

The Contribution of “Corruption” to Miscarriage of Justice Cases

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INTRODUCTION

A Miscarriage of Justice (MoJ) which involves a wrongful conviction strikes at the very heart of our society, particularly where the person is proven to be factually innocent, as has occurred in a number of high profile cases in Australia (such as in the WA cases of Mallard, Beamish and Button (Blackburn 2005; Egan 2010; Corruption and Crime Commission 2008)) and the Victorian case of Farah Jama, where cross contamination of DNA in a Victorian forensic laboratory led to the conviction and gaoling of Mr Jama for a rape, it was subsequently discovered, he did not commit).

In the US, as at 3 September 2012, there have been 297 post-conviction exonerations through the use of DNA technology. 17 of those exonerees had even spent time on death row (US Innocence Project Fact Sheet).

MoJ matters are still with us today and they even occur in civilised and sophisticated environments. They are not a creature of the deep, dark past or third world countries. As Blackmore, the then Deputy Director of Public Prosecutions for NSW stated shortly after the Wood Royal Commission in that state (n.d.):

Miscarriages of justice do not always occur in dramatic circumstances. Injustice can also occur in societies that have a stable political climate with strong institutions to protect human rights and correct miscarriages. Miscarriages can occur when these very institutions are used in a **corrupt** fashion to bring about results, which appear, on their face to represent justice, when in reality they only represent a **perversion of justice**. (emphasis added)

And the wheels don't turn quickly when it comes to rectifying a MoJ matter. The US Innocence Project (IP) found that the average time spent in prison by an exoneree was a staggering 13 years (US IP 2012).

Closer to home, consider the Lindy Chamberlain case, which took an astonishing 32 years to finally achieve justice and real closure for the wrongfully convicted. Lindy in her autobiography *Through My Eyes* was certainly disillusioned with the system after her ordeal (Chamberlain-Creighton 2004, pp.3-4):

Having 'looked at life from both sides now' ... I can't help but see inadequacies in our British justice system ... We must fight for the preservation of discerning laws in this country. One day I was just a happy housewife and mother, known only to my friends and acquaintances, next day a household word. I never dreamed it could possibly happen to me – how about you? If this continues will you be next?

As Lindy points out, if wrongful conviction can happen to normal everyday people, who might be next? You, a family member, a close friend or work associate? In her case, as with Farah Jama, it was the issue of forensic science, rather than any form of police or prosecutorial corruption, which was the primary contributor to the wrongful conviction.

While the contribution of forensic science to miscarriage of justice cases is a significant issue, as demonstrated by Chamberlain and Splatt (Shannon 1984), and even the more recent case of Gordon Wood (Cross 2009 and the NSW Court of Criminal Appeal judgement *Wood v R* [2012] NSWCCA 21), this is not the major focus of this paper. (Note, the author will be presenting on the contribution of forensic science to MoJ cases at the International Symposium of the Australian and New Zealand Forensic Science Society conference in Hobart, in late September 2012). **The focus of this paper is, instead, the contribution of police or prosecutorial “corruption” (as defined in the paper) to MoJ cases.**

BACKGROUND

After a 30 year career in policing, spanning a number of Australian jurisdictions, and time as the CEO of the Integrity Commission in Tasmania, I have always had a strong interest in integrity, justice and humanity. I must admit, coming from policing, my primary concern in the past was more one of detecting, apprehending and prosecuting offenders.

In more recent times, however, in my new role as an Integrity and Justice consultant and, more recently, as a practising lawyer, as well as during my three and a half years as an Assistant Commissioner in charge of the then Corruption Prevention and Investigation portfolio within the WA Police, I have come to see our justice system through a different lens. I have become much more aware of the very real potential for MoJ cases, particularly after seeing the case of Andrew Mallard dramatically unravel in recent years in WA. I remember that I was in Hong Kong at an Independent Commission Against Corruption (ICAC) conference when the news broke that a palm print from the 1994 crime scene (which had been only been discovered during a recent cold case review) had been matched to a convicted murderer. Andrew spent 12 long years in gaol after he was convicted of the 1994 murder of Mrs Pamela Lawrence in Perth. I have also come to fully appreciate the critical role that police play as gatekeepers to the entire criminal justice system and how resistant they can be to being held accountable for flaws or misconduct in investigations.

One of the areas that I am currently involving myself in is that of post-conviction reviews. Since January 2012, I have been heavily involved in reviewing the conviction of Ms Sue Neill-Fraser for the murder of her long-time partner, Mr Bob Chappell, on Australia Day 2009 in Hobart (see www.susanneillfraser.org). I have spent many long hours reviewing and analysing all the available evidence in the matter, seeking further information under *Right to Information* legislation from Tasmania Police and speaking to key people in the case, including Sue Neill-Fraser. I have recently completed an 85,000 word book manuscript entitled *Murderers Amongst Us*, which I hope to be able to publish soon, once this is legally possible.

After a long career in policing, I must state from the outset that I have the utmost respect for the “profession” of policing and the many hard-working, committed and honest police officers who

undertake a difficult, dangerous and challenging job on a daily basis. Policing has indeed come a long way since the Queensland Fitzgerald Inquiry in the 80's and the NSW Wood Royal Commission in the 90's. However, there have certainly been concerns expressed in Queensland about possible "extensive backsliding in post-Fitzgerald standards" ("Moonlight State's Dangerous Liaisons" 2009; Walker (2009); McKenna & Elks (2009); McKenna (2009)).

DEFINING "MISCARRIAGE OF JUSTICE"

Dr Bob Moles in his book *A State of Injustice* states (2004 p.221):

The desired result of a criminal trial is that justice be done; that is, that the accused should receive a fair trial according to law. A miscarriage of justice occurs when there is a failure to achieve that result.

It is not intended to provide a definitive definition of "Miscarriage of Justice" in this paper other than to state that the author is referring to the concept of a **wrongful conviction** (so this paper would not, for example, pick up on cases such as Muhamed Haneef, who was charged (in 2007) but never convicted).

As Nobles and Schiff in *Understanding Miscarriages of Justice* comment (2000, p.1), it is often difficult to formulate one coherent conception of the term "miscarriage of justice" as it means different things in the discourses of media, politics and the law. They state that, at its widest and most tautological, a MoJ is "simply a failure to achieve justice" (2010, p.14). They also comment that while different communities have different conceptions of the matter, MoJ carries "widespread abhorrence" (2000, p.259).

Nobles and Schiff point out that there are two principal things about wrongful convictions (2000, pp.16-17):

[T]hat the people who have been convicted of offences did not in fact commit those offences, or that their convictions were flawed because some part of the process that produced those convictions did not operate as it should ... [W]e will call the first a concern with truth and the latter a concern with due process.

My primary concern and the focus of this paper are with the wrongful conviction of those persons who appear to be factually innocent. However, in many cases factual innocence may not have been conclusively or independently established. I have focused on murder cases in this paper but do recognise that wrongful convictions occur across the full spectrum of criminal activity.

Some also refer to MoJ as where it is considered the system has failed (i.e. that a seemingly guilty person has walked free or the Coroner has decided not to hold an inquest into a particular death). Some regard, for instance, the Palm Island matter involving the Queensland Police and the death of Mulrunji in late 2004, and the outcomes in the case, as a MoJ ("The Long, Hard Struggle for Justice on Palm Island" 2008).

The whole issue of MoJ cases is fraught with tension and emotion. How does the legal system achieve the necessary balance to ensure that the guilty (in a factual and legal sense) are duly convicted and the innocent walk free?

William Blackstone once said:

It is better that ten guilty persons escape than that one innocent suffer.

As a victims' advocate for many years, I can understand that victims of serious crime (including secondary victims) may well consider that there has been a MoJ when an apparently guilty person escapes conviction. I am also well aware of the concerns of Evan Whitton outlined in his excellent book *Our Corrupt Legal System: Why Everyone is a Victim* (2009). Whitton argues that our legal system should be a search for the truth but points out that our current legal system has "24 anti-truth devices" or 6 ways of concealing evidence and 18 other mechanisms which obscure or defeat the truth (2009 pp.156- 21). For example, at page 157 of his book, he controversially states:

Justice is fairness. The bottom line is that judges have unfairly skewed the system in favour of defence lawyers and their criminal clients, and against victims, detectives, prosecutors, witnesses, jurors, and the public.

Nobles and Schiff on the issue of truth in our criminal justice system also express concern (2000, p.18):

How can one believe that criminal justice is about truth, or due process, when it is so obviously about power, expediency, control, class, the aggressive policing of suspect communities, the impossibility of objectivity, and has little, if anything, to do with justice, or any other values which might claim to lie beneath that epithet?

The situation of the "guilty" escaping conviction is not the focus of this paper. My primary concern is the wrongful conviction of the seemingly innocent due to corruption or misconduct and how such incidents can be prevented and how the criminal justice system can be meaningfully reformed.

DEFINING "CORRUPTION"

Before I proceed to discuss actual cases, I thought it would be important to provide a workable definition of "corruption" **for the purpose of this paper**.

The word "corruption" is a problematic one and has a host of definitions and interpretations. It is often frequently used to refer to a wide range of misconduct matters. (Interestingly, in Tasmania, when they chose to establish an Anti-Corruption Authority (ACA), they called it the "Integrity Commission". The legislation that underpins the agency does not even mention the word "corrupt" or "corruption" once, unlike the ACA's in the other States/Territories.)

There are a number of international definitions for corruption. For example, the definition used by Transparency International is:

Corruption is the abuse of entrusted power for private gain.

An indication of the recognition of how difficult it is to define corruption is the fact that the United Nations Convention Against Corruption (UNCAC) (the first legally binding international anti-corruption instrument) does not provide a definition of “corruption” (see http://en.wikipedia.org/wiki/United_Nations_Convention_against_Corruption).

I have chosen to use a definition relevant to people holding public office, such as police officers and Crown prosecutors as they are generally key players in any MoJ matters (although it is acknowledged that other players, such as key witnesses or informants, may have deliberately lied to the courts).

In trying to develop a workable definition of “corruption”, I have found the legislation of Australian ACA’s, particularly the NSW ICAC, to be of relevance. In addition, I have also drawn on the *Australian Standard on Fraud and Corruption Control (AS 8001 -2008)* and the Wood Royal Commission which examined the NSW Police Service (Wood 1996 & 1997).

“Corrupt conduct” is defined in the NSW *Independent Commission against Corruption Act 1988* as deliberate or intentional wrongdoing, not negligence or a mistake. The ICAC website states that corrupt conduct can take many forms, but occurs [in the public sector] when (<http://www.icac.nsw.gov.au/about-corruption/what-is-corrupt-conduct>):

- A public official improperly uses, or tries to improperly use, the knowledge, power or resources of their position for personal gain or the advantage of others
- A public official acts dishonestly or unfairly, or breaches public trust
- A member of the public influences or tries to influence, a public official to use his or her position in a way that is dishonest, biased or breaches public trust.

AS8001 Fraud and Corruption Control describes “corruption” as:

A dishonest activity in which a director, executive, manager, employee or contractor of an entity acts contrary to the interests of the entity and abuses his/her position of trust in order to achieve some personal gain or advantage for him or herself or for another person or entity.

Justice Wood in the NSW Wood Royal Commission was charged with examining “the nature and extent of corruption within the Police Service, particularly of an entrenched or systemic kind” (1996, p.32). His definition of “corruption” in the 1996 Interim Report (1996, p.32) was as follows:

‘Corruption’ is notoriously difficult to define, and its reach may vary depending upon whether it is defined according to deviation from legal, public interest, or public opinion norms. Even within one of those possible sets of criteria it may change, from setting to setting, and from time to time, according to variations in community standards and expectations. Any attempt at a universal and precise definition is, in fact, likely to present more problems than it would resolve.

Justice Wood later defined “corruption” as including “the *mala fide* exercise of police powers”. He went on to state (1997, p.20):

Corruption has accordingly been taken to comprise deliberate unlawful conduct (whether by act or omission) on the part of a member of the Police Service, utilising his or her position,

whether on or off duty, and the exercise of police powers in bad faith. It includes participation by a member of the Police Service in any arrangement or course of conduct, as an incident of which that member, or any other member:

- Is expected or encouraged to neglect his or her duty, or to be improperly influenced in the exercise of his or her functions;
- Fabricates or plants evidence; gives false evidence; or applies trickery, excessive force or threats or other improper tactics to procure a confession or conviction; or improperly interferes with or subverts the prosecution process;
- Conceals any form of misconduct by another member of the Police Service, or assists that member to escape internal or criminal investigation; or
- Engages himself or herself as a principal or accessory in serious criminal behaviour.

In each case, the relevant conduct is considered to be corrupt, whether motivated by an expectation of financial or personal benefit or not, and whether successful or not.

I have also included in my definition and discussion of “corruption” the concept of “**process corruption**” or “**noble cause corruption**” (sometimes referred to as the “Dirty Harry Problem” (Klockars 1980)) which was also usefully defined and explained in the 1997 Wood Royal Commission Reports in NSW. Wood stated (1997, p.20):

In addition to these activities which directly hinder the suppression and prosecution of crime, the good order of the Service and the creation of an environment of honesty, integrity and impartiality, the approach taken by the Commission embraces those forms of conduct sometimes referred to as ‘noble corruption’, but which are better categorised as ‘process corruption’. This is the kind of corruption whereby unnecessary physical force is applied, police powers are abused, evidence is fabricated or tampered with, or confessions are obtained by improper means. It is often directed at those members of the community who are least likely or least able to complain, and is justified by police on the basis of procuring the conviction of persons suspected of criminal or anti-social conduct, or in order to exercise control over sections of the community.

Wood referred to “process corruption” as one of the most “obvious, pervasive and challenging forms of police corruption” (1997, p.28). He pointed out that process corruption:

- has its roots in community and political demands for law and order;
- is seen by many police to be in quite a different league from the forms of corruption which attract personal gain;
- is subject to the confusion which exists over the definition of ‘good policing’; and
- is compounded by ambiguities within the legal and regulatory environment in which police work, and by senior police and members of the judiciary apparently condoning it.

In a speech that Wood delivered in 1999, post Royal Commission, he stated:

[T]he reality is that as often as process corruption has been the result of “honourable” motives, it has also been engendered by black motives referable to opportunistic theft, the elimination of rivals at the behest of a protected criminal, self advancement in securing

promotion, thrill seeking, and simple laziness or unwillingness to do the hard work required for an ethical investigation.

Wood also pointed out that process corruption may result from an exercise of **partiality** in criminal investigations or prosecutions (1997, p.29). He stated that partial investigations and prosecutions involve the abuse of police powers resulting from the ability of officers to exercise discretion. The existence of a lack of impartiality among police is potentially attributable to many factors, which included (Wood 1997, p.30):

- Attitudes to particular crimes which police themselves may commit, or personally condone, for example, drug taking, domestic violence, or driving while drunk;
- Financial gain in return for protection given to drug dealers and others;
- **The desire to obtain convictions, or information, regardless of the legality of the means used, or their consequences;**
- The existence of personal attitudes based on race, gender, sexuality, religion, and/or socio-economic status;
- The desire to protect a fellow officer at the expense of a member of the public;
- The desire to protect friends or family suspected of an offence; and
- Undue respect for, or concern as to the consequences of charging people who are particularly well placed socially or politically. (emphasis added)

Wood discussed individual police deviance and clearly stated that the “rotten apple” theory of police deviance (by which corruption had previously been understood in terms of individual moral failure) had long been discounted (1997, p.21). (Indeed, some now prefer to talk about “bad barrels” or “bad orchards”, meaning, not individual, but institutional failure). Wood also very usefully went on to distinguish between corruption of an “entrenched” or “systemic” kind, by applying a “purposive meaning” (1997 p.21):

‘[E]ntrenched’ corruption should be equated to the presence of corruption of such a nature and to such an extent, that it is firmly established within the Police Service and capable of being defended by its adherents or of resisting efforts for its eradication;

‘[S]ystemic’ corruption is taken to be the form of corruption which has become accepted as part of the way of life or ethos of the Police Service, and which a significant proportion of its membership either pursues or tolerates at some stage of their police careers.

Wood commented that such definitions tend to become “terms of art” (1996, p.33). He commented that they were, to a degree, interchangeable, or at least closely related, since in their operation one may provide the environment for the other “to spawn and develop” (1996, p.33). In his 1996 Interim Report Wood stated that the Commission had already unearthed “significant corruption of the kind which could answer the test adopted of ‘entrenched or systemic corruption’” (1996, p.34).

In light of the above, particularly the definitions provided by Wood, I have attributed a fairly broad meaning to the term “corruption”. I must admit that I also chose to use the word “corruption” in the title of my paper, given that this presentation was for the Corruption Prevention Network and I wanted the material to be as relevant as possible to the Forum’s goals and objectives.

I have also used the general definition of the *male fide* exercise of powers by prosecutors to constitute “corruption” for the purposes of this paper when referring to possible prosecutorial misconduct.

In this regard, I have had to be very careful. There have been some high profile cases here in Australia in recent times where prosecutors have been severely criticised by the courts. However, as this behaviour may not have been judged to constitute “misconduct” by the appropriate body for the purposes of any disciplinary action, I have refrained from mentioning such cases at this time.

POLICE BEHAVIOUR THAT MIGHT CONSTITUTE “CORRUPTION”

From my experience and observations over many years, the type of inappropriate behaviour or misconduct police or prosecutors can be involved in, which might lead to a MoJ, include:

- Tunnel vision;
- Misrepresentations to the accused, for example, making knowingly false statements about other witness or forensic evidence;
- Deliberately not taking a statement from a critical witness who does not support the police case;
- Obtaining a confession under duress or through the inappropriate use of force;
- Failing to declare and deal appropriately with a conflict of interest situation;
- Creating incriminatory statements or misrepresenting or enhancing statements from the accused so that they become incriminatory or more favourable to the Crown case (the “verbal”);
- Spreading malicious and untrue rumour and innuendo, which is particularly damaging in smaller communities;
- Failing to transpose important details on handwritten running sheets accurately to a more formal Investigation Log or running sheet;
- Requesting that forensic reports be edited to be more favourable to the Crown case;
- Leaking material to the media unfavourable and prejudicial to an accused;
- Being overly selective about what goes in statements from witnesses, inappropriately influencing them, or leading them on specific points to fill holes in the Crown case;
- Utilising witnesses or informants that are known to be highly unreliable;
- Planting evidence;
- Presenting evidence in a case which one knows to be false or untrue; and
- Failing to disclose relevant material to the Defence.

There may not be an obvious and major issue in a case but it needs to be realised that a consistent tweaking, fine tuning and the distortion of evidence can nevertheless have a devastating effect. As was stated by Kirby J in *Mallard* [2005] HCA 68 at para.56:

[I]t is important to consider the cumulative effect of the non-disclosure or suppression of material evidence in the hands of the police and thus available to the prosecution. It is the cumulation, variety, number and importance of such evidence that is critical to my conclusion that a miscarriage of justice occurred in the appellant’s trial.

It should also be noted that there is also scope for misconduct amongst Defence counsel and forensic personnel, although this appears far less common.

SOME NOTABLE MISCARRIAGE OF JUSTICE CASES IN AUSTRALIA

As far back as 1991, Justice Michael Kirby stated, in a speech delivered in London (p.1038):

Between the idea of British justice and the reality; between the motion of our famous legal procedures and the act of criminal conviction, a shadow has fallen which is called miscarriages of justice. It casts its dark reflection to the four corners of the world where the English language is spoken and where the procedures of justice fashioned in this city have been copied by a quarter of humanity... [T]he shadow which has fallen over it is persistent.

There have been high profile MoJ cases both here in Australia and around the world (see for example Kirby 1991; Weathered 2005; Moles 2004 & 2006; Sangha, Roach & Moles 2010). In relation to the UK, for example, the Birmingham Six, the Cardiff Three and the Guildford Four immediately spring to mind.

Australia too has had its fair share. Dr Bob Moles' website, Networked Knowledge, gives a helpful and enlightening list of what might be regarded as MoJ cases in Australia - See <http://netk.net.au/researchprojectshome.asp>.

Tasmania appears to have been fortunate in this regard, at least in modern times (I do not propose to delve into aspects of our rich convict history!).

Other states and territories have fared less well in relation to **highly controversial cases** or proven MoJ matters. Consider, for example, the following cases in Australia and New Zealand:

- NT - Chamberlain (Morling 1987)
- Queensland - Graham Stafford (Bowles 2007, Crowley & Wilson 2010) and Kelvin Condren (Weathered 2005)
- NSW – McLeod-Lindsay (Brown & Wilson 1992), Gordon Wood (see <http://netk.net.au/WoodHome.asp>; Cross 2009), Jeff Gilham (Bowles 2009) and Keli Lane (Langdon 2007 & Chin 2011)
- SA – Edward Splatt (Shannon 1984) and the ongoing case of Henry Keogh (Moles 2004 & 2006)
- Victoria - Farah Jama (Vincent 2010) and Jaidyn Leskie (Bowles 2001)
- WA - Mallard (Egan 2010; Corruption and Crime Commission 2008), Mickelberg (Lovell 1985 & 2010) and Button and Beamish (Blackburn 2005; Weathered 2005)
- NZ - Arthur Allan Thomas (Yallop 1978; Birt 2012) and David Bain (Karam 1997 & 2012).

In some of these cases, there has not only been a favourable legal outcome but also indisputable evidence of the person's factual innocence (as occurred in Mallard in WA and Farah Jama in Victoria).

THE CAUSES OF MISCARRIAGE OF JUSTICE CASES IN AUSTRALIA

Research has indicated that consistent themes emerge when one examines the causes of known or highly likely MoJ cases both here and overseas.

An article by well-known criminologist Dr Paul Wilson, co-written with Juliette Langdon, entitled “When Justice Fails” (2005) provides a valuable insight into the possible causes of miscarriage of justice cases in Australia and New Zealand. The authors identified factors said to be responsible for actual or possible MoJ, based on a review of 32 Australian and New Zealand cases since 1985.

The factors, which cover general areas such as “Police”, “Evidence”, “Secondary Sources”, “Mass Media”, “Trial Processes” and “Misunderstanding of Cultural Factors”, were identified as:

1. Allegations of Over-Zealous/Unprofessional Police Investigation;
2. Allegations of Incompetent Police Investigation;
3. Allegations of Criminal Police Behaviour;
4. Expert as Advocate (e.g. partisan expert testimony);
5. Inconclusive Expert Evidence;
6. Circumstantial/Suspect Evidence;
7. Unreliable Eyewitness Identification;
8. Possible Witness Perjury;
9. Confession by Other;
10. Unreliable Police Informer;
11. Unreliable Prison Informer;
12. Media Pressure;
13. Media Stereotyping/Prejudice;
13. Possible Erroneous Judge's Instructions;
14. Inadequate Representation;
15. Allegations of Prosecution Misconduct; and
16. Misunderstanding of Cultural Factors such as translation errors.

(It is interesting to note that the list does not include discrimination or bias as a result of gender, socio-economic status, religion, sexuality or race).

The study found that “over-zealous” police conduct was recognised as a major contributing factor leading to miscarriages of justice and that it was akin to a “systemic dynamic” (Langdon & Wilson 2005, p.8). **Over-zealous police investigation was found responsible or partly responsible in 50% of cases.** Langdon and Wilson stated (2005, p.8):

Examples of such conduct include police deliberately distorting a witness’s statement, coercing a confession from a vulnerable suspect, and ignoring exculpatory evidence. **The issues relating to over-zealous police investigations are similar to those that Wood ... described as ‘process corruption’.** Police often appear to engage in such conduct because they strongly believe the suspect is guilty and consequently fail to follow other lines of inquiry. (emphasis added)

The study also commented on the fact that police can be prompted to over-zealous behaviour by the strong circumstantial nature of a case (2005, p.10).

Fiona Brookman in her UK book *Understanding Homicide* states (2011, pp.268-269):

As argued, homicide investigations may fail due to the sheer complexity of the case, problems of information overload and the associated difficulties of determining the value and credibility of information, financial pressures and associated under-staffing and certain aspects of police occupational culture. However, there is a further important issue that merits attention, namely those occasions where the police circumvent standard practice in an effort to 'get a result'. It is, once again, the intense pressures associated with the job that can lead officers to take certain 'short-cuts'. Moreover, where these short-cuts are seen to succeed, they can become rapidly accepted and normalised as standard practice – despite the obvious dangers that such transgressions can engender.

The Wilson and Langdon study also found that media pressure can lead to the premature arrest of suspects before a thorough investigation and relevant forensic tests can be carried out. Wilson and Langdon commented (2005, p.12) that extensive media coverage of a particularly serious crime can lead investigators to form "a conjecture" of the offence and the offender, to which they cling despite the emergence of countervailing evidence. The media's prejudicial influence was found in 22% of cases (2005, p.13). The concept of "trial by media" would seem a very real consideration, particularly when you consider what occurred in the Chamberlain case. (Police are usually fairly adept and practised at feeding the media and inappropriate information provided to the media can certainly have a huge negative impact on an accused.)

It is pertinent to note that the analysis by Wilson and Langdon found that the inadequacy of legal representation and allegations of prosecution misconduct also led to miscarriages. In their study, "Erroneous judge's instructions" was found in nearly 19% of cases; "Inadequate representation" was deemed to have partly led to a miscarriage in 25% of cases; and **"Prosecution misconduct" was identified in 15% of cases.** Wilson and Langdon comment that the "inadequate representation" factor may be due to lawyers not having time to thoroughly prepare a case (2005, p.17: see also Zellick 2010).

Research such as that conducted by Langdon and Wilson is invaluable in attempting to identify the causes of miscarriage of justice cases. It is also useful to consider the causes identified in other countries with a similar legal system, such as the US, Canada and the UK (although it is recognised that policing in America is significantly different to Australasian policing in a number of key respects).

United States

The US IP website under "Understand the Causes" states:

As the pace of DNA exonerations has grown across the country in recent years, wrongful convictions have revealed disturbing fissures and trends in our criminal justice system.

Together, these cases show us how the criminal justice system is broken – and how urgently it needs to be fixed.

We should learn from the system’s failures. In each case where DNA has proven innocence beyond doubt, an overlapping array of causes has emerged – from mistakes to misconduct to factors of race and class.

The US IP lists the most common causes of wrongful convictions as:

- Eyewitness misidentification;
- Unvalidated or improper forensic science;
- False confessions/Admissions;
- **Government Misconduct;**
- Informants or Snitches; and
- Bad Lawyering. (emphasis added)

The US IP points out that each case is unique and may include a combination of the above. It also states that the cases of wrongful convictions uncovered by DNA testing are filled with evidence of negligence, fraud or misconduct by prosecutors or police departments. They state “DNA exonerations have exposed official misconduct at every level and stage of a criminal investigation”.

They list the “common forms of misconduct by **law enforcement officials**” to include:

- Employing suggestion when conducting identification procedures;
- Coercing false confessions;
- Lying or intentionally misleading jurors about their observations;
- Failing to turn over exculpatory evidence to prosecutors;
- Providing incentives to secure unreliable evidence from informants.

They list the “common forms of misconduct by **prosecutors**” to include:

- Withholding exculpatory evidence from defence;
- Deliberately mishandling, mistreating or destroying evidence;
- Allowing witnesses they know or should know are not truthful to testify;
- Pressuring defence witnesses not to testify;
- Relying on fraudulent forensic experts;
- Making misleading arguments that overstate the probative value of testimony.

Canada

In Canada, “tunnel vision” has been identified as a major aspect or leading cause of wrongful convictions (“Wrongful Convictions: The Effects of Tunnel Vision” in Department of Justice Canada 2004). Tunnel vision has been defined as (Department of Justice Canada 2004):

[T]he single-minded and overly narrow focus on an investigation or prosecutorial theory so as to unreasonably color the evaluation of information received and one's conduct in response to the information.

All three Canadian Inquiries into wrongful convictions (Marshall Inquiry, Sophonow Inquiry and the Morin Inquiry) have commented on the perils of tunnel vision and have made recommendations for police and Crown education on the topic (Department of Justice Canada 2004).

Bruce MacFarlane QC in a Canadian report on wrongful convictions and the effect of "tunnel vision" and "predisposing circumstances in the criminal justice system" commented (n.d., p.4):

A significant number of studies on wrongful convictions have been done during the past two decades. They were undertaken in distinct and diverse legal, political, and social environments in Canada, the United States, and other Commonwealth countries. Despite that diversity, the similarity in causal patterns and trends is at the same time both chilling and disconcerting.

... [T]wo critical factors have arisen in all jurisdictions: First, the existence of environmental factors or "predisposing circumstances" that foster wrongful convictions to occur in the first place, including so called "noble cause corruption," and ends-based police and prosecutorial culture that masks misconduct as legitimate on the basis that the guilty must be brought successfully to justice. Second, ... "tunnel vision" which leads justice system participants to focus prematurely on a single suspect.

United Kingdom

Nobles and Schiff comment on the UK situation as follows (2000, p.24):

Indeed recent high profile miscarriage cases are full of allegations of police perjury and brutality (Birmingham Six and Guildford Four), non-disclosure of relevant evidence (Judith Ward and Stefan Kiszko), extraction of false confessions (Darvell Brothers, the Maxwell Confait case), and witness manipulation (Bridgewater Four and the Luton post office murder case). Even those who take a less integral and more individual view of malpractice recognize the inevitable gap: 'the high-profile miscarriages of justice were in the main the result of human factors, such as police officers who fabricated evidence, scientists who made mistakes or suppressed evidence. No system is, or could ever be, fully proof against human error or human wickedness' (citing M Zander, "What is Going On" *New Law Journal* 143 (1993) pp.1507-1508).

In relation to causes of MoJ cases in the UK, Richard Foster CBE, the Chair of the Criminal Cases Review Commission (CCRC) stated in his Foreword to the CCRC 2010/11 Annual Report (2011 p.5):

The causes of miscarriage of justice are many and varied and include inefficient or misguided investigations, fabricated or suppressed evidence, misconceived expert evidence and confessions obtained through duress ... **The most common basis of referrals remains the non-disclosure of material evidence at the original trial.** (emphasis added)

Ludovic Kennedy writing in *The Times* (2002) and discussing cases like the Birmingham Six and the Guildford Four stated the following:

Most of the spate of miscarriages of criminal justice that have occurred during my lifetime have been the consequences of police corruption and judicial naivety; the police in giving false evidence to secure convictions against those they have deluded themselves into thinking are guilty and the judiciary in invariably accepting their word in preference to those of innocent defendants.

SPECIFIC CASES WHERE POLICE MISCONDUCT WAS AN ISSUE IN A MoJ CASE

I thought it would be useful to refer to a number of relevant cases. I have been careful to restrict myself to cases where the misconduct has been substantiated by a Royal Commission or an inquiry/investigation by an ACA. (However, I have also included reference to the Graham Safford case in Queensland where there was no misconduct found in the police investigation by the Crime and Misconduct Commission).

Arthur Allan Thomas (NZ)

I recently read *All The Commissioner's Men* by Chris Birt (Stentorian Publishing Ltd 2012). The book covers the events following the murder of Jeanette and Harvey Crewe in 1970 - one of the most high profile murder cases in NZ's history. A 1980 Royal Commission not only found Thomas, the convicted murderer, to be innocent (in fact, he had already been pardoned), but also found evidence of serious police misconduct. The crucial point is that those police who were responsible for the planting and fabrication of evidence to secure a conviction (primarily the cartridge case and the two stub axles) and the suppression of other critical evidence (not to mention alleged perjury) have never been held accountable, by a succession of Police Commissioners. (In fact, one of the lead investigators still holds a certificate of merit for his "diligence and zeal" in solving the Crewe homicides).

When the case against Thomas started to unravel, Birt states (2012, p.152):

The response was predictable, with the old boys of the police club - and the new ones - being called on to "do their duty". That duty was, however, to their colleagues, not to the rule of law. This aspect of collegial behaviour was ultimately captured by Thomas defence counsel Kevin Ryan in his closing submissions to the Royal Commission in 1980:

Since the pardon, many people have asked who was responsible for Thomas' convictions. The answer lies not in the specific orders of any one person, but **in the spontaneous actions of many**. When the Police Department closes its ranks, when authority takes up arms against one whom it mistakenly believes to be a murderer, there is no need for posting of battalion orders. Within the police team each member knows what is required of him, what he must do, and during this long investigation and trial each man did it. (emphasis added)

After my long, mobile and varied career in policing, first-hand experience in dealing with corruption prevention and investigation matters, and my observations of key events in policing (such as the Palm Island matter in Queensland), it appears to me that there still is a strong element of misguided loyalty within policing.

When Thomas was granted his pardon in 1979, his case had been examined in seven judicial hearings and had cost NZ taxpayers many millions of dollars. It seems that it is not uncommon for those subsequently proven innocent to have had little success in courts of appeal (Consider the WA case of Mallard or the Queensland case of Graham Stafford, as examples). This too is an area of concern.

Birt comments that the Thomas Royal Commission was, and remains, the biggest inquisition into the actions of members of the NZ Police ever conducted. However, Birt laments that, despite significant legislative changes on the 'justice' side of the Crown ledger, there have been no significant amendments to the laws that govern how criminal investigations are conducted in NZ. He states that the ability for certain police officers to suppress material evidence, to ignore information that would prove the innocence of a suspect, to fabricate and to perjure themselves appears to remain as strong as it was in 1970 (2012, p.189). He argues that the "modus operandi" in some sections of the NZ Police remains unchanged (2012, p.190). He goes on to state that it is the "culture" of the NZ Police that remains of greatest concern. Birt concludes by commenting that the Thomas case has been shown to be "the worst example of police malpractice NZ has ever seen" (2012, p.194).

There has also been a call to re-investigate the matter and hold people to account by the daughter of Jeanette and Harvey Crewe, Rochelle, who, as a baby, was left in her cot for five days but apparently tended to and fed by a woman associated with the real murderer. Vivien Thomas, the wife of Arthur Thomas, who was wrongly accused of being the woman who fed the baby, also wrote to the Prime Minister of NZ in October 2010 requesting an independent inquiry "in the strongest possible terms", shortly before her death.

It will indeed be interesting to see whether anything is done by the NZ Police to ensure proper accountability in the original matter and for subsequent events (such as the possible withholding of material from the 1980 Royal Commission).

The case is of particular interest in that highlights clear misconduct by the police that led to a MoJ but it is valuable too in that it demonstrates how hard it is to hold relevant people to account.

Mallard (WA)

A case that I am very familiar with is that of Andrew Mallard, who spent 12 years in a WA prison for a murder he clearly did not commit (see Egan 2010). Andrew had been convicted of the brutal murder of Pamela Lawrence in her jewellery shop in Mosman Park in Perth in 1994. The matter was the subject of an extensive Corruption and Crime Commission (CCC) inquiry which reported in late 2008 (CCC 2008). At that time, I was the Assistant Commissioner of the then Corruption Prevention and Investigation portfolio for WA Police and I actually sat in on some of the hearings of the CCC.

There were a host of allegations in the CCC investigation including against senior members of the WA Police who, as operational detectives, had investigated the matter at the time. However, only some of these allegations were substantiated pursuant to the definition of “misconduct” in the CCC’s underpinning legislation. In the end, there were eight misconduct findings against then Assistant Commissioner Mal Shervill (4), Assistant Commissioner Dave Caporn (2) and senior DPP prosecutor, Mr Kenneth Bates (2).

The opinions as to misconduct were summarised by the CCC as follows (2008, p.xxvii):

- That Det Sgt Caporn engaged in misconduct in writing the letter to the Police Prosecutor dated 17 June 1994 containing incorrect and misleading information.
- That Det Sgt Shervill engaged in misconduct in requesting Mr Lynch to amend his reports by deleting all references to the salt water testing.
- That Det Sgt Shervill engaged in misconduct in bringing about the alterations to the statements of various witnesses without any reference to their earlier recollections.
- That Det Sgt Caporn engaged in misconduct in bringing about the alterations to the statements of various witnesses without any reference to their earlier recollections.
- That Det Sgt Shervill engaged in misconduct in making false entries in the Running Sheets relating to the amendments to the witnesses’ statements.
- That Det Sgt Shervill engaged in misconduct in failing to disclose to the defence the original statements of the witnesses including Mr Lynch’s original report and details of the unsuccessful attempts to locate a weapon capable of inflicting wounds similar to those found on Mrs Lawrence.
- That Mr Kenneth Bates engaged in misconduct in running the trial on the basis that a wrench as drawn by Andrew Mallard was the murder weapon, but, at the same time, failing to put Andrew Mallard’s drawing to Dr Cooke and asking whether the deceased’s injuries were consistent with the use of such an instrument.
- That Mr Kenneth Bates engaged in misconduct in failing to disclose to the defence the pig’s head testing of the wrench or ensuring that it had been disclosed by the police.

The CCC report listed some of the factors that contributed to the wrongful conviction of Andrew Mallard as (2008, pp.xxv- xxvi):

- The failure of the police to properly assess the reliability of the confessional material due it would seem, to too much attention being paid to the so-called “twelve things only the killer could know” and insufficient attention to the number of matters which he got wrong;
- The altered statements and the failure of police to disclose the earlier versions of such statements ... to the defence;
- The non-disclosure of the salt water testing of Mr Mallard’s clothes and the pig’s head test of the wrench; and
- The conduct of the prosecution.

Mallard is a very clear example of how police and prosecutorial misconduct can lead to a wrongful conviction and a MoJ (although, admittedly, it did relate to police and prosecutorial conduct in the 1990’s). It is also another clear example of the difficulties in holding people to account. Both Assistant Commissioners resigned from the WA Police before “loss of confidence” action against

them could be finalised. Only earlier this year, Mr Bates was finally dealt with in the State Administrative Tribunal and was fined \$10,000 and reprimanded for his role in Mallard's wrongful conviction (although the Legal Profession Complaints Committee did not allege, nor did Justice Chaney find, that Mr Bates' conduct was deliberate) (Thomson 2012). The \$10,000 fine was the maximum available under the *Legal Practitioners Act* (Thomson 2012). Bates too had resigned from the public sector before any action could be taken against him and reportedly received a payout or "golden handshake" of \$276,000 (Thomson 2009; Perpetch 2009).

Graham Stafford (QLD)

Another case which is worthy of consideration in relation to police conduct is the case of the murder of Leanne Holland in Queensland in 1991. **However, I need to make it clear that no findings of misconduct in this case were ever made.**

I had the privilege of hearing Graham Stafford speak at the International Justice Conference held in Perth in March 2012 (see <http://internationaljusticeconference.com/>).

The details of Graham's case have been outlined in *Who Killed Leanne Holland?: One Girl's Murder and One Man's Injustice* (Crowley & Wilson 2010). According to the book, there are some interesting aspects in the case in relation to the conduct of the investigation (including possible tunnel vision), the failure to deal with conflicting eyewitness evidence and the impact of limitations in forensic science, particularly in relation to blood evidence. The case involved the brutal murder and torture of a 12 year old girl in an outer western suburb of Brisbane. Graham was convicted in 1992 of the girl's murder and spent 15 years in gaol. After numerous appeals, including to the High Court, and petitions for mercy, and despite new and fresh evidence emerging over the intervening years, his conviction was not quashed until December 2009.

There were real issues around the forensic science concerning blood of the victim's blood grouping found on items in the boot of Graham Stafford's car and in the house, a single hair found in the car boot, the single maggot found by police in the boot (but seemingly not recorded by them in all relevant official documentation), the estimation of time of death using maggots found on the body and temperature/daylight information, and the tyreprints found at the scene which it appears may have been wrongly matched to the tyres on Graham's car (Crowley & Wilson 2010). There was also the alleged missing weapon - a hammer, which seemed to have disappeared. Crowley and Wilson commented (2010, p.183):

It is more difficult, however, to decipher an innocent explanation for the maggot – similar to the ones found on Leanne's body – being in the boot of his car. This was significant and damning evidence against Stafford. Crowley spent many hours investigating the disturbing possibility that someone may have planted evidence in this case, including the police.

When the case came before the High Court for special leave to appeal one of the Justices said (2010, pp.190-191):

But the things that were not possibilities were: the mallet was missing, there was no explanation that your client could offer for the blood or the maggot in his own car, he had

injuries to his arm which were unexplained, there were car tracks that were consistent with his car, he put out the garbage, which was not his practice, and that is just a few of them. **I think it is a very, very strong Crown case, especially the maggot.** (emphasis added)

Special leave to appeal was not granted in the matter.

From reading the book, it is certainly open to consider the inference that one option is that the single maggot, which was later found to not be of the same age as maggots from the victim's body, was planted in the car boot by police, **although a complaint against police did later clear them.**

In fact, Crowley and Wilson reported (2010, p.228):

[T]he Crime and Misconduct Commission have found nothing wrong with the original police investigation.

PREVENTING, AND DEALING WITH, CORRUPTION IN MISCARRIAGE OF JUSTICE CASES

Research such as that conducted by Langdon and Wilson (2005) is invaluable in attempting to identify the causes of MoJ cases in Australia and NZ. What is needed, however, is a designated position or some institution, with appropriate status and powers, to take responsibility for collating such information and ensuring that appropriate action is taken to institute necessary cultural, procedural and legal reform.

Dr Bob Moles from South Australia in his foreword to Evan Whitton's book *Our Corrupt Legal System* states (2009, p.7):

When Australia used a truth-seeking method (a Royal Commission) in the case of Lindy Chamberlain it found out that virtually all of the scientific evidence which has (sic) been given at the trial was wrong. When it used the same method (a Royal Commission) in the case of Edward Splatt, it found out again that of the numerous pieces of scientific evidence given at the trial, not one of them was without error.

The Chamberlain and Splatt Royal Commission made recommendations, but they were not properly implemented. Since then, the official response to alleged miscarriages of justice has been to ignore them. (emphasis added)

It would also seem that there is still work to be done in preventing corruption, including process corruption, within policing.

As NSW Deputy Ombudsman, Chris Wheeler, has previously pointed out (2011), in order to address conduct that is "morally negligent, blind or reckless", a comprehensive approach is required that puts in place adequately resourced mechanisms focusing on:

- Standard setting;
- Expectation setting;

- Prevention procedures and practices;
- Enforcement mechanisms; and
- Deterrence mechanisms.

We also need to ensure that appropriate protections are in place for whistleblowers in all States and Territories. There would seem to be a serious under-utilisation of Public Interest Disclosure legislation in some jurisdictions. At the present time there are dire consequences, professionally and personally, for those who chose to speak out, particularly in policing.

Accountability for inappropriate actions or misconduct by police, lawyers, DPP's and others, also needs to be a high priority so that there is a strong deterrent in future matters and an ability for personal and organisational learning. Training and education, particularly of police, law students, lawyers and judges, in MoJ issues, as will soon be occurring for law students at Flinders University in SA, would also seem sensible and appropriate. As Justice Kirby stated (1991, pp.1049-1050):

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.

There is actually a community of people out there fervently fighting for their family members, friends or clients in order to prove their innocence and have a wrongful conviction overturned. There is an international human rights "Innocence" movement growing in strength around the globe (Weathered 2005, p.203), evidenced by the rapid growth in Innocence Projects and innocence forums. As alluded to above, I was fortunate to attend the International Justice Conference in Perth in March of this year which focused on MoJ cases. I came away from the forum both inspired and concerned about this thorny issue.

In light of newly acquired knowledge and more recent experience, I am keen to establish a much needed Innocence Project in Tasmania along the lines of those already established overseas and in Queensland (<http://www.griffith.edu.au/criminology-law/innocence-project>) and WA (www.innocenceprojectwa.org.au). I have commenced discussions with key stakeholders, particularly people from UTAS, in that regard.

I am also very supportive of the concept of a **Criminal Cases Review Commission (CCRC)** in Australia, similar to the UK model which has been established since 1997 (see <http://www.justice.gov.uk/about/criminal-cases-review-commission>; Sangha & Moles 2011; and CCRC 2011). Since the CCRC commenced, 72 murder convictions, 37 rape convictions and 320 convictions of all types have been overturned in the UK (Sangha & Moles 2011). (The CCRC website indicates at 30 July 2012, 325 convictions have been quashed).

I made two submissions (one of which was confidential in order to ensure the protection of Parliamentary Privilege) earlier this year to the SA Parliament's Legislative Review Committee in relation to a CCRC for South Australia and a possible model for a national CCRC (<http://netk.net.au/CCRC/CCCRTerms.jpg>). In my view and the view of many others, a CCRC would provide an important and much needed avenue of last resort for those innocent people wrongly convicted. Unfortunately, the SA Legislative Review Committee, which reported in July 2012, did not support the establishment of a CCRC but they did make recommendations to improve the appeals system in SA and recommended the establishment of a **Forensic Science Review Panel** (Parliament of SA 2012). The Committee recommended that the current appeal provisions in that jurisdiction be extended to include a further statutory right of appeal by a convicted person at any time (with leave of the court) on the basis of a tainted conviction, or where there is fresh or compelling evidence which may cast reasonable doubt on a person's guilt. The new right of appeal is recommended to apply to serious offences with penalties of 15 years or more imprisonment.

NSW has been the only Australian jurisdiction to address post conviction review in any way (Parliament of SA 2012, p.7). They have an extended statutory appeals section, whereby a person can apply to the court, the Attorney-General or the Governor for a review of their conviction. NSW has also established a **DNA Review Panel** which is a panel of experts who can organise the testing of DNA evidence where an applicant is of the view that such evidence may prove their innocence.

The importance of getting it right in the first place and having a proper appeal and review process is highlighted by this passage from Lindy Chamberlain's 1990 book *Through my Eyes* (cited in Brown & Wilson 1992, p.xi):

This is your Australia. This time, all this happened to me. The next time it may be you, and if your case doesn't capture the national imagination, you won't have any hope of doing a thing. No-one wants to know, and only a few close friends will care. You'll rot in obscurity like others I could name. It's time our legal system treated everybody equally and was allowed to determine truth and justice. We should not have to depend on political intervention when the appeal process is exhausted. Something needs to be done to tighten up methods and practices used in our courts today before it is too late for all our sakes.

In addition to new appeal and review mechanisms, we should also consider a national coalition to co-ordinate existing Innocence Projects and similar interests in Australia. This would be particularly important in the absence of a national CCRC. We already have a very valuable "clearinghouse" of cases, articles, research and relevant information in the Networked Knowledge website (<http://netk.net.au/>) set up, and capably maintained by, Dr Bob Moles and others. Several of us working in the area of MoJ cases have discussed the concept and have also canvassed the possibility of a Miscarriage of Justice Action and Reform (MoJAR) group.

To ensure that we get it right in the first place, we also need to ensure that Australia adopts international best practice in police investigative techniques, particularly in the area of homicide. In my opinion, the UK has been a clear role model in this regard (Centrex 2005 & 2006). I have been extensively involved in police training and education in the past, having headed up two Police Academies (NT and WA), and having chaired the Board of Studies of the Australian Institute of Police Management (AIPM) in Sydney in more recent years. It would be very useful if MoJ issues were introduced at all levels of police training and education and in specialised courses such as the

national/international Management of Serious Crime (MOSC) course coordinated by the AFP and the Police Executive Leadership Program (PELP) and other programs offered by the AIPM. There may also be a role for the Australia New Zealand Policing Advisory Agency (ANZPAA) in Melbourne to co-ordinate or oversight the development of similar documentation to that produced by the UK Association of Chief Police Officers (ACPO) and Centrex in the UK in relation to murder investigation and “best practice” investigative doctrine or principles (Centrex 2005 & 2006).

We need to ensure the highest ethical and professional standards both within policing and the legal profession and ensure appropriate and **ongoing** training and education in order to prevent miscarriages of justice. Dr Bob Moles is of the view that there should be MoJ training as part of any law degree. He recently made the very valid point to me:

Imagine if engineering students didn't study what makes bridges collapse or aeroplanes crash?

There would also be great value in having active Innocence Projects attached to law schools around the country. This would be a tremendous way of harnessing the energy, skills and talent of ten's of thousands of law students and giving them “real world” cases where the outcomes of their research could make a significant and positive impact on both the individuals concerned and the legal system.

Non-disclosure of evidence or suppression of evidence consistently appear as issues in MoJ cases. We therefore need clear policies and directives for police and the prosecution on the issue of **disclosure**, which is currently not the case in all jurisdictions of Australia. For example, Tasmania has no publicly available policy on the issue (see <http://www.crownlaw.tas.gov.au/dpp/home>).

The important role of the media in exposing corruption and applying pressure (where appropriate) on authorities to do the right thing should also be recognised (Whitton 1994). In this respect, the law on *sub judice* contempt should be clarified, as recognised by the Tasmanian Law Reform Institute (TLRI). The TLRI project plan on Contempt of Court states that the project “will consider the need for legislation to clarify both the common law and existing statutory mechanisms surrounding contempts of court”. One of the major areas for investigation relating to “inadequacies” includes (see http://www.law.utas.edu.au/reform/publications/contempt/Contempt_Project_Plan.pdf):

The appropriate boundaries of the law of contempts based upon competing policy objectives regarding individual rights to justice and transparency in the administration of justice.

Another issue that sorely needs to be addressed is proper financial compensation for those who have been wrongly convicted, especially where there is evidence of misconduct or corruption. The system needs to acknowledge that these people, once freed from prison, do not have the financial resources to engage expensive lawyers to pursue such matters. (Although it is acknowledged that many lawyers have acted *pro bono* for exonerees (or those trying to establish their innocence) in the past. The Mallard case is a great example in this regard).

Finally, we need to ensure that there are appropriate mechanisms in place to ensure that people who commit misconduct are able to be brought to account in a timely and effective way. Accountability for all involved in the criminal justice process is paramount (Thompson 2011).

A strong focus on policing, in particular, is essential as police are the gatekeepers to the entire criminal justice system. As Nobles and Schiff state (2000, p.260):

High profile miscarriages of justice generate hostility and impatience towards bodies with official responsibility for remedying mistakes. Reformers should not confuse the focus of this hostility with the appropriate site for reform: the first-order institutions that generate mistakes.

The legal profession should also be alert to any form of possible misconduct, challenge questionable practices and evidence and ensure that our legal system thereby retains essential public confidence. As Nobles and Schiff state in *Understanding Miscarriages of Justice* (2000, p.106):

Our study of newspaper reporting on miscarriages of justice shows how the discourses of crisis and public confidence become a rhetorical device for questioning and challenging legal procedures, for questioning their ability to produce truth, and consequently, their moral authority. As Ericson puts it: 'political authorities are constantly faced with the risk of loss of legitimacy, of having their institutional and personal authority deconstructed by the mass media.' ... If one believes ... in a failure of legal procedures to produce truth, then rhetorical logic (not empirical fact) points to there being some diminution of confidence in those legal procedures. If one describes such failures as general and systemic, there should, within the logic of rhetoric, be **a crisis of confidence** ... If the legal system is in crisis, then trials of individuals are replaced by trials by the media of the legal system itself. It is no longer possible to accept a conviction as conclusive authority for what an individual has done. (emphasis added)

Nobles and Schiff further comment that a loss of public confidence (2010, p.17):

... can actually reduce efficiency through a decline in the public's willingness to report crimes, be witnesses at trials, and, as jurors, to convict defendants.

We can certainly not afford to allow such a loss of public confidence to occur. We must work together to prevent a MoJ from occurring in the first place. However, where a MoJ does occur, we must move quickly to redress the wrong, fully investigate the causes of such situation, hold people properly to account, where necessary, and ensure timely and coordinated legal, procedural and cultural reform.

CORRUPTION LINKED WITH FORENSIC SCIENCE

Preventing corruption in our criminal justice system is even more essential in modern times due to "an almost mystic infallibility" in relation to forensic evidence such as DNA (Vincent 2010, p.11). The dangers were clearly demonstrated in the Victorian case of Farah Jama where Mr Jama (a young man originally from Somalia) was convicted and imprisoned for rape in 2008, **solely** on the basis of a DNA match and despite his alibi of being at home with his family. The forensic scientist at trial stated that there was a **one in 800 billion chance** that the DNA belonged to someone other than the accused man (Rout 2009a). The conviction was later overturned as it was found that there had been a contamination issue in the laboratory (Rout 2009a & b). Prosecutors apparently admitted that

there had been a “substantial miscarriage of justice”. An inquiry was conducted by former Justice Frank Vincent AO QC which firmly declared that no Victorian should ever be convicted again solely on the basis of DNA evidence (Gans 2010). Others have also criticised the system’s “faith” in, and reliance on, DNA (Rayment 2010; Gans 2011).

The question that the Farah Jama case raises for the broader criminal justice system is whether anyone should be sent to prison on the basis of DNA evidence alone.

Nobles and Schiff (2000) state that human testimony, particularly witness and confession evidence, has been shown to be suspect as a basis for criminal conviction. They state that there is now “greater reliance on expert, scientific, and technical evidence in criminal trials” (at p.173).

I have pointed out how damning the evidence of the maggot in Graham Stafford’s car boot was and how it was regarded by the courts. Similarly, we have heard in the media and in books of the impact of the allegedly forged or planted fingerprint in the Mickelberg or “Perth Mint Swindle” case (Lovell 1985 & 2010). And then, of course, there was the planted .22 cartridge in the Arthur Allan Thomas case. (Conversely we saw what occurred in OJ Simpson and the 1994 murder of his ex-wife Nicole Brown and her friend Ronald Goldman (he was found not guilty) when it was alleged that Los Angeles Police Department had planted a glove with DNA evidence on it.)

It is interesting to note the current sustained attack by Defence counsel in the Lloyd Rayney matter in WA concerning the integrity of the forensic evidence, including the (unphotographed) finding of two liquidambar seed pods in the hair of the victim at the post-mortem and in the body bag, some four months later (<http://au.news.yahoo.com/thewest/a/-/breaking/14702833/defence-challenge-on-seed-pods/>). The prosecution have stated that the pods link the crime to the Rayney family home. The criticality of such forensic evidence is clearly recognised in the case. It will clearly be a matter for the court to determine the nature and value of such evidence.

We must be fully aware that forensic science is an influential and powerful tool in our criminal justice system. An Australian Institute of Criminology study entitled *Improving Jury Understanding and Use of Expert DNA Evidence* (Goodman-Delahunty & Hewson 2010, p.viii) stated:

Perceptions that DNA evidence is irrefutable in identifying a perpetrator are reinforced by its portrayal as rapid, reliable and definitive in popular television programs such as CSI: Crime Scene Investigation (CSI). Legal commentators have expressed concern that jurors are ‘overawed by the scientific garb in which the evidence is presented and attach greater weight to it than it is capable of bearing’ (*R v Duke* 1979: 48), raising questions as to whether the safety of verdicts in criminal cases is compromised by juror misconceptions about the infallibility of DNA evidence. These concerns are supported by analyses of archival data which show that incriminating DNA evidence significantly increases convictions; juries voted guilty 23 times more frequently in homicide cases and 33 times more frequently in sexual assault cases when DNA evidence was introduced by the prosecution.

We must be absolutely confident that police in this country would never stoop to planting incriminatory evidence of DNA, in particular. It seems that such a corrupt practice, even in the absence of strong corroborative evidence, could well lead to a MoJ despite numerous warnings

following Farah Jama and the Vincent Report (2010). As the Hon. Michael Kirby stated (2010, pp.24-26):

Whilst deliberate error may be a relatively minor problem in Australia, there is always a risk that contamination of evidence will be procured through improper or fraudulent intervention. Thus, the deposit at a crime scene of evidence (say a cigarette butt containing the DNA of a suspect) would completely undermine the integrity and reliability of all of the tests subsequently performed on that sample. In criminal argot, this is sometimes described as “the giving of presents”. It may not now often happen in Australia. But police and other agencies must introduce rigorous and independently documented procedures to assure against it. These will include the immediate filming and photographic scrutiny of uncontaminated crime scenes so that evidence will later be available to prove or disprove the presence of samples from which incriminating DNA evidence is extracted ... In a sense, the very power and weight of DNA evidence produces a temptation to manipulate it.

Associate Professor Gans in a 2011 *Sydney Law Review* article entitled "A Tale of Two High Court Forensic Cases" states that the High Court of Australia has twice been asked whether a criminal conviction can be safely founded on forensic evidence alone. In both cases - in 1912 (on fingerprinting) and in 2010 (on DNA) - it refused special leave, effectively affirming the validity of such convictions, at least in some instances. Gans states "... the Court's shoddy approach to procedural justice had and has dangerous implications for the careful use of forensic evidence in Australian courtrooms".

Vincent J in his report following the Farah Jama case (Vincent 2010, p.45) stated:

Whilst there is no absolute bar to a conviction based solely on DNA evidence, the better view is that a conviction should only be returned where there is DNA evidence and at least one other item of evidence present which is consistent with the guilt of the offender.

CONCLUSION

It is clear that misconduct or “corruption” by a range of key players, including police and prosecutors, can lead to a MoJ.

We must work together across disciplines, with a degree of urgency, to prevent corruption and any resultant MoJ. We know that the lives of the wrongly convicted and those of their families and friends are devastated and changed forever. In addition to righting individual wrongs, it is absolutely essential that we maintain ongoing trust and confidence in our criminal justice system so a broad strategic approach to the issue is essential. Someone in an official capacity or, even better, some properly empowered and resourced authority or institution needs to be given clear responsibility for identifying flaws in the system as they emerge, instigating appropriate remedial action in particular cases, and ensuring that any necessary reforms are implemented.

At the present time, formal avenues for addressing a potential MoJ are inconsistent and “limited” as found in the recent report of the SA Legislative Review Committee (Parliament of SA 2012). The Australian Human Rights Commission also submitted to the Committee that the lack of ability of the

courts to fully rehear a matter may contravene Australia's obligations under Article 14 of the *International Covenant on Civil and Political Rights*. In my opinion, Australia should seriously consider the creation of something similar to the CCRC in the UK. ACA's throughout Australia should also ensure that their underpinning legislation is adequate to undertake timely and effective investigations where necessary. Such agencies should be willing (subject, of course, to normal jurisdictional and legislative considerations - such as section 36 of the Tasmanian *Integrity Commission Act 2009*) to investigate allegations of corruption or misconduct, at the appropriate time, where it emerges from the discovery of a MoJ that "corruption" (or its relevant legislative equivalent) appears to have been a significant contributing factor.

As MacFarlane QC comments (n.d. p.3):

Public confidence in the criminal justice systems in these countries [Canada, US, UK, Australia and NZ] has been shaken because wrongful convictions represent **a triple failure of justice**: an innocent person has been convicted and imprisoned; the truly guilty person was allowed to go free and, potentially, commit further crimes; and, finally, the victim's family, who had a sense of closure with the conviction, has been re-victimised by opening an emotional wound, which, with an increasingly cold evidentiary trail, may never be healed. (emphasis added)

It is only by working collaboratively and with the support of the community that we can prevent the corruption in our criminal justice system that may lead to MoJ cases or the subsequent corruption that means that MoJ cases are not properly exposed and addressed. The media will have an important role in this regard. But it is not just about prevention, it is about detection, investigation and the timely and comprehensive redress of such failures. As Fitzgerald who headed up the Royal Commission into the Queensland Police stated (1989, p.357):

The most important thing about the evidence before this Commission is not the truth or falsity of any particular allegation, or the guilt or innocence of any individual, but the pattern, nature and scope of the misconduct that has occurred, and the lesson that it contains for the future. In any case, when misconduct has become institutionalized, guilt and innocence are not matters of black and white. The entire community must take some of the responsibility both for the problem and for its solution.

REFERENCES

Birt, C. (2012) *All the Commissioner's Men* Stentorian Publishing Ltd NZ

Blackburn, E. (2005) *Broken Lives* Hardie Grant Books

Blackmore, A. M. (n.d.) "Correcting Miscarriages of Justice" at <http://www.odpp.nsw.gov.au/speeches/CORRECTING%20MISCARRIAGES%20OF%20JUSTICE.html>

Bowles, R. (2001) *Justice Denied* The Five Mile Press

Bowles, R. (2007) *Rough Justice* The Five Mile Press

- Bowles, R. (2009) *Blood Brother: Justice at Last* Five Mile Press
- Brookman, F. (2011) *Understanding Homicide* Sage Third Edition
- Brown, M. & Wilson, P. (1992) *Justice and Nightmares: Successes and Failures of Forensic Science* New South Wales University Press
- Campbell, K. (2012) "Defence Challenge on Seed Pods" *The West Australian* 30 August at <http://au.news.yahoo.com/thewest/a/-/breaking/14702833/defence-challenge-on-seed-pods/>
- Centrex (2005) *Practice Advice on Core Investigative Doctrine* 2005
- Centrex (2006) *Murder Investigation Manual* 2006
- Chamberlain-Creighton, L. (2004) *Through My Eyes: The Autobiography of Lindy Chamberlain-Creighton* East Street Publications
- Chin, R. (2011) *Nice Girl: The Story of Keli Lane and Her Missing Baby*, Tegan Simon & Schuster Australia
- Corruption and Crime Commission (2008) *Report of the Inquiry into Alleged Misconduct by Public Officers in Connection with the Investigation of the Murder of Mrs Pamela Lawrence, the Prosecution and Appeals of Mr Andrew Mark Mallard, and Other Related Matters* at <http://www.ccc.wa.gov.au/Publications/Reports/Documents/Published%20Reports/2008/Mallard%20Report%20complete.pdf>
- Criminal Cases Review Commission (2011) *Criminal Cases Review Commission Annual Report and Accounts 2010/11* The Stationery Office London
- Cross, R. (2009) *Evidence for Murder: How Physics Convicted a Killer* New South
- Crowley, C. & Wilson, P. (2010) *Who Killed Leanne Holland?: One Girl's Murder and One Man's Injustice* New Holland Press
- Department of Justice Canada (2004) *Report of the Working Group on the Prevention of Miscarriages of Justice. Tunnel Vision* at <http://www.justice.gc.ca/eng/dept-min/pub/pmj-pej/p4.html> September accessed on 30 August 2012
- Egan, C. (2010) *Murderer No More: Andrew Mallard and the Epic Fight that Proved his Innocence* Allen & Unwin
- Fitzgerald, G. E (1989) *Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* Queensland
- Gans, J. (2010) "Hard Lessons from the Farah Jama Case" 11 May at <http://www.crikey.com.au/2010/05/11/hard-lessons-from-the-farah-jama-case/>
- Gans, J. (2011) "A Tale of Two High Court Forensic Cases" *Sydney Law Review* Vol.33 pp.515-542

- Goodman-Delahunty, J. & Hewson, L. (2010) *Improving Jury Understanding and Use of Expert DNA Evidence AIC Reports Technical and Background Paper 37* Australian Institute of Criminology
- Karam, J. (1997) *David and Goliath: The Bain Family Murders* Reed Books Birkenhead
- Karam, J. (2012) *Trial by Ambush: The Prosecutions of David Bain* Harper Collins
- Kennedy, L. (2002) "Why are we so Wedded to a System that Fails us at Every Turn?" *The Times* 2 July
- Kirby, M. (The Hon Justice) (1991) "Miscarriages of Justice – Our Lamentable Failure?" *Commonwealth Law Bulletin* Vol.17 July pp.1037-1054
- Kirby, M. (The Hon.) (2010) "Forensic Evidence: Instrument of Truth or Potential for Miscarriage?" Paper presented at the University of Tasmania, Hobart 14 September 2010 at http://www.michaelkirby.com.au/images/stories/speeches/2000s/2010_Speeches/2488-UNI-OF-TASMANIA-SEPT-2010-FORENSIC%20EVIDENCE.pdf
- Klockars, C. B. (1980) "The Dirty Harry Problem" *Annals of the American Academy of Political and Social Science* Vol.452 November pp.33-47 at <http://www.jstor.org/discover/10.2307/1042758?uid=3737536&uid=2&uid=4&sid=21100997103553> retrieved on 23 August 2012
- Langdon, A. (2007) *The Child Who Never Was: Looking for Tegan Lane* Park Street Press
- Langdon, J. & Wilson, P. (2005) "When Justice Fails: A follow-up examination of serious criminal cases since 1985" *Current Issues in Criminal Justice* Vol. 17 No.2 pp.1-24
- Lovell, A. (1985) *The Mickelberg Stitch* Creative Books
- Lovell, A. (2010) *Litany of Lies: A True Story of Gold Heists, Bombings, Feral Cops, Greed, Murder & Revenge* Bookscope.com.au Perth
- MacFarlane, B. A. (n.d.) *Wrongful Convictions: The Effect of Tunnel Vision and Predisposing Circumstances in the Criminal Justice System* at http://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/policy_research/pdf/Macfarlane_Wrongful-Convictions.pdf accessed on 30 August 2012
- McKenna, M. & Elks, S. (2009) "20 Years after Historic Inquiry, Dark Forces Return to Queensland. Corrupt Cops Revive Fitzgerald Era" *The Australian* 23 July pp.1-2
- McKenna, M. (2009) "Dark Forces Return" *The Australian* 23 July p.11
- Moles, R. N. (2004) *A State of Injustice* Lothian Books
- Moles, R. N. (2006) *Losing Their Grip: The Case of Henry Keogh* Elvis Press
- "Moonlight State's Dangerous Liaisons" (2009) *The Australian* 23 July p.13
- Morling, T. R. (1987) "Report of the Commissioner" *Royal Commission of Inquiry into Chamberlain Convictions* NT

- Nobles, R. & Schiff, D. (2000) *Understanding Miscarriages of Justice* Oxford University Press
- Parliament of South Australia (2012) *Report of the Legislative Review Committee on its Inquiry into the Criminal Cases Review Commission Bill 2010* 18 July
- Perpitch, N. (2009) "\$276,000 payout for Mallard Prosecutor Ken Bates" *The Australian* 28 July at <http://www.theaustralian.com.au/payout-for-mallard-prosecutor-ken-bates/story-e6frg12c-1225755385000>
- Rayment, K. (2010) "Faith in DNA: The Vincent Report" *Journal of Law, Information and Science* Vol.7
- Rout, M. (2009a) "DNA in the Dock" *The Australian* 11 December
- Rout, M. (2009b) "Freed Man Farah Jama Angry Over Rape DNA Bungle" *The Australian* 7 December
- Sangha, B. Roach, K. & Moles, R. (2010) *Forensic Investigations and Miscarriages of Justice* Irwin Law Inc
- Sangha, B. & Moles, B. (2011) "Why We Need a Criminal Cases Review Commission" *DirectLink* November
- Shannon, C. (1984) *Royal Commission Report Concerning the Conviction of Edward Charles Splatt* Government Printer Adelaide
- Tasmanian Law Reform Institute (n.d.) Contempt of Court Project Plan at http://www.law.utas.edu.au/reform/publications/contempt/Contempt_Project_Plan.pdf
Accessed on 2 September 2012
- "The Long, Hard Struggle for Justice on Palm Island" *Solidarity Magazine* #5 retrieved at <http://www.solidarity.net.au/current/the-long-hard-struggle-for-justice-on-palm-island/> on 21 August 2012
- Thompson, J. (2011) "Who Will Prosecute the Prosecutors?" *The Innocence Project in Print* Vol. 7 Issue 1 Summer pp.9-11
- Thomson, C. (2012) "Mallard Prosecutor Ken Bates Fined \$10,000 and Reprimanded" 24 July at <http://www.oneperth.com.au/2012/07/24/mallard-prosecutor-ken-bates-fined-reprimanded/>
- Thomson, C. (2009) "Cock Cleared over Bates' Golden Handshake" *WAtoday* 13 August at <http://www.watoday.com.au/wa-news/cock-cleared-over-bates-golden-handshake-20090812-ei6f.html>
- US Innocence Project (2012) *Facts on Post-Conviction DNA Exonerations* at http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php retrieved on 3 September 2012
- Vincent AO QC, The Hon. F. H. R. (2010) *Report: Inquiry into the Circumstances that Led to the Conviction of Mr Farah Abdulkadir Jama* Victorian Government Printer May

- Walker, J. (2009) "Inquiry Lessons are Easily Forgotten" *The Australian* 23 July p.2
- Weathered, L. (2005) "Pardon Me: Current Avenues for the Correction of Wrongful Conviction in Australia" *Current Issues in Criminal Justice* Vol. 17 No. 2 pp.203-216
- Wheeler, C. (2011) "Ethics in the Public Sector – Clearly Important, But ..." Address to the Faculty of Law, University of Wollongong, 18 August
- Whitton, E. (1994) *Trial by Voodoo* Random House at <http://netk.net.au/WhittonTrialByVoodoo.asp>
- Whitton, E. (2009) *Our Corrupt Legal System: Why Everyone is a Victim (Except Rich Criminals)* Book Pal
- Wood, the Hon. J. (1996) *Royal Commission into the New South Wales Police Service: Interim Report* Government of New South Wales February
- Wood, the Hon. J. (1997) *Royal Commission into the New South Wales Police Service: Final Report Volume 1: Corruption* Government of New South Wales May
- Wood, the Hon. J. (1999) "Royal Commissions: A Prelude to the Reform Process" Address to the IACOLE Conference in Sydney 6 September
- "Wrongful Convictions: The Effect of Tunnel Vision" (2011) *Policedeviance* at <http://policedeviance.wordpress.com/2011/11/08/wrongful-convictions-the-effects-of-tunnel-vision/> accessed on 30 August 2012
- Yallop, D. A. (1978) *Beyond Reasonable Doubt?* Penguin Books
- Zellick, G. (2010) "The Causes of Miscarriages of Justice" *Medico-Legal Journal* March Vol.78 No.11 pp.11-20