List of Issues for Australia Prior to Reporting

United Nations Human Rights Committee

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I. Authors

The Wrongful Conviction International Law Task Force (WCILTF) is a global coalition of law professors, attorneys, and activists working together to fill the "Innocence Gap" in international law. The WCILTF is supported by a pro bono legal team at the international law firm Proskauer Rose (www.proskauer.com/) located in New York City.

In the past twenty-five years, wrongful conviction of the innocent has emerged as a major problem in criminal justice systems around the world. Research indicates that the problem has always existed but has only come to light in recent decades due to forensic advancements allowing for post-conviction DNA testing of crime scene evidence. Wrongful convictions occur because of human limitations in investigation and evidence collection, such as memory weaknesses and malleability (leading to misidentifications by eyewitnesses), unreliable or faulty forensic evidence, false confessions, confirmation bias or tunnel vision on behalf of investigators, inadequate defense lawyering, and many other human problems. Thus, wrongful convictions exist in all legal systems around the world, as all nations use the same types of evidence and investigation techniques regardless of the precise legal procedures employed in their courtrooms.

NGOs called "Innocence Projects" have sprung up around the globe to combat this problem, and now entire networks of innocence projects exist in Asia, Europe, North America, and South America. Innocence Projects are often housed at law schools and are operated by law professors and law students. In one member state, for example, more than 3,000 innocent people have been released from prison in recent years due to the work of NGOs like Innocence Projects. Exonerations of the innocent have occurred across the globe in the past three decades.

For a brief video overview of the global problem of wrongful convictions and the efforts of Innocence Projects to combat the problem, please view: https://youtu.be/jMATkuFaRU8?si=fO0wXGhPr-oCyhBA

As the innocence movement has developed a global presence in recent years, it has become apparent to legal scholars that an "Innocence Gap" exists in international law. The WCILTF formed to combat this problem and help fill the Innocence Gap. The WCILTF is comprised of more than twenty-five law professors and Innocence Project leaders from across Asia, Europe, North America and South America.

II. Filling the Innocence Gap

Due to the relatively recent discovery of wrongful convictions, international law covenants and treaties predate awareness of this problem and thus do not speak directly to the issue. In recent years, however, the United Nations Human Rights Committee (HRC) has identified key rights to the benefit of incarcerated person claiming innocence to be derived from the right to a fair trial and other existing rights. For example, in *Abdiev v. Kazakhstan*, 2023, the HRC stated that ***the right of incarcerated persons to re-open a criminal case in order to present new evidence of innocence after conviction and appeal have concluded, in order to achieve exoneration and freedom, is essential to the right to a fair trial under Article 14(1) of the ICCPR***. Similarly, on October 3, 2023, in Concluding Observations on the Fifth Periodic Report of the Republic of Korea, the HRC observed that South Korea should "provide adequate legal and financial assistance to enable individuals sentenced to death to ***re-examine convictions on the basis of newly discovered evidence, including new DNA evidence"***.

Likewise, on July 25, 2024, in Concluding Observations on the Second Periodic Report of Maldives, the HRC expressed concern "about the lack of information on the existence of a procedure enabling individuals sentenced to death to seek a review of their convictions and sentences based on newly discovered evidence of their innocence, including new DNA evidence, and, if wrongfully convicted, to provide them with compensation". The HRC recommended that Maldives take all necessary measures to ensure that "death sentence can be reviewed based on ***newly discovered evidence of their innocence,*** including new DNA evidence, adequate legal and financial assistance is provided to enable this review and, ***if wrongfully convicted, individuals have access to effective remedies***, including compensation" para. 28(e). *See* Brandon Garrett, Laurence Helfer, and Jayne Huckerby, *Closing International Law's Innocence Gap*, S. Cal. L. Rev. 95 (2021), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3803518#

III. Issues with the Rights of Innocent Incarcerated Persons in Australia

Australia has a range of established laws and legal procedures as part of its criminal justice system connected to post-conviction rights, which vary across the States and Territories of Australia. However, there are some significant concerns around the right to innocence. We summarize below a non-exhaustive list of some key areas of concern.

Legal procedures for post-conviction revision or re-opening of convictions based on new evidence

There are various legal mechanisms by which a person who has been convicted of a crime can challenge or seek a review of that conviction which vary across the Australian States and Territories. We draw attention to two elements that are a common challenge across multiple States and Territories.

Strict time limits

In Australia, there is typically a strict timeframe of 28 days to lodge an appeal against conviction or sentence to a higher court, in relation to both summary and indictable offences. Access to legal aid is limited and often more restricted in remote and rural areas, making it difficult for individuals to obtain timely legal advice. Preparing an appeal requires time-consuming processes such as gathering documentation, reviewing court transcripts, and identifying potential legal errors, miscarriages of justice, or unreasonable verdicts. While it is possible to apply for an extension of time, this is not guaranteed; courts assess such applications on their merits, and delays must be adequately justified. Consequently, the strict appeal deadline can act as a significant barrier for those seeking to challenge a wrongful conviction.

Statutory second appeal

A statutory second appeal provides a legal pathway for individuals who have already exhausted their initial appeal rights to challenge their conviction again, where fresh and compelling evidence has emerged that was not available at the original trial or during the first appeal. Currently, only South Australia, Victoria, and Queensland have introduced legislation enabling such appeals. In jurisdictions without this right, the only avenue available to those who claim wrongful conviction is to petition the Governor or Attorney-General for a review—an opaque, discretionary and inherently political process, rather than one grounded in transparent judicial procedures. We therefore highlight the lack of a uniform statutory second appeal mechanism across all Australian States and Territories, and the absence of a national Criminal Cases Review Commission, despite repeated calls for one. These gaps significantly undermine access to justice for those seeking to overturn wrongful convictions based on new and significant evidence.

Post-conviction DNA Testing

There are currently no formal legal rights to post-conviction DNA testing in Australia. While some jurisdictions, such as Queensland, have introduced non-binding DNA testing guidelines, these are not enshrined in legislation and are rarely, if ever, used in practice. Each State and Territory typically has only one government-run forensic laboratory, and access to private testing facilities is extremely limited. Few accredited private labs exist in Australia, and where they do, defendants must pay out-of-pocket — a cost that is often prohibitive, especially for incarcerated individuals who may already lack legal aid.

Due to capacity constraints and operational delays, some forensic testing is outsourced to New Zealand, which is more resourced and has been used as a stop-gap. Despite this, extensive backlogs remain a critical issue. For instance, a 2022 inquiry in Queensland revealed that DNA testing delays had spanned several years, with some cases facing delays of up to 12 years — effectively rendering testing inaccessible for time-sensitive appeals or exoneration efforts.

As with appeal rights (with limited exceptions where there is a statutory second appeal right in certain States/Territories), access to post-conviction DNA testing is not guaranteed and often requires individuals to petition the Governor or Attorney-General — a discretionary, non-transparent, and political process rather than one governed by clear legal standards. This undermines fair access to scientific tools that could prove innocence, and contributes to systemic obstacles for the wrongfully convicted.

Legal right to compensation for the wrongfully convicted

Those who are wrongfully convicted of criminal offenses and subsequently exonerated because of a miscarriage of justice do not have a right to access to compensation, according to Australian national law. Australia ratified the International Covenant on Civil and Political Rights (**ICCPR**) in 1996, but declined to adopt Article 14(6), ICCPR which guarantees compensation for individuals who have been convicted of a criminal offense and subsequently have their conviction reverse or are pardoned, due to new evidence demonstrating a miscarriage of justice. Instead, Australia has a reservation which sets out that the provision of compensation of miscarriage of justice in the circumstances contemplated in Article 14(6), ICCPR may be by administrative procedures, rather than pursuant to specific legal provision. Only in the Australian Capital Territory (ACT) has this been effected into law.

The absence of a legal remedy for compensation to exonerees, with the exception of in the ACT, also prevents such exonerees from having the opportunity to challenge any decision made by State or Territory Governments regarding ex-gratia compensation to be compliant with Article 14(6).

"Sunshine law" or "public records law"

Australia does not have a "Sunshine Law" or a comprehensive "public records law" that guarantees proactive public access to government records and proceedings. Instead, transparency is governed by the Freedom of Information Act 1982 (Cth) at the federal level, with each State and Territory maintaining its own freedom of

information (FOI) legislation. However, these laws are inherently reactive — they allow individuals to request access to information after decisions have been made, rather than providing automatic or real-time access to meetings, documents, or processes. In contrast, Sunshine Laws in other jurisdictions (such as the U.S.) promote transparency during the decision-making process, ensuring that government actions are subject to public and media scrutiny as they occur, which supports more immediate accountability.

The absence of such proactive transparency in Australia significantly limits access to key information in the post-conviction context. Delays, redactions, and refusals are common under FOI regimes, particularly for sensitive records like police files, forensic evidence, or prosecutorial material. This lack of open access creates substantial barriers for defence lawyers, investigative journalists, NGOs, and incarcerated individuals seeking to review or challenge a conviction. When combined with strict time limits on appeal, the lack of Sunshine-style transparency further entrenches the difficulty of overturning wrongful convictions in Australia.

IV. Questions to Australia

1. Is the time limit typically twenty-eight days across the States and Territories of Australia for the right to appeal likely to be changed (and extended) to allow incarcerated persons to bring such a legal motion at any time? Could this be considered to be implemented at the federal level, or for national expectations for the relaxation of the strict time period to be implemented at the State and Territory level?
2. Has Australia assessed the risk that the strict deadline for appeal for is a barrier for justice for those wrongfully convicted?
3. What is the process for requesting that the deadline to appeal be extended? Are there any challenges for those convicted?
4. Is Australia aware of any persons eventually found to be wrongfully convicted who could not meet the deadline to appeal?
5. Will Australia consider mandating that all States and Territories enact legislation for a statutory second appeal in cases where fresh and compelling evidence has emerged, or implement legislation to this effect at the federal level?
6. What is the legal standard that the incarcerated person must meet to reopen the case based on new evidence of innocence where there is no statutory second right to appeal?
7. Has Australia considered the risks to the wrongfully convicted of a discretionary, non-transparent, and inherently political method of petitioning for a second appeal to the Governor or Attorney General in the majority of States and Territories?
8. Is Australia going to establish a national Criminal Cases Review Commission?
9. Have any post-conviction motions presenting new evidence of innocence been successfully granted by a court in Australia, resulting in the incarcerated person's exoneration and freedom?
10. More specifically, have there been any incarcerated persons exonerated and freed following a successful right to appeal? Have courts in Australia denied any such motions?
11. Does Australia maintain a DNA database related to criminal convictions? If so, which offenses qualify for inclusion in the database?
12. Whose DNA profiles are included in such a database? How long are DNA profiles retained in such a database?
13. Is Australia considering implementing formal legal rights for access to post-conviction DNA testing of crime scene evidence to prove innocence and seek relief?
14. Will Australia invest in further DNA lab testing?
15. What is Australia's plan to reduce the extensive backlog for DNA testing?

16. Has Australia considered the risks to the wrongfully convicted of a discretionary, non-transparent and inherently political method of petitioning for DNA testing to the Governor or Attorney General in the States and Territories?
17. Will Australia ratify Article 14(6) of the International Covenant on Civil and Political Rights to enshrine in its national law the right to compensation for those wrongfully convicted and subsequently exonerated?
18. Has Australia ever provided compensation to a wrongfully convicted person?
19. Is Australia aware of cases where those who were wrongfully convicted have not been able to access compensation? If yes, how many cases?
20. How can exonerees challenge decisions made by State or Territory Governments regarding ex-gratia compensation?
21. Will Australia consider introducing a "sunshine law" or "public records law" granting defense attorneys, NGOs, journalists, or incarcerated persons access to police files and documents of an incarcerated person's case post-conviction?
22. Are there any issues with those convicted having access to information such as police files, forensic evidence or prosecutorial evidence? Are the national and State and Territory-level laws on freedom of information effective for those convicted to access all the information they may need in any appeal?
23. How can Attorney Generals or Governors be challenged on their decisions in relation to conviction and incarceration, for example, on DNA testing permission or the right to a second appeal?
24. How does Australia ensure the fundamental right to legal representation is met?
25. Does Australia have laws or regulations requiring the recording of police interrogation of suspects? If so, please outline the requirements of such laws or regulations.
26. Is there a procedure for recording police interviews by audio or video? If not, when will this be introduced and implemented in criminal procedure?
27. Does Australia have laws preventing evidence obtained by way of torture from being admissible in the legal justice system? Are any such laws adhered to?
28. Does Australia have a legal procedure requiring biological evidence collected from the crime scene to be preserved for future DNA testing? If so, how long must the biological evidence be preserved?
29. Does Australia have a legal standard requiring the police and prosecution to disclose to the defense pre-trial any exculpatory evidence or other information helpful to the defense or that might lead to new avenues of pre-trial investigation that the defense might conduct?
30. If so, what is the legal standard pertaining to this disclosure requirement?
31. Does Australia have laws or regulations ensuring that police identification procedures for eyewitnesses adhere to best practices devised by the scientific community, such as the double-blind eyewitness identification requirement? *See* https://www.ojp.gov/ncjrs/virtual-library/abstracts/double-blind-sequential-police-lineup-procedures-toward-integrated

This document was created by the following members of the WCILTF:

Rachel Lowe
Special Regulatory Counsel
Proskauer
rlowe@proskauer.com

Associate Professor Craig Trocino
Associate Professor of Clinical Legal Education
Director, Miami Law Innocence Clinic
University of Miami School of Law
ctrocino@law.miami.edu

To contact the WCILTF generally, please email:

Prof. dr. mr. G.J. Alexander Knoops.
Advocaat/Attorney at law
Professor Politics of International Law
alex@knoopsadvocaten.nl

Professor Mark Godsey
University of Cincinnati College of Law
Director, Ohio Innocence Project
markgodsey@gmail.com