

# Law Council of Australia: The Justice Project

## WrongTrac submission: The wrongfully convicted

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The Justice Project is concerned with the obstacles faced by different groups in their attempts to access justice. In this submission we draw attention to a particular group which, in some respects, faces some of the greatest obstacles of all, and with severe consequences: the wrongfully convicted.

While there is a growing body of research on wrongful convictions in Australia, the phenomenon is still little understood. We are addressing this through the construction of WrongTrac: Australia's Exoneration Registry, funded by the University of Sydney. WrongTrac will be a publicly accessible registry with data on all Australian exonerations going back to 1984, the year of the Splatt Royal Commission and the High Court *Chamberlain* appeal. WrongTrac will provide a solid basis for research into the causes of wrongful convictions and why existing safeguards are not working.

So far we have identified around 80 exonerations – cases where a conviction has been upheld by the intermediate appeal court but later officially overridden through a further appeal, commission of inquiry, or pardon. Of course, many wrongful convictions remain hidden and have not yet resulted in exonerations. WrongTrac aims to better understand the obstacles the wrongfully convicted face in achieving exoneration, and to estimate the magnitude of the problem of uncorrected wrongful convictions. We agree with the Law Council of Australia (LCA, *Policy Statement on a Commonwealth Criminal Cases Review Commission*, 2012) that the establishment of a Criminal Cases Review Commission would be a valuable reform.

WrongTrac is still under construction; we hope to launch version 1.0 by early 2018. We are not yet in a position to analyse the data or draw clear conclusions, but it will have the potential to provide insights into the barriers to access to justice faced by the wrongfully convicted. In this brief submission we just flag some of the issues mentioned in the Justice Project Consultation Papers which we will explore further in the future.

## The wrongfully convicted and other groups

As the LCA notes, while it is convenient methodologically to look disadvantaged different groups it should not be assumed that the groups are distinct and separate. Disadvantage is 'often intersectional and cumulative' (LCA, *Introduction and Consultation Questions*, Aug 2017, p 9). Many of the wrongfully convicted will fall within several of the different groups identified by the Law Council.

Many wrongfully convicted will be prisoners, although some will have left prison. Certain groups are disproportionately represented among the prison population – Indigenous Australians, those with disabilities (including poor mental health, intellectual disability, drug problems, and poor education and literacy), and the economically disadvantaged – with further overlap between these groups (LCA, *Prisoners and Detainees*, August 2017, pp 5-10).

The question arises whether these groups appear in still greater frequencies among the wrongfully convicted. This is difficult to answer directly. Exonerations data provide insights, however, it requires careful interpretation given the uncertain relationship between exonerations and wrongful convictions. Suppose, for example, the rate of Indigenous exonerations is lower than the rate of Indigenous imprisonment. This may suggest that Indigenous people are wrongfully convicted at a relatively lower rate (for example, because of the work of Aboriginal Legal Services). Or rather than Indigenous Australians being wrongfully convicted at a lower rate, may face still greater obstacles in gaining exoneration. (A relatively higher rate of Indigenous exonerations will be similarly difficult to interpret.) A close examination of the obstacles faced respectively by Indigenous and non-Indigenous exonerees and how they were overcome will enable clearer interpretation of the exonerations data. WrongTrac is gathering the necessary data on individual cases which will shed light on the access to justice of different groups of wrongfully convicted.

## Access to justice barriers

As the LCA notes (*Prisoners and Detainees*, August 2017), many prisoners have to deal with a range of criminal and civil legal issues during their incarceration. Yet they face significant barriers. As a group, prisoners suffer disproportionate rates of disadvantage such as poverty, poor education, and mental health problems which make it difficult for them to negotiate legal complexities. Prisoners' ability to address their legal problems is further hindered by the physical barriers of the prison, and their difficulties they encounter in maintaining communication and relations with support networks and legal services.

The wrongfully convicted a further significant systemic barrier. The procedures of the criminal justice system are governed by the finality principle. This principle upholds the importance of the finality of verdicts, to enable the system to operate efficiently, provide closure for victims and other affected people, and to project clear norms to broader society. The effect of this for the wrongfully convicted is that the avenues available for them to challenge their unjust verdict are limited and difficult to access. These avenues vary across different jurisdictions, however, in all jurisdictions, having failed on the first appeal, the challenge of achieving justice becomes significantly greater.

The legal system's attachment to a strong finality principle appears based upon an assumption that wrongful convictions are rare and exceptional. WrongTrac will challenge

this assumption by revealing both the high number of exonerations and also the difficulties that the exonerees overcame in order to gain exoneration which suggests that countable exonerations may just be the tip of a larger hidden wrongful conviction iceberg.

WrongTrac will also enable a comparison to be drawn across Australian jurisdictions and with other jurisdictions to measure their relative effectiveness in correcting wrongful convictions. We expect this will provide support for the LCA's view, expressed in its 2012 policy, that a national Criminal Cases Review Commission should be established in Australia, with the resources and powers to investigate potential wrongful convictions and, where appropriate, refer them back for further consideration the appeal court. Failing that, steps need to be taken to ensure that wrongfully convicted prisoners can properly access current limited correction mechanisms. Wrongful convictions are a systemic problem demanding a more adequate response from the criminal justice system.

#### [Inadequacy of services for wrongfully convicted](#)

The LCA notes the difficulties that prisoners may encounter in accessing legal services. Wrongfully convicted prisoners generally face greater difficulties in that, after an unsuccessful appeal, they may not be viewed as having a live legal claim before the courts. In some jurisdictions this requires intervention by Government, which, in the 'law and order' political environment, will often be unlikely. In other jurisdictions whether a further appeal should be heard is subject to judicial discretion which is also unlikely to be exercised in the absence of fresh evidence which most isolated disadvantaged prisoners will find it hard to obtain.

The LCA notes (*Prisoners and Detainees*, August 2017, p 19) that legal aid may be available to many prisoners for the more crucial aspects of their criminal matters (trial, sentencing, appeal), but is generally more limited for civil and family matters. Prisoners who have failed at trial and on appeal may face greater difficulties qualifying for legal aid for any further challenges as their prospects of success will appear weak, making it difficult to satisfy any merits test.

With an increasingly punitive political environment swelling the prison population, but without a corresponding investment in legal services for prisoners, access problems are increasing (p 27). It seems likely that the difficulties of the wrongfully convicted, in particular, will be exacerbated. Tightening resources may mean that Governments may consider innovative schemes promising improved rehabilitation and reduced recidivism (pp 33-34, 44, 51-52). However, while any shift from the prevailing retributionism would be welcome, the wrongfully convicted may have trouble deriving any benefit to the extent that such schemes falsely assume the correctness of the conviction.

Calls for greater investment into effective rehabilitation are a response to the reality that imprisonment can perpetuate rather than break the cycle of disadvantage (eg, p 33). Prisoners' need for assistance in reintegrating back into society are well-documented (pp 44-47). There is far less understanding of the experiences of the exonerated and the wrongfully convicted. There is scope for WrongTrac to include data on the experiences of prisoners freed after exoneration. Provision of compensation may help reintegration of a minority of exonerees. However, existing Throughcare Programs aim at prisoners who have

completed their custodial sentences, not those who have had their conviction and sentences set aside, and may not cater for exonerees' special needs. No doubt the reintegration difficulties encountered by the wrongfully convicted that were not exonerated will be far greater.

The LCA also draws attention to the to the broader community including expenditure on imprisonment and lost productivity (pp 34-36). It is questionable whether these costs can be justified even for the correctly convicted. It is clearly a waste of money where the prisoner is wrongfully convicted. The money saved by freeing wrongfully convicted prisoners would go some way towards funding an efficient post-appeal challenge system, such as a Criminal Cases Review Commission. Certainly, this system provides far better value for money than the ad hoc Royal Commissions and inquiries that governments may otherwise be forced to establish. The latest inquiry into David Harold Eastman's conviction ran into the millions of dollars. This sum could fund a standing Criminal Cases Review Commission for a year in which time it would be able to review numerous cases.

#### Future work

The wrongfully convicted are the victims of searing injustice. However, these injustices are systemically hidden. Many of the wrongfully convicted, like the larger prison population, suffer cumulative and intersectional disadvantage, making it even more difficult for them to achieve justice. WrongTrac will shed light on the magnitude of the problem of wrongful convictions, and highlight ways in which the problem can be better addressed.

Once WrongTrac 1.0 is launched, early in 2018, we will be looking for linkage partners to continue developing the database, to use its data to check the health of the criminal justice system, and to explore its implications for law reform. We would welcome the opportunity to work with the Law Council of Australia in its Justice Project, and to contribute to the uptake of its policy for a Commonwealth Criminal Cases Review Commission.

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