland DNA guidelines, as DNA testing using Profiler Plus had already been undertaken, even though it did not initially provide a profile. If this occurred in another Australian state (outside of New South Wales), Button would have had no procedural framework or rights to access DNA innocence testing. Without the infrastructure allowing him DNA innocence testing, there would be no new evidence of innocence upon which to base a pardon petition, and in all likelihood, Button would have languished in prison.

Continuing with such a system is not reflective of a society that acknowledges and is committed to correcting, wrongful convictions.

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78. See CRIME & MISCONDUCT COMM'N, FORENSICS UNDER THE MICROSCOPE: CHALLENGES IN PROVIDING FORENSIC SCIENCE SERVICES IN QUEENSLAND (2002).

79. *Id.*

80. *Id.*

81. *Id.*; see also *The Queen v. Button*, [2001] QCA 133.

82. *The Queen v. Button*, [2001] QCA 133.

#### *D. Limited Appeal Avenues*

As alluded to earlier, there are limited appeal options for wrongful conviction claimants.<sup>83</sup> One appeal to a state appellate court is often all that is available. Australia's highest court, the High Court of Australia, has determined it is unable to hear fresh evidence, even if that were compelling evidence of innocence such as DNA. Recent research highlights that Australia's appeal system, through its lack of processes and avenues for wrongful conviction claimants, may breach article 14 of the *International Covenant on Civil and Political Rights*.<sup>84</sup> In order to ensure compliance with international obligations and more adequately provide fair processes for wrongful conviction applicants, the Australian Human Rights Commission, in a submission to the LRC, stated:

The current system of criminal appeals in Australia for a person who has been wrongfully convicted or who has been subject to a gross miscarriage of justice to challenge their conviction may not be fully compatible with the right to a fair trial as set out in ICCPR article 14(5).

In the absence of a national body, the establishment of a South Australian Criminal Cases Review Commission is one mechanism by which South Australia could ensure compliance with international human rights standards.<sup>85</sup>

The new appeal avenue introduced in South Australia is therefore a major step forward in better providing appellate access for wrongly convicted people. Such a measure should be similarly adopted across the country. More significant reforms in regard to our post-conviction review processes and mechanisms would better still meet international obligations. The creation of the CCRC in England and Wales has not solved the problem of wrongful conviction, and indeed, there are a number of criticisms regarding the organization.<sup>86</sup> The CCRC has

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83. For a more comprehensive discussion surrounding appeal avenues for the wrongly convicted, please see Lynne Weathered, *Pardon Me: Current Avenues for the Correction of Wrongful Conviction in Australia*, *Current Issues in Criminal Justice*, 17 (2) J. OF THE INST. OF CRIMINOLOGY 203 (2005); and Lynne Weathered, *Does Australia Need a Specific Institution to Correct Wrongful Convictions?*, 40 (2) *AUSTRAL. AND N. Z. J. OF CRIMINOLOGY* 179 (2007).

84. Bibi Sangha and Robert Moles, *Mercy or Right? Post-Appeal Petitions in Australia*, 14 *FLINDERS L.J.* 293 (2012); Bibi Sangha and Robert Moles, *Post-Appeal Review Rights: Australia, Britain and Canada*, 36 (5) *CRIM. L.J.* 300.

85. AUSTRALIAN HUMAN RIGHTS COMMISSION, *INQUIRY INTO THE CRIMINAL CASES REVIEW COMMISSION BILL 2010 7* (2011) available at [https://www.humanrights.gov.au/sites/default/files/content/legal/submissions/2011/20111125\\_criminal\\_case\\_review.pdf](https://www.humanrights.gov.au/sites/default/files/content/legal/submissions/2011/20111125_criminal_case_review.pdf) (last visited May 25, 2013).

86. To review some of the considerations, concerns and criticisms of the CCRC, see, e.g., THE CRIMINAL CASES REVIEW COMM'N, *HOPE FOR THE INNOCENT?* (Michael Naughton, ed., 2009); Robert Schehr & Lynne Weathered, *Should the United States Establish a Criminal Cases Review Commission?*, 88 *JUDICATURE* 122 (2004); Lynne Weathered & Stephanie Roberts, *Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Projects and the Criminal Cases Review*

however, significantly impacted on the ability of wrongful conviction applicants to have their cases more thoroughly investigated through the CCRC's wide investigative powers. A distinct increase in referrals to the courts of appeal has occurred since the introduction of the CCRC. If such a body is created in Australia, lessons could be learned from the criticisms of the English model, and moreover, attention could be given to specific Australian issues such as the over-representation of Aboriginal and Torres Strait Islanders in our prisons. It should be remembered however, that there is no one solution to the problem of wrongful conviction and eternal vigilance by everyone involved in the criminal justice system will always be required.

## V. CONCLUSION

Acknowledging that wrongful convictions occur does not undermine a criminal justice system. In contrast, acknowledging wrongful convictions can demonstrate a real commitment to the ideals of justice if active reform is undertaken to address the problem. All criminal justice systems have flaws. Australia has its own examples of wrongful conviction that demonstrate its vulnerability to many of the causative factors known to occur in overseas nations. While the Australian system does have many front-end measures that may reduce the likelihood of wrongful convictions occurring, it has not sufficiently updated the post-appeal investigative and corrective measures to allow for those wrongful convictions that do occur, to be more easily identified and corrected.

Australia's current legal environment creates real obstacles to the investigation of wrongful conviction claims. In particular, Australia generally creates unnecessary difficulties by failing to provide a framework which would enable wider discovery of documents and evidence, greater access to DNA innocence testing or other forensic testing, and additional appeal avenues to correct potential miscarriages of justice. Reform measures need to address these obstacles. The creation of CCRC—empowered to fully investigate and to refer claims to courts of appeal—is the most comprehensive way to do so. The relatively few updated measures for the correction of wrongful conviction is, perhaps, now a significant differentiating feature of Australia's criminal justice system compared to that of England.

In recent times, some welcome measures have been introduced in Queensland, with the introduction of DNA innocence testing guidelines, in New South Wales, through their DNA innocence testing legislation

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*Commission*, 29 OXFORD J. LEGAL STUD. 43 (2008); Richard Nobles & David Schiff, *The Criminal Cases Review Commission: Establishing a Workable Relationship with the Court of Appeal*, CRIM. L. REV. 173 (2005).



and through the South Australian legislation enabling a second appeal. While these may be limited in scope, they all present a step forward and better address the problem of wrongful conviction than other states in Australia, where virtually no updating of mechanisms for the correction of wrongful conviction has occurred. Resistance to implementing wider more effective measures to identify and correct wrongful convictions is not demonstrative of the modern, responsive criminal justice system otherwise existing in Australia. Hopefully, the future will see increased measures adopted throughout the country, aligning Australia more closely to international developments designed to investigate, uncover, and correct, wrongful convictions.