

**NEW SOUTH WALES BAR ASSOCIATION**

**NEW SOUTH WALES BAR ASSOCIATION SUBMISSION TO PARLIAMENT  
CONCERNING THE NEW SOUTH WALES INNOCENCE PANEL**

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## NEW SOUTH WALES BAR ASSOCIATION SUBMISSION TO PARLIAMENT CONCERNING THE NEW SOUTH WALES INNOCENCE PANEL

### I INTRODUCTION AND BACKGROUND

On 16 August 2000 the then Police Minister, the Hon Paul Whelan MP, announced the formation of the NSW Innocence Panel ('the Panel'). As an administrative body accountable to the Minister of Police, the Panel was charged with facilitating both searches for nominated items which might yield DNA evidence and the testing of them.

The Panel adopted the following terms of reference at its first meeting on 17 October 2001 in the presence of the then Minister for Police:<sup>1</sup>

- (a) To receive applications from persons who claim to have been wrongfully convicted of a serious indictable offence and believe that analysis of DNA evidence may assist in proving this;
- (b) To consider whether those applications meet the criteria established by the Panel from time to time;
- (c) To facilitate the location of any forensic material from the scene of the crime for which the applicant was convicted;
- (d) To facilitate the provision of that material, and DNA material obtained from the applicant, to the Division of Analytical Laboratories for analysis;
- (e) To provide information to the applicant on the outcome of any analysis of DNA material or inform the applicant that DNA material connected with the crime scene is not in existence;
- (f) To advise the applicant on what steps are available to him or her upon receipt of this information;
- (g) To provide advice to the Minister for Police on systems, policies and strategies for using DNA technology to facilitate the assessment of innocence claims;

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<sup>1</sup> Finlay M, *Review of the NSW Innocence Panel* (2003) 9-10.

- (h) To report to the Minister for Police on any matter relevant to its functions referred to it by the Minister; and
- (i) To report to the Minister for Police by 30 June each year on its performance and on the procedures and processes put in place for its operation.

The Panel received its first application in November 2002. It received thirteen applications in total.<sup>2</sup>

On 29 July 2003, less than two years after the Panel was first convened, the then Minister for Police, the Hon John Watkins MP, suspended its operation pending review "because [he did not] believe there are sufficient checks and balances to protect the victims of crime from further anguish. The Innocence Panel process, as it is, leaves too many questions unanswered. It should be more transparent for applicants, victims and their families."<sup>3</sup>

The suspension was announced after the Panel's Chairman, the Hon Mervyn Finlay QC, raised concerns with the Minister about, amongst other things, privacy constraints and the inability of the Panel to control the use to which information it published could be put.

The review was conducted by the Chairman of the Panel under the following terms of reference:<sup>4</sup>

- (a) The need for an Innocence Panel;
- (b) The membership, structure and functions of the Panel or other appropriate body;
- (c) Legislative and administrative arrangements to support the body;
- (d) The safeguard of victim interests;
- (e) The persons eligible to apply to the Panel (including the nature of offences, the custodial status of the applicant, the DNA evidence used during the trial and whether all other avenues for testing have been exhausted);

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<sup>2</sup> Ibid 17.

<sup>3</sup> *Sydney Morning Herald* 12 August 2003

<sup>4</sup> Finlay M, *Review of the NSW Innocence Panel* (2003) 4

- (f) The relationship between the *Crimes (Forensic Procedures) Act 2000* and the body;
- (g) The relationship between the review provisions of Part 13A of the *Crimes Act 1900* and the body;
- (h) Whether the body should be able to refer matters directly to the Court of Criminal Appeal ('the CCA');
- (i) The information that should be disclosed by the body, and the persons that information should be disclosed to.

In September 2003 the report of the inquiry ('the Finlay Report') was handed down. It made the following recommendations:

- (a) There was a clear need for a Panel in New South Wales to assist with 'mak[ing] DNA technology available to those who have been convicted of an offence, and who believe that they will be proven innocent if their DNA is tested against forensic material found at the scene of the crime for which they were convicted and<sup>5</sup> it was unnecessary to establish a broader "Criminal Cases Review Commission";<sup>6</sup>
- (b) The Panel be renamed the 'DNA Reference Panel' or some similar title denoting its limited and specific role;
- (c) The Panel arrange, having assessed the merits of an application received, for searches to be conducted for nominated forensic material and the testing of the material.<sup>7</sup>
- (d) The Panel be brought within the Attorney General's Department;<sup>8</sup>
- (e) The Panel in exercising its functions take into account the interests of victims of crime and the public interest;<sup>9</sup>
- (f) Persons convicted of an offence carrying a maximum sentence of not less than 20 years be eligible to apply to the Panel; however that the

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<sup>5</sup> Ibid 41.

<sup>6</sup> Ibid 42.

<sup>7</sup> Ibid 43-44.

<sup>8</sup> Ibid 45.

<sup>9</sup> Ibid 45-46.

Panel maintain the discretion to accept applications in other 'special circumstances.'<sup>10</sup>

- (g) The Panel be made a statutory body under the *Crimes (Forensic Procedures) Act 2000 (NSW)*;<sup>11</sup>
- (h) No special relationship between the Panel and Part 13A of the *Crimes Act 1900 (NSW)* was necessary;<sup>12</sup>
- (i) The Panel be empowered to refer matters to the Court of Criminal Appeal where it considers that new scientific evidence raises a 'reasonable probability' that the Court of Criminal Appeal would quash the conviction or order a new trial;<sup>13</sup>
- (j) The Panel have clear power to disclose information about results of DNA testing to applicants and other persons, such as victims and their families, relevant government agencies and Ministers in appropriate cases.<sup>14</sup>
- (k) The *Crimes Act 1900 (NSW)* be amended to require the long term retention of forensic material found at the scene of a serious crime to facilitate post-conviction analysis.

The Government has expressed its commitment to the operation of an innocence panel based on the model recommend in the Finlay Report on several occasions since 2003. However, the suspension has not been revoked and no legislation implementing the recommendations in the Report has been proposed, let alone enacted.

The New South Wales Bar Association has considered the recommendations contained in the Finlay Report, compared them with available international models and recommends that the model recommended in the Finlay Report, or some variant of it, should be adopted in New South Wales.

Part II of this submission considers international efforts against wrongful conviction in the form of innocence projects, commissions and legislative initiatives operating in the United States, the United Kingdom, Scotland, Norway and Australia. Part III of this submission compares those efforts with the

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<sup>10</sup> Ibid 46-47.

<sup>11</sup> Ibid 48.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid 48.

<sup>14</sup> Ibid 48-50.

recommendations in the Finlay Report and shows how the recommendations of the Finlay Report should be adopted in New South Wales.

## II AN OVERVIEW OF INTERNATIONAL AND AUSTRALIAN EFFORTS AGAINST WRONGFUL CONVICTION

### A THE UNITED STATES

On 14 August 1989 Gary Dotson became the first individual in the United States to be exonerated through DNA technology and thus began what has been described as no less than a 'revolution' in the American criminal justice system.<sup>15</sup> The mass of DNA exonerations which have followed since 1989 have sparked the interest of hundreds of organisations and, to a lesser extent, state and federal government, into the correction of wrongful convictions across the United States.<sup>16</sup>

#### 1 Innocence Projects

In 1992 Professor Barry Scheck and Peter J Neufeld of Benjamin N Cardozo School of Law at the Yeshiva University in New York founded the Innocence Project, Inc ('the Cardozo model'): a 'non profit legal clinic and criminal justice resource centre' which 'provides *pro bono* legal services to indigent prisoners for whom post-conviction DNA testing can provide conclusive proof of innocence'.<sup>17</sup> Though certainly not the first organisation dedicated to the investigation of wrongful convictions, it was the first to focus exclusively upon DNA evidence, and in doing so, inspired the creation of some 30 other innocence projects across the United States, most of which are based on the Cardozo model. A list of similar projects can be found on the website of the Cardozo Innocence Project at [http://www.innocenceproject.org/about/other\\_projects.php](http://www.innocenceproject.org/about/other_projects.php). That list discloses the existence of innocence projects in 42 of the American States.

Each innocence project based on the Cardozo model is essentially a university based, academically supervised institution which substantially relies upon student involvement. For example, some 20 law students from the Benjamin N. Cardozo School of Law actively participate each year in the Innocence Project,

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<sup>15</sup> Samuel R et al, 'Exonerations in the United States 1989 through 2003' (2005) 95 *Journal of Criminal Law & Criminology* 523.

<sup>16</sup> The incidence of wrongful conviction in the United States has been estimated to be anywhere between 0.5 and 5 per cent. See Huff et al, *Convicted But Innocent: Wrongful Conviction and Public Policy* (1996) 53-67.

<sup>17</sup> Neufeld PJ, Scheck BC & Morrison NR, *Brief of the Innocence Project, Inc, as Amicus Curiae in Support of the Petitioner, Paul Gregory House v Rick Bell, In the Supreme Court of the United States* (2005) 1, Innocence Project <<http://www.innocenceproject.org/press/amicus.php>> at 29 March 2006.

Inc by drafting motions for DNA analysis, conducting investigations and locating evidence. Most projects also rely heavily upon attorneys who provide assistance on a *pro bono* basis.<sup>18</sup> While the Cardozo model investigates only those cases where DNA evidence may yield evidence of wrongful conviction, other projects are not so limited.

According to the most comprehensive study carried out in the United States to date, there have been some 340 exonerations since 1989; 144 were as a result of DNA evidence, 196 were by other means.<sup>19</sup>

Apart from the operation of the Innocence Projects, in the United States there have been few State efforts mounted comparable to the NSW Innocence Panel or a body suggested in the Finlay Report. The movement toward the establishment of state innocence commissions in the United States merits brief discussion.

## 2 Commissions

### *(a) State Innocence Commissions*

There have been repeated calls in the United States for the establishment of permanent State innocence commissions to investigate the causes of conviction of the innocent and to identify, through research, expert evidence/analysis, and discussion, potential solutions in the form of procedural or process changes or educational opportunities for eliminating each type of cause.<sup>20</sup> Though several States have committed to the idea in principle, few have taken the necessary step of actually creating such commissions. Illinois appears to have committed to the creation of an innocence commission as a result of lobbying from the Downstate Illinois Innocence Project.<sup>21</sup> Texas passed legislation in 2003 for the creation of an innocence commission – though no such commission has yet been formed.<sup>22</sup>

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<sup>18</sup> An overview of the Innocence Project can be found at:

<http://www.innocenceproject.org/about/faq.php> at 28 March 2006. See also: Stiglitz, Brooks & Shulman, 'The Hurricane Meets the Paper Chase: Innocence Projects New Emerging Role in Clinical Legal Education' (2002) 38 California Western Law Review 413.

<sup>19</sup> Samuel et al, above n 14, 524.

<sup>20</sup> See, eg: Belkin D, 'Leaders Ask for Innocence Panel in Massachusetts' *The Boston Globe*, 11 November 2003. The call for the creation of innocence commissions is also extensively discussed in: Scheck BC and Neufeld PJ, 'Toward the Formation of "Innocence Commissions" in America' (2002) 86(2) *Judicature* 98.

<sup>21</sup> University of Illinois at Springfield, 'UIS Downstate Illinois Innocence Project Announces Initiative to Establish State Innocence Commission' (Press Release, 13 April 2005).

<sup>22</sup> The Texas Senate passed bill 79(R)SB22 on 24 July 2003 for the creation of the Texas Innocence Commission.

On 14 February 2003 the Chief Justice of North Carolina established (though without legislative backing) the North Carolina Actual Innocence Commission.<sup>23</sup> Comprised of three judicial representatives, two representatives from the Governor's office, three defence attorneys, six law enforcement representatives, five prosecution representatives, three law professors, one victim assistance representative, one journalism professor, and two general interest representatives, the Commission has now made several key recommendations concerning identification procedures—a significant contributor toward the incidence of wrongful conviction.<sup>24</sup>

Only Connecticut appears to have an operating state sponsored innocence commission, following the passage of *An Act Establishing the Connecticut Innocence Commission* in 2002.<sup>25</sup> Little, however, is known of the activities of the Commission.

(b) *The National Commission on the Future of DNA Evidence*

The Federal Government of the United States has also shown a particular interest in the role DNA evidence plays in the exoneration of those wrongly convicted with the creation in 1997, at the direction of the US Attorney General, of the National Commission on the Future of DNA Evidence. Administered by the National Institute of Justice, an agency of the US Department of Justice, the Commission has made several recommendations concerning: (1) the use of DNA in post-conviction relief cases;<sup>26</sup> (2) legal concerns including *Daubert* challenges (i.e. challenges to expert evidence)<sup>27</sup> and the scope of discovery in DNA cases; (3) criteria for training and technical assistance for criminal justice professionals involved in the identification, collection and preservation of DNA evidence at the crime scene; (4) essential laboratory capabilities in the face of emerging

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<sup>23</sup> Information regarding the North Carolina Innocence Commission can be found at [http://www.innocenceproject.org/docs/NC\\_Innocence\\_Commission\\_Mission.html](http://www.innocenceproject.org/docs/NC_Innocence_Commission_Mission.html) at 1 April 2006.

<sup>24</sup> North Carolina Actual Innocence Commission, 'Recommendations for Eyewitness Identification' <[http://innocenceproject.org/docs//NC\\_Innocence\\_Commission\\_Identification.html](http://innocenceproject.org/docs//NC_Innocence_Commission_Identification.html)> at 1 April 2006.

<sup>25</sup> The text of the Act can be found at: <http://www.cga.ct.gov/2002/TOB/h/pdf/2002HB-05753-R00-HB.pdf> at 1 April 2006.

<sup>26</sup> See National Commission on the Future of DNA Evidence, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* (1996); National Commission on the Future of DNA Evidence, *Post conviction DNA Testing: Recommendations for Handling Requests* (1999).

<sup>27</sup> *Daubert v Merrell Dow Pharmaceuticals Inc* 509 US 579 (1993).

technologies; and (5) the impact of future technological developments on the use of DNA in the criminal justice system.<sup>28</sup>

### 3 Legislative Initiatives

#### (a) *The Innocence Protection Act 2004 (US)*

On 30 October 2004 the *Innocence Protection Act 2004 (US)* became law in the United States.<sup>29</sup> This was the most significant step taken toward assisting those seeking exoneration for wrongful conviction and reducing the incidence of it. The Act relevantly provides:<sup>30</sup>

- (a) Federal post-conviction DNA testing by establishing rules and procedures governing applications for DNA testing by inmates in the federal system.

A court is obliged to order DNA testing if the applicant asserts under penalty of perjury that he or she is actually innocent, and the proposed DNA testing may produce new material evidence that supports such assertion and raises a reasonable probability that the applicant did not commit the offence. Motions filed more than 5 years after enactment and 3 years after conviction are presumed untimely, but the presumption may be rebutted upon good cause being shown.

- (b) Prohibitions against the destruction of DNA evidence in a federal criminal case while a defendant remains incarcerated, with certain exceptions.

The government may destroy DNA evidence if the defendant waives the right to DNA testing; if the defendant was notified after his conviction became final that the evidence may be destroyed and did not file a motion for testing, if a court has denied a motion for testing, or if the evidence has already been tested and the results included the defendant as the source.<sup>31</sup>

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<sup>28</sup> Information concerning the activities of the National Commission on the Future of DNA

Evidence can be found at:

<http://www.ojp.usdoj.gov/nij/topics/forensics/dna/commission/welcome.html> at 1 April 2006.

<sup>29</sup> The *Innocence Protection Act 2004 (US)* substantially incorporates most of the provisions of a previous Bill introduced to the Senate of the United States, the *Innocence Protection Act 2001*. The provisions of that bill are extensively reviewed in Leahy P, 'The Innocence Protection Act of 2001' (2001) 29 *Hofstra Law Review* 1113.

<sup>30</sup> The *Innocence Protection Act 2004 (US)* is summarised at the Justice Project: <http://ccjr.policy.net/proactive/newsroom/release.vtml?id=37341> at 1 April 2006.

<sup>31</sup> *Innocence Protection Act 2004 (US)*, s 411.

- (c) The authorisation of \$5 million a year in grants through 2009 to help States defray the costs of post-conviction DNA testing and further incentive grants to States to ensure consideration of claims of actual innocence.<sup>32</sup>
- (d) Increased compensation in federal cases for the wrongfully convicted. Increases the maximum amount of damages that the US Court of Federal Claims may award against the United States in cases of unjust imprisonment from a flat \$5,000 to \$50,000 per year in non-capital cases, and \$100,000 per year in capital cases.<sup>33</sup>

(b) *State Post-Conviction DNA Testing Statutes*

In addition to the provisions of the *Innocence Protection Act 2004* (US), many states have enacted their own post-conviction DNA testing legislation which makes provision for the preservation of DNA evidence and prescribes the procedures for testing.<sup>34</sup> On the whole though, the State legislation is attended with no level of uniformity and many States appear to have curtailed post conviction DNA testing rather than increasing access, with often arbitrary and unreasonable time limits for post conviction testing.

## B CANADA

Canada has been relatively slow in appreciating issues concerning wrongful conviction. Only in March 2005 did the Canadian Department of Justice release a comprehensive report<sup>35</sup> recommending changes to the criminal justice system in response to a number of dangers identified as contributing to the incidence of wrongful conviction.<sup>36</sup> The report came in the wake of a number of highly publicised incidents of wrongful conviction in Canada, three of which were the subject of exhaustive inquiries.

Although most of the efforts against wrongful conviction in Canada have focused upon commissions of inquiry, several advocacy groups and innocence

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<sup>32</sup> *Innocence Protection Act 2004* (US), ss 412-413.

<sup>33</sup> *Innocence Protection Act 2004* (US), ss 431-432.

<sup>34</sup> The legislation is collected and reviewed in Swedlow K, 'State by State Review of "Post-Conviction DNA Testing" Statutes' (2003) 1 *Online Journal of Justice Studies* 1.

<sup>35</sup> Canadian Department of Justice, *Report on the Prevention of Miscarriages of Justice* (2005) available at <<http://canada.justice.gc.ca/en/dept/pub/hop>> at 21 April 2006.

<sup>36</sup> The dangers are succinctly summarized in Cowdery N, 'Wrongful Conviction and Double Jeopardy' (2005) 17(4) *Judicial Officers' Bulletin* 27, 28.

projects based on the Cardozo model<sup>37</sup> also campaigned in support of substantive reform of the criminal justice system.<sup>38</sup>

### Commissions and Inquiries

To date, three lengthy enquiries have been conducted into specific incidents of wrongful conviction.

#### *(a) The Kaufman Commission on the Proceedings Involving Guy Paul Morin*

Following the acquittal of Guy Paul Morin by the Court of Appeal for Ontario on 23 January 1995 in relation to his conviction for the murder of Christine Jessop on 3 October 1984, the Province of Ontario quickly moved to establish an investigation principally into the handling, maintenance and security of forensic scientific material held by the Centre of Forensic Sciences.

Morin's successful appeal as a result of fresh DNA testing called into question the activities of the Centre of Forensic Sciences and, after hearing from 128 witness over 146 hearing days, on 31 March 1998 the Commission, headed by the Honourable Fred Kaufman QC, delivered a report containing hundreds of pages of findings and recommendations concerning the handling and testing of forensic material, jail house informants, police investigations, and criminal prosecutions.<sup>39</sup>

#### *(b) Inquiry Regarding Thomas Sophonow*

The Inquiry Regarding Thomas Sophonow, ordered by the Province of Manitoba on 7 June 2000, followed a protracted campaign by Sophonow and his supporters for a formal exoneration following his acquittal by the Manitoba Court of Appeal in 1985 for the murder of Barbara Stoppel. The Inquiry was ordered only after belated recognition on the part of the Winnipeg police service that Sophonow was not responsible for the murder.

The report of the Inquiry was handed down on 30 September 2001 with an exhaustive list of recommendations concerning the investigation and prosecution of Sophonow and further advised in relation to entitlements for compensation. Amongst its numerous recommendations was the recommendation that, in

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<sup>37</sup> See York University Innocence Project at

<<http://www.yorku.ca/dmartin/Innocence/innocenc.htm>> at 25 April 2006.

<sup>38</sup> The most prominent of which is the 'Association in Defence of the Wrongly Convicted' at <<http://www.aidwyc.org/>> at 25 April 2006.

<sup>39</sup> The Report can be found at

<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/>

future, Manitoba establish "a completely independent entity" which can "effectively, efficiently and quickly review cases in which wrongful conviction is alleged". The UK Commission was described as "an excellent model".

It appears that only one of the recommendations from the Inquiry — a revised policy concerning the use of in-custody informants — has been implemented.

(c) *The Commission of Inquiry into the Wrongful Conviction of David Milgaard*

After David Milgaard was exonerated of the murder of Gail Miller, the Government of Saskatchewan on 20 February 2004 announced the appointment of the Honourable Mr Justice Edward P. MacCallum of the Alberta Court of Queen's Bench to conduct an inquiry into the wrongful conviction.

The Commission has a mandate to inquire into and report on any and all aspects of the conduct of the investigation into the death of Gail Miller, and the subsequent criminal proceedings resulting in Milgaard's wrongful conviction. It is also charged with determining whether the investigation should have been reopened based on information subsequently received by the police and the Department of Justice. The inquiry is presently ongoing.<sup>40</sup>

## C UNITED KINGDOM AND SCOTLAND

While the efforts of the United States toward remedying wrongful conviction have focused almost exclusively on the power of DNA evidence, the United Kingdom has adopted a broader position with the establishment of the Criminal Cases Review Commission ("the CCRC").

### 1 The Criminal Cases Review Commission

Of all the international models considered by the Committee the CCRC represents the most firmly established, legislatively based and government funded body committed to the review of possible miscarriages of justice.

Though briefly referred to in the Finlay Report,<sup>41</sup> the CCRC was not the subject of any detailed discussion in it. That is largely as a consequence of the Review's focus on those bodies which fix exclusively upon DNA evidence in their efforts to exonerate the wrongly convicted, as opposed to those such as the CCRC,

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<sup>40</sup> Details of the inquiry can be found at < <http://www.milgaardinquiry.ca/home.shtml> > at 1 May 2006.

<sup>41</sup> Finlay M, above n 1, 12, 31-32, 42.

which generally examine all possible miscarriages of justice irrespective of whether DNA evidence formed a part of the case.

On 1 January 1997 the CCRC was established as an independent public body under Part II of the *Criminal Appeal Act* 1995 (UK) and officially assumed responsibility from the Home Office and Northern Ireland Office for the review of suspected miscarriages of justice on 1 March 1997.<sup>42</sup> Currently comprised of 15 Commissioners,<sup>43</sup> each of whom was appointed by the Queen on the recommendation of the Prime Minister, the CCRC is an executive non-departmental public body accountable to Parliament through the Secretary of State for the Home Office.<sup>44</sup> Though independent, the CCRC remains 'sponsored' by the Home Office, from where it derives its annual operating budget—some £5.75M for the year 2004-2005.<sup>45</sup>

Previously, the Home Secretary (or in Northern Ireland the Secretary of State) dealt with applications by people who claimed to be the victims of miscarriages of justice and could then refer cases back to the Court of Appeal. In the wake of public concern about miscarriages of justice such as the cases of the Guildford Four and the Birmingham Six, a Royal Commission on Criminal Justice recommended the establishment of an independent body to consider suspected miscarriages of justice, arrange for investigation where appropriate and refer cases to the Court of Appeal where matters needed further consideration.<sup>46</sup>

The jurisdiction of the CCRC extends over all criminal cases in any Magistrate's Court or Crown Court in England, Wales and Northern Ireland.<sup>47</sup> With a support staff of approximately 110,<sup>48</sup> 44 of whom are 'Case Review Managers',<sup>49</sup> the CCRC exercises the following statutory functions and powers set forth in Part II of the *Criminal Appeal Act*:

- (a) Refer a conviction, verdict, finding or sentence to an appropriate court of appeal (usually the Court of Appeal) in circumstances where the CCRC considers that 'there is a real possibility that the conviction,

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<sup>42</sup> A brief overview of the CCRC can be found at:

[http://www.ccrc.gov.uk/canwe/canwe\\_27.htm](http://www.ccrc.gov.uk/canwe/canwe_27.htm) at 13 March 2006.

<sup>43</sup> Criminal Cases Review Commission, *Annual Report and Accounts* 2004-2005 (2005) 75. The CCRC may consist of no fewer than 11 members: *Criminal Appeal Act* 1995 (UK) c 37, s 8.

<sup>44</sup> *Ibid* 45.

<sup>45</sup> *Ibid* 47.

<sup>46</sup> See history of CCRC at [http://www.ccrc.gov.uk/about/about\\_28.htm](http://www.ccrc.gov.uk/about/about_28.htm)

<sup>47</sup> See *Criminal Appeal Act* 1995 (UK) c 37, ss 9-12.

<sup>48</sup> Criminal Cases Review Commission, above n 36, 10.

<sup>49</sup> *Ibid* 42.

verdict, finding or sentence would not be upheld were the reference to be made';<sup>50</sup>

- (b) Investigate and report to the Court of Criminal Appeal on any matter to which it is directed to investigate and report;<sup>51</sup>
- (c) Consider any reference from the Secretary of State of any matters relating to the royal prerogative of mercy;<sup>52</sup>
- (d) Require the production, inspection or preservation of any document or other material where the CCRC 'believe[s] that a person serving in a public body has possession or control of a document or other material which may assist the Commission in the exercise of any of their functions';<sup>53</sup>
- (e) Appoint investigating officers to assist the CCRC in the exercise of any of its functions in relation to any case.<sup>54</sup>

Since its inception, as at 31 January 2006 the CCRC had received a total of 8,401 applications from those seeking reviews of their cases.<sup>55</sup>

Each application is subjected to a number of stages of review within the CCRC. First, cases are assessed for eligibility. Where the appeals process is yet to be exhausted or a Commissioner is of the view that the case demonstrates no exceptional circumstances such as to warrant further review, the application progresses no further.<sup>56</sup> Cases which satisfy the criterion of eligibility are then subjected to 'stage 2 review' during which the CCRC ensures that potentially relevant material has been preserved. A case worker is also appointed to investigate the case.

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<sup>50</sup> *Criminal Appeal Act 1995* (UK) c 37, s 13

<sup>51</sup> *Criminal Appeal Act 1995* (UK) c 37, s 15. The Court of Appeal has made 13 directions to the CCRC since the establishment of the Commission. See: Criminal Cases Review Commission, above n 36, 32.

<sup>52</sup> *Criminal Appeal Act 1995* (UK) c 37, s 16. The CCRC has never been called upon to exercise this responsibility. See: Criminal Cases Review Commission, above n 36, 32.

<sup>53</sup> *Criminal Appeal Act 1995* (UK) c 37, ss 17-18.

<sup>54</sup> *Criminal Appeal Act 1995* (UK) c 37, s 19. The CCRC has only ever appointed a total of 29 Investigating Officers since 1997 to investigate 37 cases. See: Criminal Cases Review Commission, above n 36, 23.

<sup>55</sup> Up to date statistics of the CCRC may be found at:  
[http://www.ccrc.gov.uk/cases/case\\_44.htm](http://www.ccrc.gov.uk/cases/case_44.htm) at 19 March 2006.

<sup>56</sup> Criminal Cases Review Commission, above n 36, 22.

If, at the completion of the stage 2 review process, it appears that the case is one not amenable to referral by the CCRC to the Court of Appeal, a Commissioner, not previously involved with the case, will make a preliminary determination and invite written representations from the applicant. A committee of three Commissioners not previously involved in the case is then required to consider any representations and formally determine whether to reject the application. Written reasons accompany all such decisions.

If referral seems likely, a committee of three Commissioners not previously involved in the case is required to make a determination and send written reasons to the applicant, the appeal court and the relevant prosecuting authority. Cases of some complexity are occasionally, before the making of any determination concerning referral, subjected to a 'stage 3 review' during which the CCRC appoints outside investigative officers (usually senior police officers) to further investigate the case and report to back to the CCRC.<sup>57</sup>

Since 1997 the efforts of the CCRC have resulted in 257 referrals to the Court of Appeal. Of the 257 referrals made thus far, the Court of Appeal has quashed convictions in 179 cases, upheld convictions in 75 cases and is presently reserved in 3 appeals.<sup>58</sup> Unfortunately, a detailed statistical analysis of the cases referred by the CCRC is not publicly available such as to support a substantive discussion on the types of cases referred to the Court of Appeal. A few generalisations, however, shall be ventured.

Most referrals relate to serious indictable offences, particularly murder, attempted murder, sexual offences, drug offences, armed robbery and assault.<sup>59</sup> The issues attracting referral are extremely varied. In 2004-2005 cases the subject of referral involved issues such as prosecutorial non-disclosure,<sup>60</sup> the acceptance of expert evidence concerning Sudden Infant Death Syndrome in cases of unexpected infant death,<sup>61</sup> police misconduct,<sup>62</sup> unreliable scientific evidence,<sup>63</sup>

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<sup>57</sup> The review process of the CCRC is summarised in: Criminal Cases Review Commission, above n 36, 21-23.

<sup>58</sup> See above n 47.

<sup>59</sup> Murder has generally accounted for one third of the references made by the CCRC. See: CCRC, above n 36, 18.

<sup>60</sup> See *R v Broughton* [2004] EWCA Crim 2119; *R v Kasser* [2004] EWCA 1812; *R v Warren* [2005] EWCA 659.

<sup>61</sup> See *R v Anthony* [2005] EWCA Crim 952. *Anthony* appear to be but the first of a number of referrals which will be made by the CCRC in light of the Court of Appeal decision in *R v Cannings* [2004] 2 Cr App R 7.

<sup>62</sup> *R v Murphy and Pope* [2004] EWCA Crim 2787; *R v Deans* [2004] EWCA Crim 2123.

<sup>63</sup> *R v Bacchus* [2004] EWCA Crim 1756.

psychiatric evidence<sup>64</sup> and fresh evidence concerning the credibility of prosecution witnesses.<sup>65</sup>

Now in its ninth year of operation the CCRC continues to play an important part in the criminal justice system in the United Kingdom and has been the subject of praise from the Court of Appeal.<sup>66</sup> In testament to the success of the CCRC Scotland resolved to establish a commission modelled on the CCRC in April 1999. Norway followed likewise in January 2004.<sup>67</sup>

## 2 The Scottish Criminal Cases Review Commission

The Scottish Criminal Cases Review Commission ('the SCCRC') was established as a non-departmental body on 1 April 1999 under s194A of the *Criminal Procedure (Scotland) Act 1995* (Scot) and is substantially modelled on the CCRC. The SCCRC currently comprises 7 board members, each appointed in the same fashion as the CCRC described above.<sup>68</sup> As at 17 March 2006 a total of 765 applications for review had been received by the SCCRC since its inception.<sup>69</sup>

The review process of the SCCRC is similar to that of the CCRC, only on a smaller scale. The SCCRC's powers of referral are reflected in s 194E of the *Criminal Procedure (Scotland) Act 1995* (Scot), which empowers the SCCRC to refer any summary matter to an appropriate court, and s 194C which provides for the referral of solemn cases (cases on indictment) to the High Court of Justiciary. The test for referral reflected in s 194C appears to be somewhat more stringent than that of the English equivalent—the SCCRC may only refer cases to the High Court where the commission believes 'that a miscarriage of justice may have occurred' and 'that it is in the interests of justice that a reference should be made.' Paradoxically, perhaps, the rate of referral of the SCCRC is greater than that of the CCRC.<sup>70</sup>

As at 17 March 2006, a total of 53 cases had been referred by the SCCRC, 35 of those to the High Court. Of those referred to the High Court, 22 appeals were

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<sup>64</sup> *R v Reynolds* [2004] EWCA Crim 1756; *R v Friend* [2004] EWCA Crim 2661.

<sup>65</sup> *R v Steele* [2006] EWCA Crim 195.

<sup>66</sup> See *R v Warren* [2005] EWCA Crim 2119 at [17] (Keene LJ);

<sup>67</sup> See Criminal cases Review Commission, 'Norwegian Delegation Visits Commission' (Press Release, 23 June 2004). And <http://www.gjenopptakelse.no/index.php?id=30>

<sup>68</sup> See Scottish Criminal Cases Review Commission, *Annual Report for 2005* (2005) 28.

<sup>69</sup> Up to date statistics of the SCCRC can be found at:

<http://www.sccrc.org.uk/freedom%20of%20information%20publication%20scheme/legislative%20framework/case%20statistics.pdf> at 28 March 2006.

<sup>70</sup> Between 2004-2005 the SCCRC had a referral rate of 10% compared with the referral rate of 4% for the CCRC during the same period. See: Scottish Criminal Cases Review Commission, above n 60, 21.

allowed, 10 were unsuccessful and 3 were abandoned.<sup>71</sup> Unfortunately, the available statistics of the SCCRC are little better than those of the CCRC. Those seeking review of convictions or sentences for sexual offences and murder dominate the applications received by the SCCRC.<sup>72</sup> The predominant ground for referral by the SCCRC to the High Court is 'fresh evidence'.<sup>73</sup>

The success of the SCCRC demonstrates the adaptability of the CCRC model to much smaller jurisdictions and, importantly, to a jurisdiction with a comparable population to that of NSW. The key features of the model (a general power of review coupled with an express power of referral) have undoubtedly contributed to the ongoing success of both the CCRC and the SCCRC.

#### D NORWAY

Norway's general and prison populations virtually equate to those of Scotland.<sup>74</sup>

The Norwegian Criminal Cases Review Commission is an independent body with the responsibility for deciding whether those convicted of criminal offences and who seek a review of their convictions or sentence should have a retrial in court.

The Commission has five permanent members and three alternates all appointed by the King in Council. It has a permanent chair and a secretariat with eight employees, six of whom are investigators.<sup>75</sup>

If it is of that opinion, the Commission then refers the case for retrial before a court other than that which imposed the conviction or sentence. The grounds for review include the availability of new evidence or new circumstances, criminal conduct on the part of a prosecutor, judge, expert, defence counsel or witness that may have adversely affected the person convicted or, in a case against Norway, an international court or the UN Commission on Human Rights has concluded that the decision was or the proceedings were in contravention of international law and there are grounds to suppose that a new examination of the case will lead to a different result.

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<sup>71</sup> See above n 61.

<sup>72</sup> Scottish Criminal Cases Review Commission, above n 60, 13.

<sup>73</sup> Ibid.

<sup>74</sup> Norwegian Criminal Cases Review Commission Annual Report for 2004. The latest population statistics indicate that Norway has a population of about 4.6 million, the population of Sydney.

<sup>75</sup> Norwegian Criminal Cases Review Commission Annual Report for 2004

The Commission is responsible for ensuring adequate investigation of the case so that only in special circumstances will it appoint at public expense a legal representative for the convicted person.

In its first year the Commission received 232 petitions for case review. 61 were completed within the year, 23 of them heard on the merits, 5 referred to the court for review.

In its annual report for 2004 the Commission emphasised the need for proper procedures within the police and prosecuting authorities for storing and securing evidence in concluded cases.

## E AUSTRALIA

Apart from the brief operation of the NSW Innocence Panel, permanent and ongoing efforts in Australia toward the investigation of wrongful convictions might best be characterised as limited, at least in comparison to those of the United States, the United Kingdom, Scotland and Norway. That said, several initiatives have emerged in response to the growing realisation that 'wrongful conviction is a fact of life in Australia'<sup>76</sup> and not simply a peculiar fallibility of the United States criminal justice system.

### 1 Innocence Projects

Australia has seen the intermittent operation of three innocence projects based, with some modification, on the Cardozo model. Much like their US counterparts each Australian project is quintessentially a 'university-based, student-resourced, academically-supervised, and lawyer-instructed pro-bono investigation into claims of wrongful conviction [with the] ultimate aim of ... securing the release of innocent people from prison'.<sup>77</sup>

The New South Wales Bar Association has had the benefit of considering several scholarly articles published over the last five years which summarise in varying degrees the operations of the innocence projects in Australia.<sup>78</sup> The first two innocence projects established in Australia were the Griffith University

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<sup>76</sup> Weathered L, 'Investigating Innocence: The Emerging Role of Innocence Projects in the Correction of Wrongful Conviction in Australia' (2003) 12(1) *Griffith Law Review* 64.

<sup>77</sup> Weathered L, 'A Question of Innocence: Facilitating DNA-Based Exonerations in Australia' (2004) 9 *Deakin Law Review* 279, 282.

<sup>78</sup> See Weathered L, above n 66 and 67; Hussin F, Osboldstone G, Orr G, Roberts A, Stewart M, & Tompkins T, 'Queensland: Innocence Project' (2001) 26(5) *Alternative Law Journal* 259; Liverani M R, 'UTS Innocence Project Excellent Training for Criminal Law Students' (2001) 39(10) *Law Society Journal*.

Innocence Project in Queensland and the University of Technology, Sydney Innocence Project in New South Wales. Both were established in 2001. Recently, the University of Melbourne announced the formation of its own innocence project based on the Cardozo model to be run in conjunction with the Victoria Innocence Project: a collective of barristers, solicitors and retired judges committed to freeing wrongfully convicted persons.<sup>79</sup>

Unfortunately, little information is publicly available about the operations of the UTS or University of Melbourne Innocence Projects. However, the operations of the Griffith University Innocence Project have been summarised by the Director of that project in an article published in the *Deakin Law Review* and, whilst not necessarily indicative of other innocence projects, it at least provides a concise overview of the work it presently undertakes.

The Griffith University Innocence Project aims to investigate cases where:

- a person has been convicted of an offence and the initial appeal period to the respective jurisdiction has expired; and
- the person claims to be innocent of the crime of which he or she was convicted; and
- DNA testing may provide new evidence of innocence; and/or
- no DNA evidence is available but there is a real possibility that other new evidence may prove innocence.

The Project does not accept cases where:

- a conviction would be overturned through a technicality rather than innocence;
- the applicant's claim to innocence is based on the establishment of any type of defence (such as self defence or provocation);
- there is an admission of sexual contact in sexual offence cases;
- the applicant is currently on or awaiting trial, or where appeal time limitations have not yet expired.

## 2. Procedures

Cases are subject to a four-stage screening and investigative process. These are:

- (1) initial screening: determining whether the case generally falls within the ambit of the Project;

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<sup>79</sup> Reedy M, 'Student Sleuths Go In Search of Innocents', *The Age* (Melbourne), 29 August 2004.

- (2) initial investigation: A further review of the case based on documentary evidence;
- (3) full investigation: To seek out possible new evidence of innocence;
- (4) referral to a pro-bono lawyer to act as a solicitor for the appellant where the case is to be considered for an appeal or pardon petition.<sup>80</sup>

More than 200 people have applied to the Griffith Innocence Project seeking assistance.<sup>81</sup> In 2001 Frank Button became the first individual in Australia to be exonerated with the assistance of the Griffith Project—and also the first through DNA evidence.<sup>82</sup> DNA testing carried out ‘at the insistence of his lawyers’ after a jury had convicted him of rape and after he had spent about 10 months in prison as a result of the conviction, proved that he did not commit the crime and identified the true culprit.<sup>83</sup>

### III CONSIDERATION AND RECOMMENDATIONS OF THE NEW SOUTH WALES BAR ASSOCIATION

#### *A The New South Wales Bar Association’s Recommendations Concerning the Nature and Objectives of the Innocence Panel: References (a)-(c) of the Finlay Report*

The New South Wales Bar Association agrees with the observations of the Finlay Report generally concerning DNA evidence. The United States experience has demonstrated that DNA evidence can be a powerful tool in proving innocence. The decision in *R v Button* [2001] QCA 133 certainly serves to reinforce the need for a body to assist with making DNA technology available to those who have been convicted of an offence and who believe that they will be proven innocent if their DNA is tested against forensic material found at the scene of the crime for which they were convicted. As the Finlay Report suggests:

“There may well be cases in New South Wales in which innocent persons have been wrongly convicted of serious crimes, and DNA evidence that was not, for whatever reason, available at the trial can conclusively demonstrate that fact. Certainly, that has been the experience in other Australian jurisdictions and overseas”.<sup>84</sup>

<sup>80</sup> Weathered L, above n 67, 284.

<sup>81</sup> As at 19 August 2003. Weathered L, above n 66, 80.

<sup>82</sup> See *R v Button* [2001] QCA 133. The case is also discussed in some detail in: Edwards K, ‘Ten Things About DNA Contamination That Lawyers Should Know’ (2005) 29 *Criminal Law Journal* 71, 73-74.

<sup>83</sup> *Rv Button supra*.

<sup>84</sup> Finlay M, above n 1, 41.

The Finlay report went further and concluded that, 'having regard to the specialist function undertaken by the Panel and to existing NSW legislation for Review of Convictions, it is unnecessary to follow the path of the alternative option of the Criminal Case Review Commission'.<sup>85</sup>

It is the New South Wales Bar Association's view that in the longer term arbitrarily limiting the activities of such a body to those cases where only DNA evidence may assist in demonstrating innocence represents an unnecessary curtailment of the effectiveness of a body to fulfil the greater objective of remedying miscarriages of justice through wrongful conviction. The New South Wales Bar Association ultimately prefers that the activities of the Panel be expanded and modelled on the success of the CCRC in the United Kingdom. The New South Wales Bar Association is certainly not alone in recommending such a step. As the review carried out by Professor Mark Findlay in relation to the *Crimes (Forensic Procedures) Act 2000* (NSW) observed:

"It would be preferable for the Attorney General to extend the role of the Panel in the direction of a wider Criminal Cases Review Commission, as in the United Kingdom, or Miscarriages of Justice model as in Scotland, to examine all cases of wrongful conviction of innocent people, irrespective of whether DNA evidence formed part of the case. The best examples of these are independent community endeavours. What Government can do here, we advise, is to create a wider institutional framework that can adjudicate on the innocence claims brought before it and provide the resources for the appropriate testing of any such worthy claims."<sup>86</sup>

Similarly, Kirsten Edwards, Director of the UTS Innocence Project, made the following submission to the review conduct by the Hon Mervyn Finlay QC:<sup>87</sup>

"It is the preference of the UTS Innocence Project that the Panel either be reformed into a proper Criminal Cases Review Commission or cease to exist altogether. If proper legislation about the custody, storage, retention and access to forensic samples is made there may be no need for any Panel:

- i. This part recommends that the current methodology be abandoned in favour of a completely new model - a Criminal Cases Review Commission . . .
- ii. Instead the Panel is a cumbersome mechanism which places an unnecessary and time consuming layer of bureaucracy between prisoners who claim wrongful conviction and

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<sup>85</sup> Ibid 42.

<sup>86</sup> Ibid 31.

<sup>87</sup> Ibid 29-30.

believe that DNA testing can assist their cause, and access to the results of searches and tests of those samples . . .

- iii. The superiority of the model is self-evident. A CRRC eliminates the false dichotomy between DNA and non-DNA cases and focuses on the most pressing need of the wrongfully convicted - pro-active, holistic and creative factual and legal investigation by a body empowered to overcome the resistance and obstacles that traditionally arise in this field. "

However for the present, the New South Wales Bar Association submits that the Finlay Report's reasons for rejecting proposals that the Panel be modelled on the CCRC should be accepted as an interim solution. This is because some clear progress is required on a long overdue reform in the short term. Debate about CCRC models can take place later. As a brief aside, this submission now considers the longer term benefits of and reasons for a CCRC type of Panel but accepts that the DNA Reference Panel, as recommended by the Finlay Report is what is clearly needed in the short term. Creating a DNA Reference Panel now is not at all inconsistent with further reform later on CCRC models.

The Finlay Report did not back a Panel modelled on the CCRC because (a) the NSW Innocence Panel exercises a 'specialist function'; and (b) Part 13A of the *Crimes Act 1900* (NSW) makes any CCRC type panel unnecessary. With respect to the first, there would be no reason why the Panel could not continue to perform its 'specialist function' within the wider context of a CCRC. With respect to the second, there is no doubt that part 13A of the *Crimes Act 1900* (NSW) makes 'extensive provision for review of convictions'.<sup>88</sup> No other State has provisions comparable to those in Part 13A.<sup>89</sup> However the fact that Part 13A is an available avenue for reviewing convictions (and sentences) is insufficient

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<sup>88</sup> Ibid 12-13. Section 474B provides for petitions to the Governor for reviews of convictions or sentences or for pardons. Section 474C provides that the Governor may direct that an inquiry be conducted by a prescribed person or the Minister may refer the whole case to the Court of Criminal Appeal (where it is to be dealt with under the *Criminal Appeal Act 1912*) or the Minister may request the CCA to give an opinion on any point arising in the case. Section 474D provides that an application for an inquiry into a conviction or sentence can be made directly to the Supreme Court, in which case s 474E provides that the Court may direct that an inquiry be conducted by a prescribed person into the conviction or sentence or refer the whole case to the Court of Criminal Appeal where it appears that there is a doubt or question as to the guilt of the convicted person or as to any mitigating circumstances in the case or as to any part of the evidence in the case. Section 474G confers on the person appointed to conduct an inquiry the powers, authorities, protections and immunities conferred on a commissioner under the *Royal Commissions Act 1923*. The CCA's powers are limited by the terms of the *Criminal Appeal Act*.

<sup>89</sup> Weathered L, 'Pardon Me: Current Avenues for the Correction of Wrongful Conviction in Australia' (2005) 17(2) *Current Issues in Criminal Justice* 203, 212.

reason for *not* ultimately having a CCRC type body in New South Wales. The Committee submits that:

- (a) Part 13A of the *Crimes Act* has never been thoroughly evaluated to determine the extent to which it is adequate to remedy wrongful conviction; whether it alleviates the necessity for a CCRC is really unknown.
- (b) The Supreme Court has a very wide discretion to 'refuse to consider or otherwise deal with the application'.<sup>90</sup>
- (c) A CCRC, with the power to expressly refer matters to the Court of Criminal Appeal, would possess all the positive attributes of Part 13A of the *Crimes Act* and, more importantly, would greatly improve access to forensic material and testing on behalf of those seeking exoneration.

The experience in Scotland and Norway, with populations lower than that of New South Wales,<sup>91</sup> demonstrates that the model may be readily adapted to meet the needs of a population smaller than that for which the CCRC was established.

However the New South Wales Bar Association prefers that the Panel be renamed the DNA Reference Panel as recommended by the Finlay Report. The New South Wales Bar Association is of the view that the membership of the review body accord with the membership of the panel suggested in the Finlay Report.<sup>92</sup> Both the membership of the NSW Innocence Panel and that suggested in the Finlay Report reflect a broad range of expertise and experience together with a healthy diversity of opinion.

The New South Wales Bar Association submits that the Finlay recommendation for a DNA Reference Panel be endorsed.

The New South Wales Bar Association also endorses the recommendation that the Panel be brought within the Attorney General's Department. Such a measure will promote further confidence in the integrity and impartiality of the process and remove any perception that the body is aligned with the interests of the NSW Police.

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<sup>90</sup> See s 474E(3).

<sup>91</sup> Scotland has a population of 5,078,400. See Registrar General of Scotland, *Mid 2004 Population Estimates Scotland* (2005) [2.1]. New South Wales has a population of 6,682,053. See Australian Bureau of Statistics <http://www.abs.gov.au/ADssTATS> at 1 April 2006.

<sup>92</sup> Finlay M, above n 1, 43.

The DNA Reference Panel would need to be adequately resourced to enable it to function effectively. As Williams JA said in *R v Button* [2001] QCA 133,

“It may well be that laboratory testing is expensive, particularly if it is to be as extensive as in my view it should be, but the cost to the community of that testing is far less than the cost to the community of having miscarriages of justice such as occurred here. The cost to the community in a case like this includes not only the costs of both sides of the aborted trial, but the costs to the appellant [and, the Committee would add, to the community] of the fact that he has been in custody for the length of time that I have indicated.”

*B THE COMMITTEE'S RECOMMENDATIONS CONCERNING THE SAFEGUARD OF VICTIM'S INTERESTS, THOSE ELIGIBLE TO APPLY FOR REVIEW AND THE STATUTORY BASIS OF THE PANEL: REFERENCES (D)-(F) OF THE FINLAY REPORT*

The New South Wales Bar Association agrees with the recommendations of the Finlay Report concerning the safeguarding of victims' interests. Maintaining membership to include a responsible representative of the Victims Advisory Board will serve to ensure that the voice of victims will be heard and enhance public acceptance of the work of the body.

With respect to the recommendations of the Finlay Report concerning the eligibility of those who may apply to the Panel, the New South Wales Bar Association agrees that an applicant's failure to take the opportunity to have requested DNA testing at an earlier time should not be a barrier to application for review. Furthermore, the New South Wales Bar Association agrees that anyone no longer serving a sentence should remain eligible to apply.

However, the New South Wales Bar Association does not agree that only those convicted of an offence carrying a maximum sentence of not less than 20 years imprisonment should be eligible to apply, save in 'special circumstances', even as an introductory measure.

In the New South Wales Bar Association's opinion the recommendation is arbitrary and finds no comparison in either the *Criminal Appeal Act 1995* (UK) c 35 or most of the United States post-conviction DNA testing statutes. Instead, the New South Wales Bar Association recommends that anyone sentenced to a custodial sentence (however served) be eligible to apply to the review body. A statistical analysis of the CCRC and SCCRC suggests that the activities of such an organisation will naturally focus on those convicted of murder, sexual assault and serious drug offences without the need to set arbitrary eligibility requirements.

The New South Wales Bar Association agrees with the Finlay Report that the review body should be given a statutory basis, although in the light of the above recommendations, it may be appropriate to achieve such an objective via an amendment to the *Crimes Act* rather than the *Crimes (Forensic Procedures) Act 2000* (NSW).

C THE COMMITTEE'S RECOMMENDATIONS CONCERNING PART 13A OF THE CRIMES ACT 1900, THE PANEL'S POWERS OF REFERRAL, DISCLOSURE OF DNA RESULTS AND THE RETENTION OF DNA EVIDENCE: REFERENCES (G)-(J) OF THE FINLAY REPORT

The powers of referral recommended by the Finlay Report are essential to the future success of the Panel and, accordingly, the New South Wales Bar Association agrees that the body must have the power to directly refer matters to the Court of Criminal Appeal. However, whether the Panel should only do so where there is a 'reasonable probability' that the Court of Criminal Appeal would quash the conviction or order a new trial deserves greater consideration. The test of 'reasonable probability' certainly embraces a much more demanding test than that provided for under s 13 of the *Criminal Appeal Act 1995* (UK) c 35. That said, there is certainly no uniformity between the United Kingdom, Scotland and the United States which demands a 'truly persuasive showing of actual innocence'—at least before freestanding *habeas corpus* relief will be available.<sup>93</sup>

The New South Wales Bar Association prefers the test imposed under s 474E(2) of the *Crimes Act*, namely, whether "there is a doubt or question as to the convicted person's guilt, as to any mitigating circumstances in the case or as to any part of the evidence in the case". There seems to be no logical reason to impose a higher test than that which will justify an inquiry or appeal under Part 13A of the *Crimes Act*. Yet, whether a test of 'reasonable probability' should be adopted or some other is perhaps a question best reserved for further submissions once a draft bill is available.

The New South Wales Bar Association further agrees with the recommendations of the Finlay Report concerning the disclosure of information by the Panel.

The Panel would no doubt become an ineffectual body if legislative measures were not adopted for the long term retention of crime scene exhibits and other forensic material. Therefore, the New South Wales Bar Association agrees with the recommendations contained in the Finlay Report for legislation ensuring the

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<sup>93</sup> *Herrera v Collins*, 506 US 390, 404-405 (1993). On 11 January 2006 the US Supreme Court heard oral argument in *Paul Gregory House v Ricky Bell, Warden* No. 04-8990 in an effort to provide some guidance as to what constitutes a 'truly persuasive showing of actual innocence' under *Herrera*.

retention of such material. Although in late 2001 the Commissioner of Police issued a directive for the preservation of crime scene exhibits,<sup>94</sup> there has been some suggestion that evidence has subsequently been destroyed.<sup>95</sup> Clear directives should be given immediately to ensure that this does not happen.

#### D. SOME GENERAL OBSERVATIONS

In June 2001 Mr Whelan was reported as saying that "unethical police behaviour had resulted in large numbers of wrong convictions" and that "people would be shocked to find out how many people had been wrongly convicted."<sup>96</sup>

In October 2001 Mr Whelan told the NSW Parliament that the injustices surrounding wrongful convictions "destroy lives" and that "the Carr Government is doing all it can to prevent such occurrences from happening ever again".

In May 2004 the Hon. John Hatzistergos MLC told the Parliament that it was "carefully examining" the Finlay Report, that "the Minister had the highest regard for Mr Finlay's legal acumen and high principles" and added:

"The Government has made it plain that it is committed to the existence of an Innocence Panel. Judge Finlay's report will be most constructive in putting the panel on a firm basis. I will refer the matter of legislation to the Attorney General to establish whether there is a timetable."

Despite this assurance it seems that nothing has been done. During the debate on the *Crimes (Serious Sex Offenders) Bill* in March this year the leader of the Australian Democrats in the New South Wales Parliament, Dr Arthur Chesterfield-Evans MLC, asserted that the NSW Innocence Panel had been "degraded, delayed and discarded".<sup>97</sup>

The New South Wales Bar Association submits that the promises made about the NSW Innocence Panel must now be honoured.

In addition, the ALRC has called upon the Federal Government to establish a process to consider applications for post-conviction review from convicted persons who believe that DNA evidence may establish their innocence.<sup>98</sup>

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<sup>94</sup> Weathered L, above n 66, 81.

<sup>95</sup> As in *R v M* [2002] NSWCCA 66. See Edwards K, above n 72, 75.

<sup>96</sup> *The Age* 9 June 2001

<sup>97</sup> Hansard, Legislative Council, 30 March 2006, p 21801

<sup>98</sup> <http://www.alrc.gov.au/media/2003/bn290503-6.htm> In Discussion Paper 66 the ALRC raised a proposal that the Commonwealth legislate to establish an independent body to consider applications for post-conviction review based on DNA evidence where the person

#### IV. SUMMARY OF THE RECOMMENDATIONS OF THE HUMAN RIGHTS COMMITTEE

The New South Wales Bar Association recommends as follows.

1. The NSW Government implement the recommendations of the Finlay Report:
  - i. to establish a DNA Reference Panel or some other body facilitating the use of DNA technology by those who have been convicted of an offence and who believe that they will be proved innocent if their DNA is tested against forensic material found at the scene of the crime for which they were convicted;
  - ii. that the membership of the body reflect that of the NSW Innocence Panel during its period of operation;
  - iii. that the body be independent of the NSW Police and be brought within the Attorney General's Department with appropriate funding and support provided;
  - iv. that the body have the clear power to disclose information about results of DNA testing to applicants and other persons, such as victims and their families, relevant government agencies and Ministers in appropriate cases.
2. The body should have the power to receive applications for review from any person convicted and sentenced to a term of imprisonment (however to be served). Those no longer serving a sentence of imprisonment should also remain eligible to apply.

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provides *prima facie* evidence of a miscarriage of justice. Most of the submissions received following the proposal in Discussion Paper 66 supported the proposal. Some, including one from the Victorian Bar, complained that the requirement that an applicant show *prima facie* evidence of a miscarriage of justice was too onerous: Victorian Bar, *Submission G261*, 20 December 2002. Privacy NSW in its submission emphasised the need for "precise legislative authorisation" and clear delineation of procedures, powers and responsibilities and "proper allocation of resources to enable independent assessment of the facts relevant to a particular application, without undue reliance on the views of police and prosecutors". Office of the Privacy Commissioner (NSW), *Submission G257*, 20 December 2002. Ultimately, the ALRC recommended that the Commonwealth establish a process to consider applications for post-conviction review from any person who alleges that DNA evidence may exist that calls his or her conviction into question. ALRC Report 96 *Essentially Yours: The Protection of Human Genetic Information in Australia* Recommendation 45-2. The ALRC report was tabled in Federal Parliament in May 2003.

3. The *Crimes Act 1900* (or the *Crimes (Forensic Procedures) Act 2000*) should be amended to provide a statutory foundation for the body.
4. The body should have power to refer cases directly to the New South Wales Court of Criminal Appeal where it considers that the new evidence raises a question as to the convicted person's guilt, as to any mitigating circumstances in the case or as to any part of the evidence in the case.
5. Legislative amendments should be made requiring the long term retention of crime scene exhibits and other forensic material.

13 July 2006.