

# **SUBMISSION TO THE AUSTRALIAN PRODUCTIVITY COMMISSION INQUIRY INTO ACCESS TO JUSTICE**

Submitted by **Michael O’Keeffe**, retired legal practitioner, and practising volunteer solicitor, 4 November 2013.

## **Introduction**

This submission seeks to deal with the issue of the lack of access to justice for exonerees, that is, for those Australian citizens who have been subject to a miscarriage of justice, wrongly convicted by a court of a criminal offence, subsequently imprisoned, and then exonerated of the crime of which they were convicted.

The issue is a fundamental access to justice issue, and goes to the heart of the effectiveness of the criminal justice system, and the associated attendant civil law judicial practice and policy processes.

My respectful submission is that this issue is relevant to the Commission’s terms of reference and issues paper, in particular, the need to consider

- the impact of the costs of accessing justice services and securing legal representation and its effectiveness,
- assessing the economic and social impact of the costs of assessing justice services, and
- looking at other jurisdictions with respect to reform.

The submission also touches on the practice of cost shifting in the costs of criminal trials, and the phenomenon where people fall through the cracks of an inadequate legal aid system, often with disastrous results. This submission points to Australia’s poor record with regard to restorative practices, including by reference to comparable overseas jurisdictions, and suggests areas for consideration of appropriate reforms.

## **“Cost shifting” in the costs of criminal trials**

in Australian criminal trials, very real financial damage is sometimes occasioned to accused persons who may have committed no crime. In contrast to civil trials, successful accused persons in criminal trials on indictment are not awarded costs. This is said to historically reflect a public policy that the Crown neither asks for or pays costs.

Generally tens of thousands (sometimes more) in legal costs (such as barristers and solicitors fees, witness expenses, forensic and expert medical costs) must be paid to defend charges brought by the state which ultimately end up in favour of the

accused. Persons with legal aid are generally not financially impacted. Similarly, the very rich (for whom money is no barrier) will find it galling or annoying and unjust, but in relative terms experience little real impact financially.

The position for the average salaried or self-employed working person with the average assets of house and car and personal possessions is often financially ruinous. In its 1995 issues Paper *Cost Shifting – Who Pays for Litigation?*, the ALRC proposed that there should be a presumption in criminal cases that a person who is acquitted should recover costs:<sup>1</sup> The ALRC recommended:

***Presumption that a person who is acquitted should recover costs***

7.20 In order to avoid hardship suffered by some criminal defendants in presenting their case, the Commission considers it appropriate that a person acquitted of a criminal charge should recover his or her costs. However, this rule must be balanced against the need for an effective and efficient criminal justice system. A court should have the power to make a different costs orders in appropriate circumstances.

7.21 The Commission notes that this recommendation will have financial implications for many prosecuting authorities. In some cases it may be necessary for the relevant government to provide the additional resources an authority may need to meet its obligations under the proposed costs rule.

Almost 20 years on, respective federal and state governments have not acted on the ALRC recommendation.

## **Legal Aid Funding**

Much of the current debate about access to justice relates to the paucity of legal aid funding. The Sydney Morning Herald of December 22 2011 carried a feature article headed *The Cruelty And Injustice Of A Poorly Funded Legal Aid System contributed by two Melbourne lawyers*, Elizabeth O'Shea and Nicole Papaleo.<sup>2</sup>

The article (see Attachment 1) points out that The Commonwealth's share of spending on legal aid declined from 49 per cent in 1996-97 to 32 per cent in 2009-10, and the states and territories have been unable to make up the shortfall. The article goes on to assess the impact of what they describe as “a grossly underfunded system”, and are disturbed by the fate of those who fall through the cracks of our justice system. They argue:

“In 1997, legal aid suffered funding cuts under the Howard government. Legal aid is funded in partnership by the Commonwealth and states and territories.

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<sup>1</sup> Australian Law Reform Commission, *Cost Shifting – Who Pays for Litigation?* ALRC Issues paper No 1975, Sydney, NSW, 1995, paras 7.20 – 21.

<http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC75.pdf>

<sup>2</sup> The Sydney Morning Herald, 22 December 22, 2011 *The Cruelty And Injustice Of A Poorly Funded Legal Aid System*

The lion's share of this limited [legal aid] resource is spent on criminal and family law cases, many civil legal aid divisions were closed or drastically reduced after these cuts. Today, the means thresholds for civil cases tend to come in below the poverty line, meaning the number of legally aided civil cases (other than family law) is tiny.

Troublingly, the increased complexity of litigation has led to an increase in the cost of cases across all courts by 78 per cent in real terms from 1998 to 2008.

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By global standards, we are lagging behind. The UK government spends £2 billion (\$3 billion) of taxpayers' money a year on publicly funded legal advice, per capita spending of \$68.36 compared with Australia, which spends just \$23.

The result is Australia has a grossly underfunded system that ends up proving costly. Modelling done on family law matters in Queensland found net efficiency benefits for cases where legal aid funding was available. It was estimated that for every dollar spent on legal aid, we save between \$1.64 and \$2.25 in fees, court time and other litigation expenses. In other words, this is a positive investment of public money because it saves money elsewhere.”

To this should be added the observation that state funding by state governments supporting such policies as “tough on crime” have substantially increased spending for criminal law enforcement, primarily for the use of police and prosecuting authorities. At the same time, there has been a reduction in comparable resourcing for citizens who are the targets of such policies who, until convicted, are entitled to the presumption of innocent under our legal system.

In over 15 years, the gap has continued to widen.

## **FALLING THROUGH THE CRACKS – THE FATE OF THE EXONERATED**

“Being falsely accused is the stuff of nightmares for the average person, for it compounds powerlessness and shakes one’s faith in the justice system. Most of us dread injustice with a special fear.

“Surely few people need to be told that imprisonment in general has very serious and psychological effects on the inmate. For the person who has been subjected to a lengthy term of imprisonment, we approach the worst case scenario. The notion of permanent social disability due to a state wrong begins to crystallise. The longer this distorting experience of prison goes on, the less likely a person can ever be whole again.”

- Archibald Kaiser - *Wrongful Conviction and Imprisonment: Towards an End to the Compensatory Obstacle Course*<sup>3</sup>

### **Cost Shifting – Who Pays When someone is Wrongfully Convicted ?**

In addition to those persons who come before various of the Australian criminal courts and are dealt with by dismissal of the criminal allegations against them (who will nevertheless often suffer significant financial loss), there is another smaller but nevertheless sizeable category of persons who suffer more than just financial loss.

These are the wrongfully convicted, that is those who have actually served jail time, and who are subsequently exonerated. The effect on the exoneree will have a devastating effect, rising to catastrophic if the miscarriage of justice is serious and the sentence of imprisonment wrongly served is lengthy. When it comes to access to civil remedies for restitution for the wrongfully imprisoned, my submission to the Commission is that Australia's response falls well below international standards of customary and treaty law, and when compared to comparable world democracies, has been repeatedly criticised for its dealings with an increasing number of Australians grievously wronged by the State.<sup>4</sup> My admittedly untested hypothesis is that Australia's ongoing failure to provide for systemic restitution paradoxically is likely to involve more financial cost than not making restitution.

Professor Kaiser says that the wrongfully convicted are obliged to bear the whole of the costs of the State's mistakes:

“Where compensation is either unavailable or ungenerous, or where there is no payment as of right, and discretion is retained by the executive, the state has clearly indicated the low priority it gives to the plight of the wrongly convicted.

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<sup>3</sup> Professor Archibald Kaiser is Professor of Law and Assistant Professor, Department of Psychiatry, Faculty of Medicine, at the Dalhousie University, Halifax, Nova Scotia. He has written extensively on this issue. *This quotation is taken from his landmark paper, Wrongful Conviction and Imprisonment: Towards an End to the Compensatory Obstacle Course.* (Kaiser, Archibald, *Wrongful Conviction and Imprisonment: Towards an End to the Compensatory Obstacle Course*, Windsor Yearbook of Access to Justice, Vol 9, 1989, University of Windsor (Nova Scotia, Canada) Faculty of Law),

<sup>3</sup>. Kaiser, Archibald, *Wrongful Conviction and Imprisonment: Towards an End to the Compensatory Obstacle Course*, op cit,

<sup>4</sup> For example, the United Nations Human Rights Committee, in the concluding remarks to its Human Rights report on Australia tabled at the UNHRC's ninety-fifth session in Geneva in 2009, again expressed its regrets that Australia had not, among other things not withdrawn its reservations to article 14(6) of the ICCPR.

“The costs of legal errors of such huge proportions are thereby borne by individuals and not by the state, which thus conceals the financial and policy implications of its malfunctioning criminal justice system. “<sup>5</sup>

In a similar vein, Etter<sup>6</sup> argues convincingly that sound public policy dictates that the official acknowledgement of a wrongful conviction (conceding that no system is perfect), a government’s public recognition of the harm inflicted upon a wrongfully convicted person helps to foster his healing process, while assuring the public that the government – regardless of fault – is willing to take ownership of its wrongs or errors, and thus ensure continuing public confidence in the proper management and conduct of its justice system and the State’s officers.

Etter goes on to say that

“Public confidence in the criminal justice system is diminished when innocent people are convicted and true perpetrators remain at large.”

### **How many Australians are affected?**

At first blush, in a democracy such as Australia, the prospect of wrongful conviction would seem to be remote, given the checks and balances inherent in our judicial system. But it does happen and frequently, and the political will to stop it happening is sadly lacking. The phenomenon of governments’ lack of response to wrongful conviction, and the lack of access to civil remedies to overcome that lack of response, is deserving of the consideration of the Commission.

Wrongful conviction in Australia is in fact an area of much misconception, partly because of the paucity of empirical evidence, partly because of the lack of knowledge of the problem both inside and outside the legal profession, and partly because it is in the political and economic interests of governments to play down the mistakes of the criminal justice system for which governments may be held politically responsible or financially accountable.

There is an old saying that “there are no votes in prisons.” In addition, the political and media emphasis on criminal justice tends more to favour subjects that are electorally populist, such as “tough on crime” invective. Further, political and media utterances on those legal protections which are relevant to criminal law tend to be

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<sup>5</sup> Kaiser, Archibald, *Wrongful Conviction and Imprisonment: Towards an End to the Compensatory Obstacle Course*, Windsor Yearbook of Access to Justice, Vol 9, 1989, University of Windsor (Nova Scotia, Canada) Faculty of Law),

<sup>6</sup> Etter, Barbara, *The Changing the Way We Think about Justice! Dealing with Miscarriages of Justice – Shifting Boundaries and Changing Lives*, a paper presented to the Australian and New Zealand Critical Criminology Conference 2012 at the University of Tasmania on Friday 13 July 2012. Barbara Etter APM, is a Principal of BEtter Consulting ([www.betterconsult.com.au](http://www.betterconsult.com.au)), and an Adjunct Associate Professor, School of Law and Justice, Edith Cowan University, Perth, WA

almost totally focussed on increasing sanctions against particular groups of offenders (in Queensland it is bikie club members, at least at the present time), arguably without regard to broader jurisprudential principles and wider community priorities for prevention of all crime.

A US NGO database – the Wrongfully Convicted Database <sup>7</sup> - maintains worldwide wrongful conviction statistics on 105 countries. This database includes names, dates and details of well over 100 individual Australian cases of wrongful imprisonment before exoneration, occurring between the years 1985 to 2011. These 100 cases involve serious offences reversed by the appellate jurisdiction of State Supreme Courts or the High Court. Almost all persons served significant periods of post-conviction imprisonment. A full list of those 100 Australian cases, with web links to the database case summary, is contained at Attachment 2. It is disappointing that a perusal of that US website demonstrates a regularity, year after year, of Australian cases being added on to this list. For example five new Australian cases were added to the list in 2011, the last year reported on.

These cases do not include the many cases where persons have been remanded in custody and subsequently found not guilty at trial. These cases also do not include those who have been imprisoned wrongly for lesser offences. For instance, there is no available resource which lists wrongful conviction cases where persons have been imprisoned following conviction for summary offences, and discharged after appeal to a summary appeal court (eg criminal appeals to the District Court of Queensland under Section 222 of the *Justices Act (Qld) 1886*.)

The Australian Institute of Criminology (AIC) commented in a 2008 paper by Hoel <sup>8</sup> (citing Huff et al <sup>9</sup>) that wrongful conviction rates in the US range from 0.5% to 5%. In the UK, rates are reported as 0.1 % of all convictions. The AIC was unable to advance any figure for Australian rate of wrongful conviction.

Langdon and Wilson's 2005 and 1989 studies show consistency over time of documented cases of wrongful imprisonment of innocent persons for very serious offences. <sup>10</sup> They argue that " the time has come to introduce more radical

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<sup>7</sup> Wrongfully Convicted Database, maintained by Forejustice and *Justice Denied* magazine, [http://forejustice.org/db/location/innocents\\_1.html](http://forejustice.org/db/location/innocents_1.html) . Note that dates used refer to the date of **original** conviction, not the date of discovery of innocence, which can be a decade or more after conviction .

<sup>8</sup> Hoel, Adrian, *Compensation for wrongful conviction*, Trends & issues in crime and criminal justice no. 356 ISBN 978 1 921185 81 6 ISSN 0817-8542 Canberra: Australian Institute of Criminology, May 2008.

<sup>9</sup> Huff, C. Ronald, Ayre Rattner and Edward Sagarin *Convicted But Innocent: Wrongful Conviction And Public Policy* by. Newbury Park, CA: Sage Publications, 1996.

<sup>10</sup> Langdon, Juliette, and Paul Wilson , 2005, *When justice fails: A follow-up examination of serious criminal cases since 1985*, Current Issues in Criminal Justice, Vol. 17, No. 2, Nov 2005: 179-202; and Wilson, P (1989) 'When justice fails: a preliminary examination of serious criminal cases in Australia', *Australian Journal of Social Issues*, vol 24, no 1, pp 3–22.

procedures such as State and Federal case review commissions based on the British model, commenting:

“that unless institutions of this type are established, innocent people will continue to languish in jail.

ABS figures to 30 June 2012 show that there were 29,383 prisoners in Australian prisons, an increase of 1% over the 2011 total. Using past cases as a guide, there are many persons wrongly in prison in Australia today, for whom the possibility of exoneration is still years away, if ever.

The direct costs of the imprisonment to the individual and to the families directly affected have not, as far as is known, been costed. In addition, the costs to the community (including the costs to the community of the continued criminal presence of those who actually committed the offence for which the prisoner was wrongly convicted, and the costs to the community of a reduced lack of confidence in the justice system) are also not known, nor is there any Australian economic modelling of same.

Costs to the Australian health system of wrongful conviction are also an issue. Post wrongful conviction counseling is, to my knowledge never offered by the State, which invariably excretes the wrongfully convicted from the prison system, together with all his/her mental instabilities, to fester in the community.

Hoel argues that there are also emotional costs to prisoners and their families, which are invariably shifted to the Australian health sector.

"Wrongfully convicted people may experience psychiatric and emotional effects from the conviction and subsequent imprisonment. They undergo enduring personality changes similar to that experienced by people suffering a catastrophic experience. They often exhibit serious psychiatric morbidity and display symptoms of disorders (Grounds 2004).

"Wrongfully convicted people may also suffer ongoing emotional effects from the conviction and the disengagement from society that it brings. They often exhibit feelings of bitterness, loss, threat, paranoia and hopelessness. Such prisoners lose basic emotional coping skills, making it very difficult for them to adapt to life " <sup>11</sup>

The one fact that is known is that the respective Australian government justice systems, for the most part, simply pass the whole of the burden (financial, health and social) of their failures onto the wrongly convicted person and their families. It is a massive exercise in cost shifting from those who are extraordinarily well resourced to those who are unable to access justice. Kaiser argues that all citizens have “a profound right not to be convicted of crimes which they are innocent”. He says:

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<sup>11</sup> Hoel, Adrian, and Judy Putt, Compensation for wrongful conviction, *AIC Trends & issues in crime and criminal justice series*, Australian Institute of Criminology, Canberra May 2008

.....  
This right is one of the cornerstones of an orderly society. Where it has been trampled upon by the criminal justice system, the individual and society are fundamentally threatened:

Indeed the legal system is capable of creating few errors that have a greater impact upon an individual than to incarcerate him when he has committed no crime.<sup>14</sup>

Kaiser goes on to say that a forceful public policy case can be mounted that reducing wrongful convictions will increase confidence in the criminal justice system, and that “public respect for the system may then be heightened by this admission of error and assumption of responsibility.” He goes on to argue that making restitution according to accepted international standards will prevent persons in future from being wrongfully convicted, because governments will be minded to minimise financial sanctions by improving accountability of agencies and their processes.

## **ACCEPTED INTERNATIONAL LAW PRACTICE AND RESPONSIBILITIES OF SIGNATORY STATES TO THE ICCPR**

### **Australia’s failure to comply with Accepted Standards of International Law - Australia's reservation to Article 14(6) of the ICCPR**

The International Covenant on Civil and Political Rights (**ICCPR**) provides for certain fundamental rights in criminal cases to be provided by State Parties of signatory states for its citizens. These include: the [rights of the accused](#), the [right to a fair and speedy trial](#), the [presumption of innocence](#), the forbidding of [double jeopardy](#), rights of appeal to a higher tribunal, rights to legal representation, against [self-incrimination](#), and compensation for victims of [miscarriages of justice](#).

Of all these fundamental rights, Australia as a signatory state, has, declined to comply since 1983 with its responsibility under international law to legislate to make laws under Article 14(6) ICCPR, that is, the responsibility to compensate victims of wrongful imprisonment.

Article 14(6) of the ICCPR provides:

"When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law."

The avoidance of Australia’s responsibility under international law has been accomplished by the lodgement of a reservation to Article 14(6). Australia’s reservation is as follows:



“The provision of compensation for miscarriage of justice in the circumstances contemplated in paragraph 6 of article 14 may be by administrative procedures rather than pursuant to specific legal provision.”

The existence of Australia’s reservation has been repeatedly criticised by the UN itself. At its ninety-fifth session in Geneva in 2009, the United Nations Human Rights Committee, in its concluding remarks, once again criticised Australia’s human rights record in relation to restitution for persons wrongly convicted. The Committee regretted that Australia has not withdrawn its reservation to Article 14(6) of the ICCPR, and should withdraw it. The UN Committee stated:

"While taking note of the State party’s explanations, the Committee regrets that it has not withdrawn any of its reservations entered upon ratification of the Covenant. The State party should consider withdrawing its reservations to .... Article 14 para 6 ..... of the Covenant." <sup>12</sup>

Previous UNHRC reports have made the same criticisms, without withdrawal by Australia.

### **The Practice of comparable nations**

The response of all but nine signatory states to the ICCPR has been to incorporate article 14(6) (or a rewording of the article) directly into domestic legislation to create a statutory right to compensation, or the conferring of a dedicated discretion on an administrative or judicial body to determine whether awards of compensation should be paid.

Hoel cites, as a typical example, the UK response and subsequent outcome:

“The United Kingdom has directly incorporated article 14(6) into its domestic legislation under the Criminal Justice Act 1988 (UK), s 133. A wrongfully convicted person must make an application to the Secretary of State who determines applications for compensation on the criteria set out in s 133. If the criteria are met, the claim is sent to an assessor who determines how much compensation to pay using principles analogous to normal civil damages. The incorporation into the UK legislation of a right to compensation has not caused a spike in payouts to wrongfully convicted people or 'opened the floodgates' since its implementation nearly 20 years ago.” <sup>13</sup>

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<sup>12</sup> Concluding remarks of the UNHRC’s Human Rights periodic report on Australia, tabled at the UN’s ninety-fifth session in Geneva in 2009

<sup>13</sup> Hoel, Adrian, *Compensation for wrongful conviction*, Trends & issues in crime and criminal justice no. 356 ISBN 978 1 921185 81 6 ISSN 0817-8542 Canberra: Australian Institute of Criminology, May 2008

The list of parties to the ICCPR is attached at Attachment 3.

Hoel points out that only nine signatory states have made reservations to article 14(6). Six (Trinidad and Tobago, Malta, Guyana, Belize and Bangladesh) have expressly recognised the right to compensation but have stated that they are too impoverished to implement such a system. This leaves the United States, New Zealand and Australia as the only party states among united nations to recognize the right to compensation. Australia is arguably the worst offender among the community of nations.

Hoel goes on to show that the US and New Zealand have taken at least some steps to comply. He says that the majority of US states have however introduced state domestic legislation which is in compliance with Article 14(6). In the case of New Zealand, published cabinet guidelines have been put in place, which, while not statutory, nevertheless provide some criteria, rules and accountability of the New Zealand government to provide restorative justice and compensation to exonerees<sup>14</sup>. These guidelines are attached at Attachment 4.

With the singular exception of the Australian Capital Territory, Australia is the only western signatory state that has made no move towards a legislative or administrative regime for compensation of the wrongly convicted. While the ACT has enacted legislation to compensate victims of wrongful imprisonment, neither the Commonwealth nor any Australian State has any published administrative procedure which deal with the compensation of victims of wrongful imprisonment. Such cases are dealt with by ex-gratia payments only.

Amnesty International has repeatedly called for the withdrawal of Australia's reservation to Article 14(6)

In its February 2009 Briefing for the UN Human Rights Committee, Amnesty stated:

“As highlighted in its previous submission Amnesty International also believes that Australia should withdraw its reservations to the Covenant. Australia retains reservations to Article 10, paragraphs 2(a) and 2(b), Article 14, paragraph 6, and Article 20. Australia is a developed country with the means to give effect to these rights.”<sup>15</sup>

If Article 14(6) is revoked Australia will be required to enact legislation to compensate person wrongfully convicted. It will provide an immediate and effective remedy for those mistreated at the hands of the State. The payment of compensation will provide effective and meaningful deterrents to state governments

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<sup>14</sup> Compensation and Ex Gratia Payments for Persons Wrongly Convicted and Imprisoned in Criminal Cases (New Zealand POL Min (01) 34/5, 12 December 2001).

<sup>15</sup> Amnesty International Australia, *Briefing for the UN Human Rights Committee*, February 2009 AI Index: ASA 12/001/2009

who will be required to accept the lawful financial and moral responsibility owed to the wrongfully convicted.

### **Is Australia being fair and honest is claiming that Ex Gratia Payments are “Administrative Arrangements”?**

Ex-gratia payments are not creatures of law. They represent a power exercised solely by the State. They create no rights, and there is no legal redress for citizens to claim or challenge the payment or quantum of a state’s largesse by way of ex-gratia payment.

Kaiser points out that ex-gratia payments are not substitutes for law or administrative arrangements. He argues that there is no obligation on governments to make ex-gratia payments in objectively appropriate cases; such payments can be capricious; grants or quantum may owe more to political expediency rather than merit; the deliberative processes are “shrouded in secrecy”, when there is a general public interest in an otherwise open criminal justice system; and an exclusively ex-gratia scheme tends to “trivialise the nature of potential claims”, making the interests affected “seemingly suitably responded to by largesse or charity”.<sup>16</sup>

Across Australia, State governments control absolutely the process of paying compensation on a grace and favour basis, not according to the obligations of international law, or processes of Parliamentary accountability. In effect the reservation has allowed all governments except the ACT to completely bypass the obligation imposed by Article 14(6), with disastrous results for those exonerees adversely affected.

### **Mistakes and Miscarriages of Justice**

Mistakes happen in the justice system. That is why the ICCPR mandates rights of appeal to a higher tribunal. And that is why we have courts of appeal.

In the 6 month period January to June 2012, there were approximately 170 cases dealt with by the Queensland Court of Appeal. Over 50 % of all these appeal cases were appeals in the criminal jurisdiction, with about 25 % of the total being appeals against conviction. About 30 % of appeals against conviction in this court (12 cases) over this same period were successful, sometimes involving retrial in the court of first instance. While it would be wrong to draw any conclusions based on this sample (other than the fact that the Court of Appeal is clearly doing its job of comprehensively reviewing cases) , it is clear that these high appeal rates are a

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<sup>16</sup> Kaiser, Archibald, *Wrongful Conviction and Imprisonment: Towards an End to the Compensatory Obstacle Course*, Windsor Yearbook of Access to Justice, Vol 9, 1989, University of Windsor (Nova Scotia, Canada) Faculty of Law)

significant workload for any Court of Appeal, and overall is an expensive drain on legal resources.

By statutorily compensating the wrongfully imprisoned, the State imposes a powerful financial sanction on itself to “get it right”. While mistakes will always occur, even in the best of criminal justice systems, paradoxically there is a not un reasonable hypothesis that the cost of a systemic compensation scheme would result in fewer poor prosecutions, fewer subsequent appeals, and thus fewer costs in judicial proceedings.

To this must be added the social and health costs of the imprisonment (to the individual and to the families directly affected).

There are also the financial costs savings inherent in a justice system that has the confidence of its citizens, which is reflected in higher trust and co-operation levels between citizens and with police and other authorities. This also includes the costs to the community of the continued criminal presence of those who actually committed the offence for which the prisoner was wrongly convicted.

### **The lack of utility of existing civil remedies**

Kaiser argues that existing remedies at civil law are difficult to maintain. Consider the financial resources of a prisoner locked up for 5 years, who is exonerated and has to pursue a claim against a government and Crown Law office with bottomless pockets.

He argues that existing torts of remedies false imprisonment, malicious prosecution, and negligence are simply unable to adequately deal with the situation of a wrongly convicted prisoner and that a separate cause of action, consistent with 14 (6) of the ICCPR should be established. He argues that each of these three torts is likely to fail in the civil judicial system, and that their utility as legal remedies for the wrongly convicted are in large part, illusory. He makes the following observations:

### (i) False imprisonment

False imprisonment begins to appear unsuitable even at the definitional stage where it is variously described as "... the infliction of bodily restraint which is not expressly or impliedly authorised by the law"<sup>49</sup> or "... the wrong of intentionally and without lawful justification subjecting another to a total restraint of movement. . ."<sup>50</sup> "The word 'false' is intended to impart the notion of unauthorized or wrongful detention."<sup>51</sup>

However, even if the initial arrest is fundamentally flawed there are still limits on the usefulness of this action for the wrongfully

### (ii) Malicious prosecution

The major text writers are virtually unanimous in noting, in respect of this tort, that such primacy is given to the protection of the perceived societal interest in the efficient administration of the criminal law that the action is for all practical purposes defunct. "... the action for malicious prosecution is held on tighter rein than any other in the law of torts."<sup>57</sup>

... it is so much hedged about with restrictions and the burden of proof upon the plaintiff is so heavy that no honest prosecutor is ever likely to be deterred by it from doing his duty. On the contrary . . . the law is open to the criticism that it is too difficult for the innocent

### (iii) Negligence

Grave problems would be encountered with causation. As the damage would be the wrongful conviction and imprisonment, it becomes extremely difficult to establish the causal connection where a judge or jury have interposed their independent decision making to enter a conviction. Of course, the negligent investigation of the police officer may have contributed to the cause.<sup>66</sup> None the less the verdict of a neutral third party supplies *the novus actus interveniens* which may break the chain of causation between the act of negligence and the injury.<sup>67</sup> Beyond this factor is the general flexibility with which "operational decisions" containing within them some element of discretion may be viewed by the court, what Wilson J. in *Kamloops* called "policy considerations of the secondary level".<sup>68</sup> Finally, in light of *Nelles* (albeit not argued in negligence), Crown immunity could again be the ultimate defence to an otherwise successful action. Although there may have been some erosion of

Kaiser's pessimism on the utility of existing actions is supported by Australian research conducted by Rachel Dioso-Villa, an American researcher, who has reviewed 57 cases across Australia. Of the 57 exoneration cases reviewed, she found only 3 where compensation was awarded after commencement of civil litigation by the exoneree.<sup>17</sup>

Dioso-Villa found 33 instances where compensation was known to have been sought. 27 exonerees sought ex gratia (seventeen awards; eight rejections; two pending), and 7 by pursued civil litigation (three successful, four failed). At least one exoneree in the sample filed a civil suit subsequent to the ex gratia claim. This data, while a major contribution to an area otherwise bereft of empirical research, does not deal with the question of the quality of the decision making on ex-gratia payment. There is no information whether the compensation was adequate, either subjectively (from the point of view of the recipient), or objectively, by a competent analyst. In many cases, the quantum of compensation is often subject to a confidentiality provisions. Given that ex-gratia persons have no right of review, there is a lacuna in our knowledge of quantum ex-gratia grants by government.

It is also worth noting that statutory limitation provisions preclude many exonerees from bring civil actions – it is not uncommon for wrongly convicted persons to be declared innocent decades after their conviction. Even if they could overcome the problem of obtaining legal representation, many exonerees do not have the option of choosing whether to commence civil proceedings or accept ex-gratia payment – they have no option but to accept an ex-gratia payment on whatever basis the state unilaterally deems fit. Even in cases where if the limitation period has not expired, the inevitable delay occasioned by serving time in prison, and significant evidence-gathering limitations occasioned to incarcerated persons, will significantly reduce the capacity of that exoneree to properly prosecute a civil claim.

Dioso-Villa comments on the uncertainty that pervades claims for wrongful imprisonment for exonerees in Australia because of a lack of law or published guidelines. She goes on to suggest practical models of compensation, based on existing models that address economic and non-economic loss. She observes:

“Australia currently has no existing compensation legislation at the state or federal level for the wrongfully convicted, with exception of the ACT. Building on what other countries have successfully implemented, Australia can create a federal statute that is uniform and uniquely geared to the Australian population and its resources. Based on the known consequences of wrongful conviction, a proposed compensation statute should not be limited to monetary compensation for economic loss; rather, it should attempt to also address non-economic repercussions that are both debilitating and devastating. Within the literature, researchers propose two types of

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<sup>17</sup> Dioso-Villa, Rachel *Without Legal Obligation – Compensating the wrongfully convicted in Australia*, Albany Law Review, New York, Mar 22, 2012

comprehensive compensation models that address economic and non-economic loss which vary in their delivery and access: (1) monetary compensation model and (2) holistic and individualized compensation model.

There is an obvious inequality of financial resources available to a prisoner locked up for 5 years (and then turned out into the street), when compared to a government and Crown Law office with bottomless pockets. Absent a legal champion, a person is in no real position to pursue a civil claim determinedly through the courts.

O'Shea and Papaleo point to the fact that legal aid is not available for civil litigants, and point the cost shifting, as follows:

"Instead, the shortfall in legal services must be picked up by overworked community legal centres or pro bono practices in large firms. This is no substitute for a funded system. Many fall through the net or go unrepresented." <sup>18</sup>

### **So why is there no end to the Compensatory Obstacle Course?**

Hoel argues, that to reduce the mistakes:

"Governments should foster a process for determining such claims fairly and appropriately, if not generously."

What stops that fundamental reform?

At the end of the day, the following opinions must be regarded as matters for judgement. But there are matters which may usefully prompt debate and discussion with the Commission's deliberation.

1. Australia should respond to international civil rights concerns, and withdraw its reservation to article 14 (6) of the ICCPR.
2. Guidelines drawing on existing overseas models should be drawn up as an interim measure, pending legislation.
3. Politicians generally are not driven by social equity in criminal and penological matters, but by simplistic populism, reinforced by institutional favoritism for adherents of that populism
4. Governments generally do not understand the fundamentals of human rights.
5. The political imperative of refusing to admit error, of avoiding political fallout, and the possible conflict of interest this may create for governments prevents fair dealing with the wrongly convicted.
6. There is an unrealistic fear by governments as to the actual financial cost of paying compensation wrongly convicted persons

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<sup>18</sup> The Sydney Morning Herald, 22 December 22, 2011 *The Cruelty And Injustice Of A Poorly Funded Legal Aid System*

7. There is a lack of political will to establish Criminal Cases Review or Compensation Committees.
8. There is a lack of statistical data, and consequent accountability, for lost prosecutions by Directors of Public Prosecutions.
9. The media (with a few exceptions) no longer has investigative capability, and is primarily attracted to simplistically dealing only with notorious or sensational cases (e.g. convictions for murder, or convictions by celebrities)
10. There is an abject lack ongoing research and education to foster community values which instill the intellectual rigor necessary to understand a complex issue
11. There is an inadequately funded Legal Aid system.

Justice Michael Kirby said in 1991,

“We, the judges and lawyers, must go on trying to improve the system of criminal justice. Without arrogance or self-satisfaction we must learn from the lessons which miscarriages of justice teach us. We must have the humility to acknowledge error. We must have a sense of urgency to ensure improvements in our institutions. And we must never rest content with institutional injustice which we have failed to repair when it was in our province to do so. Doubtless these are most exacting standards. But it is the highest tribute to our judicial forebears that they are the standards which our communities expect of us today. We must not fail”.<sup>19</sup>

Michael O’Keeffe  
4 November 2013

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<sup>19</sup> Kirby, M. (The Hon Justice) (1991) “Miscarriages of Justice – Our Lamentable Failure?” *Commonwealth Law Bulletin* Vol.17 July pp.1037-1054