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Rights of the Wrongfully Convicted

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Interest and recognition of miscarriages of justice has been increasing in Australia and indeed around the world, generated by high profile cases, the emergence of Innocence Projects, as well as tribunals such as the Criminal Cases Review Commission in the United Kingdom. Despite this, there is often a desire to marginalise miscarriages of justice, evidenced by narrow definitions that are limited to situations where the review mechanisms in place have failed to correct the wrong that has occurred. In contrast, a broader definition describes a miscarriage as a failure to achieve justice. Indeed this failure 'can occur at any stage of the criminal justice process, from law-making through street policing practices, investigations, court processes and custodial practices'.¹ As a result, miscarriages of justice raise 'concerns regarding the fallibility of due process, human rights violations, and the limitation of the adversarial approach'.² These concerns have led to a critical and questioning attitude toward the justice system.

This article will examine what we know about the causal factors of miscarriages including police misconduct, eyewitness errors, false confessions and flawed forensic evidence. A specific example of an alleged miscarriage of justice is provided to explore the legal steps involved in trying to have a conviction overturned. The article will also detail the effects that wrongful convictions can have on individuals such as loss, anger and perceptions of not really being released, as well as the impact on families and friends. Lastly, the avenues open for those who have been wrongfully convicted to seek exoneration will be outlined, together with the compensation programs available in countries such as Canada, the United States, the United Kingdom and Australia.

Causes of wrongful conviction in Australia

Much research has been done to highlight the potential individual and systemic causes of miscarriages of justice which can act either alone or in concert with one another. However, very few studies have been conducted in Australia. One local project completed by Langdon & Wilson in 2005 examines the causes of possible and actual miscarriages of justice in 32 cases of manslaughter, murder,

attempted manslaughter/murder, interpersonal crimes, robbery and drug-related offences.³ This work updates a 1989 study by Wilson⁴ and finds that in addition to the persistent factors leading to miscarriages that were presented in the original study, new issues have emerged, such as witness/victim perjury, inadequate representation, allegations of prosecutorial misconduct and misunderstanding of cultural nuances.⁵

The recurring factors responsible for actual or possible miscarriages of justice found by Langdon & Wilson in their recent study were categorised and include:

1. Police. This included over-zealous/unprofessional investigation where police deliberately distorted witness statements, coerced confessions from vulnerable suspects or ignored important evidence. Police appeared to engage in this type of behaviour because of their strong belief in a suspect's guilt and as a result, did not follow-up on other potential suspects or lines of inquiry. This is a major contributing factor and was responsible or partly responsible for miscarriages in 50% of cases studied. This category also includes incompetent police investigations where mistakes were made that put the evidence gathered into question, where crucial forensic testing was not conducted, or where delays occurred in crime scene photos being taken. Another aspect of this type of miscarriage involved allegations that police may have fabricated or withheld evidence, or otherwise deliberately took part in criminal behaviour.

2. Evidence. This included experts who acted as advocates rather than neutral parties reporting to the court. The opinions put forward by experts were found to be consistent with the prosecution's scenario even when inadequate or incomplete testing had been carried out. In 22% of the cases studied, 'experts as advocates' was partly responsible for the miscarriage. Closely related to this was inconclusive expert evidence where conclusions were inappropriately drawn from the evidence. As well, cases that relied on circumstantial or suspect evidence were found to lead to miscarriages in nearly 44% of the cases researched. Unreliable eyewitness identification was another factor found in the cases studied (nearly 16%) and is widely recognized as a significant cause for wrongful convictions, especially in the United States. Eyewitness errors can be unconscious or exacerbated by poor police interviews or suggestibility factors.

3. Secondary sources. The area of 'confession by other' was included in this category and relates to cases where doubt is cast on the original conviction when another person later confesses to the same crime. Unreliable police or prison informers are two key areas under this category and involve relying on notoriously unreliable informant evidence to assist in the conviction of an individual. This type of evidence is problematic because the informant usually has a vested interest in cooperating with police because of rewards being promised to them. Langdon & Wilson's study found that in over 9% of cases unreliable police informers contributed to a miscarriage of justice.

4. Mass media. This involved cases that were found to be clearly influenced by media pressure resulting in premature arrests. Media stereotyping and prejudice were also a factor when police formed opinions about the case despite evidence that painted a different picture. The media's influence was an evident factor in approximately 22% of cases examined in the study.

5. Trial processes. Under this classification 'erroneous

judge's instructions' were found in just under 19% of cases; 'inadequate representation' was deemed to have partly contributed to a miscarriage in 25% of cases studied; and finally 'prosecution misconduct', mainly involving how the Crown framed its case, was identified to have partly led to a miscarriage in 15% of those 32 examples of alleged or actual miscarriages.

6. Misunderstanding of cultural factors. This category involved mainly language barriers experienced when the defendant did not speak the country's language. This problem can lead to miscarriages when inadequate translation services are provided, in particular when the defendant is being questioned by police.

Thus this study isolated six broad categories of 'causes' involved in wrongful convictions in Australia, but within each category are found other groupings of reasons for why the miscarriage occurred. The literature from countries such as Canada and the United States suggests similar causal factors including eyewitness misidentification, false confessions, professional misconduct by legal players, use of informants and forensic evidence.⁶ Although it is important to identify and understand how these factors contribute to miscarriages, focusing on causal factors can also be unhelpful because they are based on a 'simplistic assumption' that once we have identified them, we will know how to remedy them.⁷

Legal steps in overturning a wrongful conviction

Having examined some of the causes of wrongful convictions, we now turn to a specific example of an alleged miscarriage of justice to explore the legal steps involved in trying to have a conviction overturned. One case that we have been working on at Bond University for over 13 years is that of Graham Stafford. The initial involvement came when Stafford's parents approached Professor Paul Wilson in 1993. This case later became one of the first that was addressed by students when our 'Miscarriages of Justice' course commenced at Bond in 1999. Since then teams of students, along with the conveners of that course, Professors Paul Wilson and Eric Colvin, have re-examined the case. Currently there is a group of students and staff preparing a second petition to the Governor of the State to endeavour to have this conviction re-examined.⁸ This case epitomises the difficulty in trying to secure some kind of re-investigation in Australia.

The case centres on the murder of 12-year-old Leanne Holland who was last seen at Goodna in Queensland on Monday 23 September 1991. It was the first day of her school holidays and despite many sightings of her on that and subsequent days, the discovery of her body the following Thursday confirmed that she was a murder victim. Graham Stafford was in a defacto relationship with Leanne's older sister Melissa and lived in the family home. He had a rostered day off work and spent the day at home mending his car, making him the last known person to see Leanne alive. It was alleged that the two had an argument, Graham bashed Leanne, hid her body in the boot of his car and dumped it two days later. Graham continues to strenuously deny any involvement in her killing. There has never been a motive established in this case, there are no eyewitnesses to the crime, no confession, no weapon located and almost no opportunity for Graham to have been the offender in this

matter. Graham was recently released on parole after serving almost 15 years in prison. This is quite a unique scenario given that he has constantly denied any culpability for the crime and therefore has never conceded remorse. This is an important point for those wrongfully convicted – if they continue to deny responsibility for the crime then they are seen as a higher risk, lacking any rehabilitation, and therefore their punishment is greater than those who do admit guilt. So it is unusual that Stafford has been released into the community given his strong denial.

So what legal steps have Graham, his family, his legal helpers and the team of students and other supporters had to take during the past decade and a half? Graham was formally arrested on Saturday 28 September 1991, five days after Leanne's disappearance, and bail was never granted. Therefore Graham was incarcerated from that time until his recent release. The committal hearing took place at the Ipswich Magistrates Court on 2 December 1991, where Graham was granted legal aid and a barrister was appointed. There were 43 statements and 19 exhibits in the prosecution brief and five witnesses (mostly police and other scientific personnel) were cross-examined about the blood and other forensic evidence. The eight-day trial commenced some three months later, on 16 March 1992, at the Supreme Court in Brisbane. Graham again received legal aid but his former barrister was called to other duties and so another took over the case on the Friday before the trial commenced, giving him only the weekend to prepare. The case was prosecuted before Justice Derrington, with several defence witnesses being called who recounted sightings of Leanne on the Monday and Tuesday of the week she disappeared. On 25 March 1992, when the trial concluded, the judge delivered a lengthy summation, the jury retired at 2.45 pm, and a guilty verdict was returned at 5.57 pm, leaving the judge no option but to give a life sentence.

Because there are time limits related to appeals, an appeal notice was lodged with the Court of Criminal Appeal within a month and the appeal commenced on 13 August 1992. The appeal was rejected and the original sentence was reaffirmed, with the decision being handed down on 29 August that year. The family were not prepared to give up and therefore funded an application for special leave to appeal to the High Court of Australia on 4 March 1993, but this was rejected the following day. In the meantime they had consulted Professor Paul Wilson and private investigator Graeme Crowley. Three years later they secured the assistance of solicitor Richard Carew who presented a petition for mercy to the Governor of Queensland seeking a review of the case on 18 September 1996. By February of the subsequent year that appeal found its way back to the Court of Criminal Appeal and the petition was formally dismissed by three judges (Davis, Fitzgerald and McPherson JJ) in a 2:1 majority decision. Then in a highly unusual step the case was again sent to the High Court in an application for leave to appeal on 17 April 1998. Because the appeal had been rejected the lawyers were able to again take the matter to the High Court and in the process, create Australian legal history, as this was the first time that a criminal case had been to the High Court twice to seek a quashing of a conviction. In 23 minutes the special leave application was denied and again Graham's conviction and sentence were reaffirmed.

Despite years of work on this case by a host of journalists, lawyers, criminologists, students and the family and friends

of Graham Stafford, there is still no resolution on the horizon. All those who have viewed the material outside of legal forums believe that at least there should be a re-trial so that the evidence can be properly tested. Yet this option – despite two appeals, two applications to the High Court of Australia and a petition to the Governor – has not been granted. This case demonstrates more than any other the need for some kind of criminal cases review commission such as that operating in the United Kingdom where independent investigators can truly re-examine a case outside the limitations of our legal processes.

Effects of wrongful convictions

The focus of most research in the area of miscarriages of justice has been on uncovering and exploring the causal factors as described above. While these studies are vital, little attention has been paid to the effects experienced by those individuals who were wrongfully convicted – the victims of the criminal justice system. The existing perspectives of miscarriages often obscure the wide range of additional harms that accompany wrongful convictions such as social, psychological, physical and financial harms.⁹ The studies conducted in this area indicate that the long-term effects are experienced not only by the individual but also by their friends and families. Interviews carried out by Denov & Campbell in 2005 with five wrongfully convicted men in Canada found four recurring themes:¹⁰

1. Loss. The interviewees raised many aspects of loss (both physical and emotional) from loss of job and income, to loss of dignity and reputation. In many cases they lost their families if they were taken away or if they did not believe in their innocence.

2. Anger. The interviewees said their sense of injustice made them feel more impatient and aggressive. They had become tougher just by being in prison as well, and they felt that the experience had changed their personalities.

3. No release. This theme had practical as well as emotional components because interviewees felt their reputations had been lost and so despite being released from prison they could never be ‘free’. Some suffered panic attacks because the public might recognise them or more importantly that they might again be wrongly accused of a crime. Those convicted of sex crimes felt the label could never be fully removed and so the vilification and stigma remained. Others changed their appearance to avoid being recognised. One reported that he worked as much overtime as possible so that he always had an alibi ‘just in case’, while most noted that they had to keep their past a secret which decreased their levels of trust.

4. Impact on families. The interviewees also noted how all the above problems were similarly visited upon their families such as loss of income and financial difficulties in having to support the person in prison or to pay legal expenses. In some cases children were taken into care because the household could no longer support them, and many of the same emotional consequences were also directly or indirectly experienced by family members. Children themselves felt angry or they had to endure a parent who was now more aggressive than before.

Other studies conducted on the effects experienced by the wrongfully convicted have found comparable results but also indicate striking similarities to effects experienced by those who were prisoners of war or political prisoners.¹¹ This primarily included symptoms of post traumatic stress disorder.

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der or chronic psychological trauma. At present a study on these consequences is being undertaken in Australia as there is no literature on this in our country.¹²

Options for the wrongfully convicted to pursue exoneration

This section will describe the avenues available for the wrongfully convicted to pursue exoneration in countries such as Canada, the United States, the United Kingdom and Australia. It is important to note that because most of these nations consist of federated states/provinces and because justice is usually a state-based activity, there is no single method in each country. In addition, with the advent of new technologies (like DNA testing) as well as the increased public, media and political attention given to miscarriages in the past two decades, there have been many recent amendments to the processes involved. Within some countries there exists specialised legislation, tribunals and panels which also offer redress to the wrongfully convicted. There are however generally three main avenues for a wrongfully convicted person to pursue an exoneration and include royal commissions, DNA testing and innocence projects.

Miscarriages in the past have traditionally been resolved or come to light via royal commissions or government inquiries. Unfortunately the extensive recommendations that flow from these inquiries are not always implemented and the main outcome is to award financial compensation rather than to ensure that systematic problems are addressed. Another avenue is to petition heads of state to examine and potentially issue a pardon.

DNA evidence is another means whereby the wrongfully convicted may seek to have their convictions overturned and there have been six such cases in Canada up until late 2000. DNA exonerations are expensive and are limited as the samples may be contaminated during storage by police, and in other cases no physical evidence exists. With misinterpretation, this forensic technique has the potential to cause as many miscarriages as it has the potential to resolve.

Innocence projects are a final avenue of redress. The first was established in the United States by Barry Scheck and Peter Neufeld at the Cardozo School of Law in New York in 1992. It was created after a landmark study by the US government that estimated a 5% failure rate in the US justice system, which suggests as many as 100,000 falsely convicted prisoners. Due to the overwhelming response to their project, the founders formed an Innocence Network by establishing satellite projects.¹³ Innocence projects are not uniformly composed and have varying aims, services and selection criteria. However, in general they work to exonerate and obtain the release of the wrongfully convicted, as well as to develop and implement reforms to prevent wrongful convictions and assist other groups to start their own innocence projects. Such projects exist in most US states, Canada and Australia, forming an international Innocence Network of projects.¹⁴

There is now in the United States specialised legislation – the *Innocence Protection Act 2004* – which is one part of a package of criminal justice reforms aimed at reducing the risk that innocent persons may be executed. The Act affords convicted federal offenders greater access to DNA testing by allowing them the right to petition a federal court to have such testing completed. The Act also provides for funding to states for increased use of DNA testing in new criminal

investigations and increased funding to improve the quality of legal representation in capital cases. In addition, the Act increased the compensation limits for the wrongfully convicted to a maximum of \$50,000 for non-capital cases and \$100,000 in capital cases for every year spent in prison.¹⁵

The Canadian government has also enacted legislation providing for further review of cases that are considered to be potentially wrongful convictions. Section 696.1 of the Criminal Code of Canada allows an application for review to the Department of Justice's Criminal Conviction Review Group. The eligibility criteria require that the applicant must have new and significant information and have exhausted all other appeals. There are four stages to the application (preliminary, detailed examination, investigation brief, and advice to the Minister). The Minister can order a new trial, a new appeal or can ask questions of the appeal court if a miscarriage of justice is established. However, the process has been criticised as lacking transparency and independence, as being cumbersome, expensive, and not likely to be successful for most.¹⁶

The United Kingdom's Criminal Cases Review Commission is 'an independent body responsible for investigating suspected miscarriages of justice in England, Wales and Northern Ireland'.¹⁷ It is here that those who believe they have either been wrongfully convicted or sentenced can submit an application to have their case reviewed. The Commission can gather information related to a case and carry out its own investigation. Once completed the Commission decides whether to refer the case to the appropriate appellate court for further review. It will only refer a case to an appellate court if it believes there is a real possibility that the person's conviction would not be upheld. On average it refers 30 cases per year to appellate courts, and in 75% of those cases the appeal succeeds.¹⁸

In Australia, the state of New South Wales formed an 'Innocence Panel' in 2003 which comprised the Privacy Commissioner, representatives from the Director of Public Prosecutions and the Police Department, as well as victims of crime.¹⁹ The role of the Panel was to assist individuals who may have been wrongly convicted of a crime by facilitating the DNA testing of evidence that may help establish their innocence.²⁰ Unfortunately, the NSW Government suspended the Panel's operation shortly after announcing it due to an outcry over a contentious case. However, the NSW Bar Association recently petitioned the NSW Premier requesting the re-introduction of the Innocence Panel. The NSW Government has now committed itself to introducing such legislation in that state's next parliamentary session.²¹

Compensation for the wrongfully convicted

Should a wrongfully convicted person be fortunate enough to succeed in any of the above processes, there can be avenues to grant compensation for their wrongful conviction and imprisonment. Unfortunately, however, in many countries the process is ad hoc. Government compensation can be granted following major royal commissions or other bodies of inquiry. For example, in Australia the pursuit of compensation usually involves members of the government assessing an application with political factors often determining whether compensation is paid.

Compensation can also be sought and is often awarded through private/civil law suits (especially in the United

States). This avenue poses its own difficulties, particularly in the adversarial system where fault really needs to be proved – a task which is almost impossible because of mechanisms that protect those acting on behalf of the state. Despite this, some of those with post-conviction exonerations are increasingly suing defence lawyers, police and prosecutors with mixed results. There are significant differences among the state-based laws – for example, some will only deal with matters where there has been a DNA exoneration, while other states have short time restrictions on filing a claim. Suffice to say that the claimant has enormous burdens to overcome in order to run a successful lawsuit for wrongful conviction and imprisonment. If successful, compensation awards vary from thousands to millions of dollars depending on the state, circumstances of miscarriage and length of time spent incarcerated. There are no uniform compensation statutes so similarly positioned individuals can be treated very differently.²²

Conclusions

Miscarriages of justice often result from a multitude of factors or causes and, in some instances, the complex interactions that occur between them.²³ They cannot be viewed as isolated occurrences but rather are the result of multi-dimensional and systemic problems in our justice systems.²⁴ They have serious adverse consequences on the rights and lives of those involved, as well as the broader effect of undermining the legitimacy of and public trust in the criminal justice system.²⁵ As demonstrated above, miscarriages are difficult to correct as the avenues for exoneration are limited. Even if successful, the claimant faces enormous hurdles if they wish to seek compensation by filing a lawsuit for wrongful conviction and imprisonment, due to protections offered to legal actors as well as the stringent criteria needing to be met before an application can be made.²⁶

It would be incorrect to assert that nothing can be done to improve this scenario and significantly decrease the incidence and implications of miscarriages. The tightening of evidentiary protections is much needed in particular over the causal areas identified above such as eyewitness testimony and the potential for false confessions. It is through such protections and resultant reductions in errors that individuals will be less likely to be victims of miscarriages in the arrest and trial stages. There is also a need to recognise that those who experience a miscarriage are victims of the criminal justice system and that justice has not been served for them, their families and indeed for the community. With limited avenues for redress, there is also a demonstrated need for a body beyond courts of appeal to assist those who are seeking to prove their innocence. The Criminal Cases Review Commission in the United Kingdom, innocence projects and the Innocence Panel in New South Wales could all serve as models for any future bodies. As well, there is a need for the creation of a uniform compensation program to pay back for the wrong that has been committed.

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Consider and discuss:

Should Australia establish a uniform compensation program for those who have been wrongfully convicted and subsequently exonerated? If so, what amount of compensation should be offered? Should there be a cap on the amount an individual can be granted?

Should other Australian states follow the NSW example and institute an Innocence Panel? What would be the pros/cons of a government run and funded program?