Contemporary Comment

Reviewing the New South Wales DNA Review Panel: Considerations for Australia

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Abstract

New South Wales currently offers the only legislative avenue for DNA innocence testing in Australia. In line with its sunset provision, it is now undergoing a statutory review to determine whether it will continue or cease to operate. This article considers the role of the DNA Review Panel within the context of correcting wrongful convictions in Australia and in light of international developments, and argues that it is the expansion, not the dismantling, of the New South Wales Panel that is required. Moreover, this article notes that in order to ensure compliance with obligations under the *International Covenant on Civil and Political Rights*, all Australian states and territories should act to create some new mechanism for wrongful conviction applicants. Recent developments in South Australia offer one option, while the creation of a Criminal Cases Review Commission would offer a more comprehensive way to identify and correct wrongful convictions.

Introduction

DNA testing has profoundly impacted criminal justice systems across the globe, providing support to attain convictions and to highlight wrongful convictions. New South Wales was the first Australian state to introduce DNA innocence testing, initially through the creation of the now defunct Innocence Panel and currently via the legislative provisions found in pt 7 div 6 of the *Crimes (Appeal and Review) Act 2001* (NSW) ('*Crimes (Appeal and Review) Act*'), 'Applications to DNA Review Panel'. In August 2010, Queensland also implemented measures for DNA innocence testing in the form of guidelines for applications to the Attorney-General to request post-conviction DNA testing (Department of Justice and Attorney-General 2010). These are the only two current mechanisms for DNA innocence testing in Australia, with South Australia poised to implement similar, but wider, measures.

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To date, the New South Wales and Queensland provisions are the most significant developments in Australia with regard to correcting wrongful convictions. The New South Wales provisions, being statutorily based and establishing a specifically empowered DNA Review Panel ('the Panel'), should offer a stronger platform for the progress of claims of wrongful conviction than the Queensland guidelines. The reforms proposed for South Australia would be the most progressive yet.

A statutory review of the Panel is currently taking place, in line with the sunset provision of its establishing legislation (s 97 of the *Crimes (Appeal and Review) Act*). The review will consider whether the Panel be abolished or continue to function beyond its seventh anniversary. This article considers issues relevant to the New South Wales review and broader implications for Australia, including other options for the identification and correction of wrongful conviction. It briefly analyses two recommendations that would widen the eligibility criteria for review by the Panel. The situation is New South Wales is then compared to that in other states and territories where no legislation exists, thereby highlighting the role of the Panel. This article finally notes recent conclusions that Australia may be in breach of international obligations and, to ensure compliance and provide better mechanisms for applicants with claims of wrongful conviction, challenges all Australian states and territories to enact new measures.

Identifying innocence: DNA and beyond

Internationally, the use of DNA to exonerate innocent people has exposed the potential for inaccuracy in criminal convictions and the need to identify and correct wrongful convictions where possible. This has been most evident in the United States, where legislation setting the framework for the preservation of biological evidence and/or rights to access and undertake DNA testing on that evidence now exists in 49 of 50 states. With access back into an appellate court, innocence projects and other independent lawyers and groups have worked to free 302 innocent, but convicted, people from prison through DNA evidence. In almost 50 per cent of those cases, the real perpetrator has been identified (Innocence Project 2013).

Elsewhere in the world, DNA can play a role in correcting wrongful convictions within a larger framework for addressing miscarriages of justice. In Canada, a Criminal Conviction Review Group ('CCRG') established in 2002 reviews claims of wrongful conviction with the power to undertake DNA innocence testing among other forms of investigative review (DOJ Canada 2005:7; for relevant legislation in Canada, please see *Criminal Code*, RSC 1985, c C-46, s 696). Prior to this development, wrongly convicted Canadians were restricted to pardon provisions similar to those applying in Australia.

The most comprehensive body created to correct wrongful convictions is the Criminal Cases Review Commission ('CCRC') based in Birmingham, UK, which operates for England, Wales and Northern Ireland (for relevant legislation in England, Wales and Northern Ireland, see the *Criminal Appeal Act 1995* (UK) c 35, s 8; see also the Ministry of Justice, Criminal Cases Review Commission website at <http://www.ccrc.gov.uk>). Scotland and Norway have also each established their own CCRC, while other countries including Australia are still considering whether to create such a body. The CCRC is an independent, government-funded body that investigates claims of miscarriages of justice with the ability to refer cases to their courts of appeal. DNA innocence testing is incorporated within its broad and extensive powers of investigative review.

As evidenced by previous well-known cases of wrongful conviction, Australia is far from immune to the problem.[1] Calls for reform include the expansion of DNA innocence testing throughout the country and the establishment of a CCRC either on a state-by-state basis or through a federal oversight body. The most recent developments stem from South Australia. The South Australian Legislative Review Committee ('LRC') held a recent inquiry into the establishment of a CCRC (LRC 2012:9). While it concluded against the establishment of a CCRC at this time, the LRC nevertheless determined that better post-conviction review processes were required (LRC 2012:81). 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' (LRC 2012:84). The proposed Panel is to some extent modelled on the NSW Panel, but has a broader scope as it allows for a range of scientific evidence to be re-examined, not just DNA — though it falls short of a CCRC in that it is still restricted to forensic issues.

The LRC further recommended that pt 11 of the *Criminal Law Consolidation Act 1935* (SA) be amended to allow a new statutory right of appeal (with permission of the court) where the evidence is tainted or where there is fresh and compelling evidence to be considered (LRC 2012:81–3). This would be an important 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 (Weathered 2005; 2007).

A new statutory right of appeal where there is fresh and compelling evidence has been incorporated into the Statutes Amendment (Appeals) Bill 2012 (SA), which was introduced to Parliament in November 2012. It will also be put to the Standing Committee of Attorneys-General for wider consideration (Seven Network 2012). The implementation of these reforms will place South Australia in advance of other states — and open up an opportunity for Australia-wide action. New South Wales therefore has the opportunity to consider expanding the Panel in a similar way, when undertaking its statutory review.

Statutory review of the NSW DNA Review Panel

The Panel considers applications from prisoners in New South Wales claiming to be wrongly convicted and undertakes a threefold task in that regard: first, to consider whether the DNA testing requested would assist a convicted person; then, if so, to arrange searches for the biological material; and, if that is successful, to arrange for its testing (DNA Review Panel 2011:27; Lawlink 2011). The Panel commenced operation in June 2007 (DNA Review Panel 2011:25). It is now undergoing a review to consider its continuance or abolition as required under s 97 of the *Crimes (Appeal and Review) Act*.

From its commencement in June 2007 to June 2011, the Panel considered 29 applications, including 10 applications received in the 2010–11 financial year (DNA Review Panel 2011:31). As at June 2011, there were seven cases where evidence had

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[1] See, eg, some of the known wrongful convictions in Australia: *Re Conviction of Chamberlain*; *Button v The Queen*; *Beamish v The Queen*; *Mallard v The Queen*; *Mickelberg v The Queen*; *R v Condren*; *Ex parte Attorney-General*; *Easterday v The Queen*; see also Royal Commission of Inquiry in Respect to the Case of Edward Charles Splatt (1984).

been sought (with one pending), six where items have been tested (with one pending) and four cases where a DNA profile was obtained (with one where DNA analysis is pending). As yet, there have been no case referrals from the Panel to the Criminal Court of Appeal (DNA Review Panel 2011:31–2) and this is of concern.

The reasons for the zero referral rate from the DNA Review Panel to the Court of Appeal need to be determined and examined so that it can be more fully understood and, in doing so, ensure that the criteria currently employed through the legislation and the discretionary elements of the legislation are the most effective to give people who are innocent but convicted the opportunity to establish their innocence through, in part, the use of DNA testing.

Two small amendments to the eligibility criteria within the current legislative provisions (noted below) would expand the New South Wales provisions so that they become more widely available to wrongly convicted people.

Section 89(3): Requirement that applicants be convicted prior to 2006

Recommendation 6.1 of the *DNA Review Panel Annual Report 2010–2011* is that s 89(3) of the *Crimes (Appeal and Review) Act* is amended so as to remove the condition that convicted persons are only eligible to make an application if they were convicted before 19 September 2006. The Law Society of New South Wales supports the removal of this condition (Law Society of NSW 2012). The South Australian LRC expressly rejected that any such restriction applies to the recommended Forensic Review Panel (LRC 2012:85).

It is unclear why this restriction was originally included in the *Crimes (Appeal and Review) Act*. It appears to assume mistakenly that because DNA testing would have been available pre-trial for applicants convicted after 19 September 2006, there could be no need to question the accuracy of that testing. This is demonstrably wrong. The Queensland case of Frank Button (2001: *Button v The Queen*) and the Victorian case of Farah Jama (2008: *R v Jama*) highlight how errors with DNA testing can occur at any time, and therefore evidence must be preserved if those mistakes are to be corrected — and applicants must be allowed the same opportunity for correction. Further, as stated by the Panel itself, 'DNA testing is a continually evolving science and technological procedure, with significant advances being made all the time' (DNA Review Panel 2011:33).

The extension to those convicted after 19 September 2006 is also necessary to make sense of the preservation of evidence requirements. If the requirement to preserve evidence under the *Crimes (Appeal and Review) Act* only applies post-19 September 2006, but the eligibility for consideration for DNA innocence testing under the Act only applies prior to 19 September 2006, then the preservation requirement does not apply to its potential applicants (Weathered and Blewer 2009).

Section 89(3)(a): Relevant offences reviewable under the Crimes (Appeal and Review) Act

The Panel has also revisited the issue of whether s 89(3)(a) of the *Crimes (Appeal and Review) Act* should be expanded so as to make a relevant reviewable offence, one that is punishable by imprisonment for 14 years or more, rather than the current 20 years. A 'relevant offence' is currently defined in s 89(3) as:

(a) an offence that is punishable by imprisonment for life or for a period of 20 years or more or,

(b) any other offence punishable by imprisonment in respect of which the Panel considers that there are special circumstances that warrant the application.

Initially the Panel recommended against lowering the threshold to offences punishable by imprisonment for 14 years or more; however, this changed in its *Annual Report 2010–2011*. Earlier reasons against lowering the threshold included 'the impact this would have in relation to the retention of exhibits', suggesting it would be 'impracticable', and that where necessary an offence could come under the special circumstances clause in s 89(3)(b) which 'gives the Panel the power to consider any application, regardless of the offence, if it considers that the interests of justice so require it' (DNA Review Panel 2010:30) The Panel has since moved from this position and now considers the lower threshold offers a 'reasonable and appropriate balance between the Panel's consideration of serious matters attracting lengthy custodial sentences; and not requiring police to retain exhibits beyond conviction and appeal to all custodial offenders' (DNA Review Panel 2011:33).

Adoption of the Panel's recommendation would be of great importance to many of those who are wrongly convicted of an offence who would not meet the current 20-year punishment criteria. A stronger improvement still would be if the legislation expanded further and applied to all indictable offences — so that those living under the cloud of a wrongful conviction with the potential of DNA to expose it might have the opportunity to use this scientific tool. While the Panel may have some discretion to refer cases if it considers it is in the interests of justice to do so (under s 89(3)(b)), wrongly convicted people should not have to be reliant on a discretionary determination as to whether their convictions are given the chance to be corrected. A wrongful conviction can have a lifelong impact, regardless of the sentence imposed.

While an evidential imposition would be incurred if the Panel's recommendation is adopted, it is only the portion of the evidence that contains biological material (and not the entire piece of evidence) that requires preservation. If the vast majority of states in the United States can incorporate preservation of evidence within their DNA innocence testing legislation for a prison population of approximately two million people, then the storage requirements for New South Wales, with a prison population of approximately 10 000 people, are surely manageable (Australian Bureau of Statistics 2011).

Moreover, the expansion of 'relevant offences' is necessary to ensure evidence is preserved. Currently, the *Crimes (Appeal and Review) Act* only requires the preservation of evidence for cases punishable by life or for 20 years or more (s 96(1)(a)). Therefore, even if the Panel used its discretionary power to determine that a DNA test should take place, the evidence for that test is unlikely to exist and may be the determinative reason why an innocent person remains in prison.

Essential considerations

Within DNA innocence testing parameters, four essential elements are generally at play: the need to preserve evidence; the need to be provided with information regarding what evidence does or does not exist for potential testing; access to any existing and potentially probative evidence for DNA testing; and access to appellate courts for consideration of the new evidence. The New South Wales legislation incorporates all four aspects in some manner. Further expansion of that legislation could better facilitate DNA exonerations, as

examined in an earlier article (Weathered and Blewer 2009). That said, as the only current government-funded body to specifically address wrongful convictions in Australia, the Panel is an improvement to the situation in states without such a body or legislative avenue.

The role of the Panel in searching for and providing information to applicants about whether biological material still exists in their case is a vital component in correcting miscarriages of justice. Even though the outcome of a search may be devastating for an applicant if the evidence sought has not been preserved, the role of the Panel in undertaking the search and reporting the findings is critical to the overall provision of DNA innocence testing. It answers questions as to the availability or otherwise of evidence, providing essential information about whether or not an applicant's matter can be progressed. Such knowledge either offers a step toward potential DNA testing or, alternatively, at least some sense of finality for those involved. Applicants elsewhere in Australia can wait many years without being advised whether or not biological evidence in their matter exists, or may not be advised at all, leaving everyone involved in an appalling state of uncertainty. Information as to the existence or otherwise of biological evidence is not controversial — but it is of fundamental importance. The value of the Panel in this regard alone should not be underestimated.

If the Panel was abolished, it would place New South Wales applicants in the same position as applicants from other states and territories where no DNA innocence testing legislation or guidelines exist. There are currently no real discovery powers to access potentially exonerating information once the appeal right has been exhausted. Opportunities for the full investigation of cases by those seeking to help the wrongly convicted are thereby hindered or thwarted altogether. Wrongful conviction applicants remain reliant on ineffective traditional pardon petitions. Two major shortcomings of these provisions were highlighted by the Law Council of Australia:

> 9.i. It is entirely within the Executive Government's discretion whether or not to issue a pardon or return a case to the courts for further review. There are no statutorily prescribed criteria to guide the exercise of this discretion.
>
> 9.ii. The Executive Government makes a decision on whether to refer a matter to the appeal court based on the material submitted by the petitioner, that is, the convicted person. The Executive rarely conducts its own inquiry. Further, if a matter is referred to the court for review, the appeal court reviews the case based on the material submitted by the parties. It does not conduct its own inquiry.
>
> The result is that post-conviction the entire burden, including the financial burden, of identifying, locating, obtaining and analysing further evidence rests entirely with the convicted person.
>
> He or she has no particular power or authority to compel the production of information, interview witnesses or conduct scientific testing on relevant materials (Law Council of Australia 2012:2).

If the Panel ceased to operate, there is no other body that would undertake a search for biological evidence, and no process in place or right to undertake a DNA innocence test. Without legislation or guidelines, the way forward for wrongly convicted people becomes hopelessly difficult to traverse (Sangha and Moles 2012a; 2012b; Weathered 2012; 2007; 2005). Such absence of avenues is far from conducive to the correction of wrongful conviction — and a long way from international developments.

International Obligations

Recent research highlights that Australia's appeal system, through its lack of processes and avenues for wrongful conviction claimants, may breach art 14 of the *International Covenant on Civil and Political Rights* ('*ICCPR*') (Sangha and Moles 2012a; 2012b). In order to ensure compliance with international obligations and more adequately provide fair processes for wrongful conviction applicants, the Australian Human Rights Commission has recommended that South Australia establishes a CCRC (Australian Human Rights Commission 2011:7). The Law Society of South Australia agreed and expressed concerns that such non-compliance was likely to result in a legal challenge and recommended the adoption of a CCRC 'so as to avoid uncertainty, delay, expense and criticisms that would be associated with such further litigation and findings of non-compliance' (Law Society of South Australia 2012b:2).

Australia is therefore in need of significant reform to its post-conviction review processes and mechanisms.

Conclusion

DNA innocence testing can both demonstrate a wrongful conviction and identify the real perpetrator of a crime. Public safety is undermined if an innocent person is convicted and incarcerated while the guilty person remains free. For reasons outlined in this article, if New South Wales was to abolish the DNA Review Panel and its accompanying legislative avenue as found in pt 7 div 6 of the *Crimes (Appeal and Review) Act*, without immediately providing in its place another more expansive form of DNA innocence testing legislation or an alternative mechanism for the review of a wider range of wrongful conviction applicants, it would signal a step backwards for justice, not only for New South Wales, but for Australia. Moreover, in light of concerns that Australia may not currently be meeting its international obligations under the *ICCPR*, maintaining the Panel, while incorporating the recommendations discussed within, would appear to be at best the most minimalist response required to address the problem of wrongful conviction — though whether it is enough to satisfy international standards would appear open to question.

A CCRC with extended reach to all types of evidence, combined with independence, strong investigative powers and the ability to refer cases to the appellate courts, would offer a significantly more comprehensive way to identify and correct miscarriages of justice, and there is high-level support for the creation of such a body (see Australian Human Rights Commission 2011:7; Law Society of South Australia 2012a:1–2; 2012b:1–2; Law Council of Australia 2012; for comments regarding the Australian Lawyers Alliance support, see Dornin 2011).

However, if a CCRC is not established at either state or national level, then the need for another measure to expose and correct wrongful convictions is heightened. This is where the comparatively easy and cost-effective measure of DNA and other scientific testing in conjunction with an additional appeal avenue could come to the fore to address the urgent need for reform. Such measures will be especially productive if opportunities for the effective discovery of documents, DNA testing and an avenue back into the appeal courts is also available to independent organisations assisting the wrongly convicted, as evidenced by the success of innocence projects in the United States.

Michael Kirby recently commented that, when it comes to adopting measures to better identify and correct wrongful convictions, the choice may be as brutal as whether or not we care sufficiently about wrongly convicted people (Sangha, Roach and Moles 2010:xxii). That brutal choice now applies to the decision as to the abolishment or continuance of the DNA Review Panel — and to decisions as to what mechanisms should be introduced across the country.

The challenge for Australia goes beyond adopting similar measures to those already in place in New South Wales. All states and territories are now poised to review the more expansive South Australian reform measures, with the potential to enact similar mechanisms — or employ even more comprehensive ways to address wrongful conviction, such as the establishment of a CCRC-style body — and, in doing so, bring Australia closer to international developments and ensure compliance with current international standards and obligations.

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