The investigative process: Collecting and processing physical/forensic evidence

Forensic science has played a prominent role in cases of wrongful conviction to exonerate those wrongly convicted through forensic DNA testing of evidence after conviction, and it is also a leading *contributor* to wrongful convictions through erroneous testing and misleading expert testimony (Garrett 2011; Gould et al 2013; Saks and Koehler 2005). In their study, Saks and Koehler (2005) identified forensic science errors as second only to eyewitness errors as leading factors associated with wrongful convictions (63 per cent and 71 per cent of cases, respectively). This is due, in part, to an uncritical 'faith' in the value of forensic evidence (Roach and Pease 2006). Police and the courts have routinely accepted the results of forensic science, rather than subjecting them to regular scrutiny and critique. In particular, judges 'admit most forensic evidence' (Moriarty and Saks 2005:28) without question and lawyers are not necessarily equipped with the knowledge to critically engage with forensic science evidence in the courtroom (Edmond et al 2014). This lack of critical examination of forensic science provides an environment in which miscarriages of justice, based on problematic forensic science, are highly likely. The reviews of wrongful convictions bear this out (Garrett 2011; Gould et al 2013).

While considerable research has been undertaken in Australia on problems associated with the admissibility of forensic evidence in court (Edmond et al 2014; Edmond and San Roque 2014) and on the degree to which jurors do or do not understand DNA evidence (Goodman-Delahunty and Hewson 2010; Martire, Kemp and Newell 2013), recent research identifies problematic aspects of forensic science during the collection and processing stages (Julian et al 2011). This is further exacerbated by several factors, including that forensic science is a fragmented and specialised system (Roux, Crispino and Ribaux 2012), scientific approaches and methods are not well embedded in policing (Weisburd and Neyroud 2013), and there is clear evidence of breakdowns in communication between criminal justice agencies (Vincent 2010). Taken together, these factors can contribute to errors in the evaluation of forensic evidence; thus, caution must be exercised against over-reliance on forensic science.

Taking physical evidence from the crime scene to court

An Australian study (Julian et al 2011) on the effectiveness of forensic science in the criminal justice system has identified critical issues surrounding the integrity and value of forensic evidence at the crime scene, the forensic laboratory, the police, the coroner, and the courts. Errors can be generated at any of these stages and sites. First and foremost, errors can enter the system at the crime scene. Crime scene examiners vary considerably in their ability to collect traces that produce reliable forensic evidence. Recent reports in the United Kingdom (British Home Office 2007) and the US (National Academy of Sciences 2009) have 'highlighted that some examiners clearly outperform their peers in the quality of their work, with this difference resulting in more positive justice outcomes and less unsolved cases' (Kelty, Julian and Robertson 2011:175). If a crime scene is not processed effectively, the traces collected may not provide valuable information that could be used to direct an investigation and assist in solving the crime.

Errors may also occur at the forensic laboratory. Considerable attention has been given in the past to the potential occurrence of contamination in processing traces at forensic laboratories. As a consequence, forensic laboratories throughout Australia have developed complex quality assurance processes (Robertson, Kent and Wilson-Wilde 2013). More recently, problems of confirmation bias have been highlighted. Confirmation bias has been raised as a concern among forensic scientists engaged in pattern-matching (for example, DNA

analysis, fingerprint analysis) (Dror, Charlton and Peron 2006) and is being addressed through Australian research (Tangen, Thompson and McCarthy 2011). Examples of improved practices include strategies to assist in controlling for the potential effects of bias in forensic laboratories (Found 2015) and the implementation of context management procedures in firearms departments (Stoel, Dror and Miller 2014).

Little is known about how detectives use forensic evidence in their investigations (Williams and Weetman 2013); however, it is unlikely that they incorporate forensic evidence as a routine component of criminal investigations when significant delays occur in receiving forensic reports due to unmanageable backlogs in police stations and laboratories (Strom and Hickman 2010). Under these conditions, forensic evidence cannot be used effectively to eliminate or identify suspects early in an investigation; rather, detectives will rely on more traditional processes of investigation in which forensic evidence is used to confirm, rather than identify, suspects (Strom and Hickman 2010), heightening the possibility of confirmation bias occurring under these circumstances.

As the forensic process moves into the courts, studies have also identified limited understanding of DNA evidence by lawyers, along with inadequate communication between forensic scientists and lawyers (Cashman and Henning 2012). The latter becomes particularly significant in light of recent studies identifying difficulties in the readability of forensic scientists' reports, which raises questions about how useful they are as sources of information for police and lawyers (Howes et al 2014).

Physical evidence and wrongful conviction

Ineffective or problematic use of forensic evidence in the processes leading to conviction, from criminal investigation through to its use in court, has the potential to influence the police investigation and the evidence obtained in the case, which may in turn contribute to wrongful convictions. Australian research highlights the necessity for criminal justice agencies and their personnel to have a high level of forensic awareness to enable them to harness the potential value of forensic evidence and, most importantly, to critically evaluate the use of forensic evidence in their everyday work practices.

In Australia, the 2009 wrongful conviction of Farah Jama (*R v Jama*) for a rape he did not commit has led to a critical appraisal of the role of forensic evidence in criminal investigations and prompted a 'learning from error' approach to the Australian criminal justice system (Doyle 2010). In this case, the jury's verdict rested solely on DNA evidence, with no other corroborating evidence presented at the trial (Vincent 2010). The Vincent Report into this wrongful conviction detailed an extraordinary case of forensic evidence contamination (at a sexual assault crisis care unit rather than the laboratory) combined with limited interactions and information flow between the medical, scientific and law enforcement practitioners involved throughout the entirety of the case. Vincent found that the DNA evidence was perceived to possess 'an almost mystical infallibility that enabled its surroundings to be disregarded' (2010:11) and concluded that 'the Victorian criminal justice system had wholeheartedly let FJ [Farah Jama] down' (Kelty et al 2013).

The investigative process: Memory, eyewitness identification and false confessions

Wrongful convictions are not only caused by erroneous or misleading forensic evidence; other factors either independently, or in combination, play a part. The most common cause is

mistaken eyewitness identification (Scheck, Neufeld and Dwyer 2003). The fallibility of perception and memory of all people — both the investigator and the person providing information — makes errors possible (Nickerson 1998). Like the collection and preservation of physical/forensic evidence at a crime scene, care is needed to examine and preserve the accounts of witnesses and suspects.

An investigation involves gathering information from a variety of sources to establish if a criminal offence was committed and who was involved (Kebbell and Milne 1998). Eyewitnesses often provide this information and become the central leads in criminal investigations. They provide the police with information at multiple points across the course of the investigation, from a call-taker who initiates the police response, to frontline uniformed officers who are first to attend the scene, to detectives who conduct the investigation. Sometimes the witness will talk to the same police officer on multiple occasions to elicit an initial account and conduct formal interviews, write the brief for the evidence the witness is expected to give in court and, in some jurisdictions, prepare the witness to give that evidence. Similarly, an investigator is likely to gather information from sources other than one witness, including other witnesses, the crime scene, the suspect or other investigators. Each one of these varied interactions can generate errors that can contaminate the investigation (Wilcock, Bull and Milne 2008), as can the process of integrating the information obtained from all these sources to decide on further lines of enquiry, the identity of the alleged offender, or whether to proceed with a prosecution.

The first place an error can enter the system is a witness's memory for the event. Psychological research demonstrates memory is not like a video-recording (Tulving 1974; Suddendorf and Corballis 2008). We do not passively take in information and replay it; rather, memory is an active, creative process that can be inaccurate for a variety of reasons. Hence, witnesses may unwittingly integrate prior experiences (for example, media reports they have read, conversations they have had with other witnesses or associates: French, Garry, and Mori 2008; Gabbert, Memon and Wright 2006) and expectations into their accounts of what happened, even before police become involved (Greenberg, Westcott, and Bailey 1998). Such problems with the reliability of memory are exacerbated if the alleged crime occurred a long time ago (Read and Connolly 2007).

Errors can also occur with how an investigator perceives and remembers information obtained from that witness or other sources. Confirmation bias may occur when an investigator is motivated towards a particular outcome (Kassin, Dror and Kukucka 2013). For example, an investigator may be more likely to remember the information given by a witness that matches the description of a person the investigator already suspects of committing the offence; or the investigator may interview the witness in a suggestive way to elicit information to support his or her theory through leading questions and witnesses may inadvertently comply with these expectations (Loftus and Palmer 1974). The culmination of small (or not so small) errors like this may lead to a wrongful conviction.

Investigative procedures and eyewitness interviews

Despite the potential for error, investigators do not often document their decision making, which means we know little about the investigative process. We know the most about homicides, because they tend to be better documented (Brodeur 2010). We know little about wrongful convictions other than more readily detectable DNA exonerations (particularly in homicide and rape), which make it obvious that any identification of the offender or confession must have been false (Gross 2013). Our knowledge about wrongful convictions is therefore restricted by the information that is available about the investigative process.

Throughout the process an investigator decides what lines of enquiry to follow, yet this entire process is only selectively documented (Brodeur 2010). Similarly, how investigators record adult witness interviews can be problematic. The usual method is for an investigator to record these interviews on a written statement — an unreliable process prone to bias because it relies on an investigator reproducing from memory what the witness says (Köhnken, Thürer and Zoberbier 1994). In an attempt to control the flow of information to make this task manageable, investigators often resort to leading questioning methods that can result in less reliable witness information (Westera, Kebbell and Milne 2011). The statement usually contains no record of the questions asked, preventing criminal justice professionals from scrutinising any problems with the interview process.

False identifications are a particularly common cause of wrongful convictions (Scheck, Neufeld and Dwyer 2003). Research supports four rules developed to minimise the likelihood of a wrongful conviction resulting from the misidentification of a suspect from a line-up (Wells et al 1998). The first is that the person administering the line-up should not know which member of the line-up is the suspect. The second is that the eyewitness should be warned that the criminal might not be present in the line-up, so the witness is not compelled to select the person who most resembles the offender. The third is that *all* foils, members of the line-up, should be selected based on the eyewitness's verbal description of the criminal and all foils should be similar to each another and the suspect should not stand out. The fourth is that confidence should be recorded at the time of identification, and any increases in confidence should be treated with caution since witnesses' accounts may be affected by additional information heard or learned about the crime or suspect (for instance the suspect's criminal history of similar offences). Violating these four rules has been associated with misidentifications in the US (Wells et al 1998), and there is a strong evidence base that indicates that complying with these rules reduces misidentifications. Nevertheless, these rules are not exhaustive and additional procedures, such as sequential presentation of line-up members and video-recording the procedure, can be adopted (for further details, see US Department of Justice 1999).

Currently there is no universal legislation in Australia regulating how identifications are conducted. The closest thing to a national code for identifications is the *Evidence Act 1995* (Cth) s 114, although it is not adopted nationwide. This legislation meets three of Wells et al's (1998) rules: the witness is told the offender may not be present; it is not communicated to witnesses who the suspect is; and the suspect and foils are of similar description. The witness's confidence in his or her determination is not recorded unless the witness volunteers a statement. In Queensland, identification evidence is covered in the *Police Powers and Responsibilities Act 2000* (Qld). This Act only meets two of the rules for accurate identifications: there is no requirement for confidence to be recorded or for the witness to be warned that the suspect may not be present. Further, while the *Uniform Evidence Law* states that identifications should be done with an identification parade of the sequential presentation of a line-up of members, in practice, it appears photo-boards are used in the simultaneous presentation of line-up members. This illustrates the possible disconnect between police practice and legislation.

Protecting against false confessions

False confessions are also a frequent factor in wrongful convictions. For example, Kassin et al (2010) suggest that DNA exonerations indicate that 15–20 per cent of wrongful convictions in the US involved false confessions (usually with other factors such as eyewitness error). However, generalising from the US to Australia requires caution. In the US, the use of an arguably coercive interview strategy, the 'Reid Technique' (Inbau et al 2001), appears

frequent and it may facilitate a greater number of false confessions than typical suspect interviewing in Australia. Kassin and Gudjonsson (2004) argue that the Reid Technique has three stages: 'custody and isolation' — where the suspect is detained, isolated and resistance is weakened; 'confrontation' — where the suspect is confronted with incriminating evidence that may include fabricated evidence, denials are rejected as out of hand, and consequences of denials are emphasised; and 'minimisation' — where the interviewer makes the crime seem less serious and provides face-saving reasons for the crime, which may include suggestions that the victim deserved it. Given these coercive strategies, it is not surprising that false confessions occur. However, the combination of legislation and a cultural tradition of following policing in England and Wales mean that the interviewing of suspects appears to be different in Australia. In particular, legislation requires interviews with suspects to be recorded in most instances, ensuring the process is transparent, and the suspect is cautioned by the police that he or she does not have to say anything and may talk to a lawyer (for example, s 281 of the *Criminal Procedure Act 1986* (NSW)).

In recent times, most police services in Australia have started to use an approach to interviewing common in England and Wales called the PEACE approach (Preparation and Planning, Engage and Explain, Account and Clarification, Closure and Evaluation: Clarke and Milne 2001). This approach emphasises fairness and explicitly rejects coercion; it encourages interviewers to find out the 'truth' and to allow the suspect to give his or her own account. Police in Australia are not permitted to fabricate or lie to suspects in a suspect interview and, importantly, adherence to the PEACE protocol and the relevant legislation is ensured through the requirement to record all suspect interviews where practicable. For these reasons, confessions where the police have coerced responses from suspects would be less likely than in the US.

Nevertheless, the safeguards in place to prevent coerced confessions do not eliminate the possibility entirely. Some people confess to crimes without any coercion; these are voluntary false confessions (Gudjonsson 2003). In these cases, the individual may believe they have committed a crime (for example, because of a mental illness such as schizophrenia or because of a desire achieve notoriety). Further, while legislation is intended to prevent false confessions, it is not effective if it is not complied with. There have been cases where the courts have not accepted admissions because they were not legally elicited, for example, because of denying legal advice (*Arthurs v Western Australia*) or not providing a translator (*State of Western Australia v Gibson*). Situations concerning false confessions are of particular concern as confession evidence has a profound impact on juries' decision-making, even when they know it is tainted by coercive police interviewing (Kassin and Sukel 1997).

Investigative errors, such as false confessions and identifications, are compounded if investigators are naive to their occurrence or are motivated to ignore them. However, once errors in the investigation process move to the prosecution phase they are likely to be more difficult to identify because other decision-makers in the prosecution process (lawyers, judges, jurors) often can rely on only the police's secondhand interpretation of the evidence. The investigator generates the brief evidence that forms the basis of the prosecution case and disclosure to defence counsel. Even if defence counsel is cognisant of potential errors and has the resources to conduct further enquires, the damage done to memory may be irreversible. Unless there is contradictory evidence from other sources, there is no reliable way of discerning correct from erroneous accounts, including false confessions (Read and Connolly 2007). Video recording witness interviews instead of producing a written statement and documenting the decision-making of investigators can reduce the risk of these errors occurring. However, memory decays over time, which limits the opportunity for decision-makers to access additional information from what investigators have gathered and reported.

Post-conviction: Limitations on the correction of wrongful conviction in Australia

Ensuring that investigative practices conform to best practice is critical in addressing the problem of wrongful conviction, in part because identifying and correcting wrongful convictions is fraught with difficulties. Problems encountered in the identification and correction of wrongful convictions within the Australian legal system have been discussed elsewhere (Hamer 2014; Sangha and Moles 2014; Weathered 2005). For the purpose of this article, key aspects are briefly summarised below.

Limited appeal avenues

Following a trial there is a general restriction to only one appeal, which occurs at the State appellate level (see *Grierson v R*; *R v Nudd*). This appeal must typically be launched within one month of the conviction and relies on arguments relevant to the evidence presented at trial. New or fresh evidence of innocence is rarely available so soon after trial and a wrongfully convicted person in Australia spends an average of 4.5 years in prison before release, making this a near impossibility of exoneration within one month of conviction (Dioso-Villa 2012). If leave is granted, the High Court of Australia may offer a further appeal for a small percentage of criminal cases. However, the current interpretation of the High Court's ambit is that it is constitutionally restricted from hearing fresh evidence, so that even if fresh and compelling new evidence of innocence became available, it would be unable to take that into account in its decision-making (*Mickelberg v The Queen*; *Re Sinanovic's Application*).

The *Statutes Amendment (Appeals) Act 2013* (SA) and the *Crimes Appeal and Review Act 2001* (NSW) may offer state-level post-appeal avenue, but these too are limited in their ability to correct wrongful convictions (Hamer 2014). Elsewhere in Australia, wrongfully convicted people are still reliant on petitioning for a pardon from the Executive, such as the Attorney General, as the only way forward. However, the lack of transparency surrounding the process and decision of the Executive to refer or not to refer a case may result in the perception that petitions are dismissed without the full and impartial consideration that might otherwise be given if applications were received directly by the courts or by an independent body of review, such as the Criminal Cases Review Commission in England.

Investigative difficulties

Claims of innocence are easily dismissed if they are without supporting evidence. The key to success with any of the legal avenues above may be the availability of new or fresh evidence that undermines the safety of the original conviction. Ascertaining new or fresh evidence of innocence is, however, hindered by the lack of post-appeal investigatory powers. As the Law Council of Australia commented:

> The Executive Government makes a decision on whether to refer a matter to the appeal court based on the material submitted by the petitioner, that is, the convicted person. The Executive rarely conducts its own inquiry...
>
> The result is that post-conviction the entire burden, including the financial burden, of identifying, locating, obtaining and analysing further evidence rests entirely with the convicted person. He or she has no particular power or authority to compel the production of information, interview witnesses or conduct scientific testing on relevant materials (Law Council of Australia 2012:12).

With no power or authority to compel the production of information, interview witnesses or conduct scientific testing on relevant materials, applicants (or those working on their behalf) are thwarted in their attempts to access full information and potentially exculpatory evidence. The South Australian Legislative Review Committee highlighted a similar point in relation to scientific evidence and recommended that a Forensic Review Panel be established to 'enable the testing or re-testing of forensic evidence which may cast reasonable doubt on the guilt of a convicted person' (Legislative Review Committee 2012:84)

Perhaps the most powerful scientific tool currently available to the criminal justice system is DNA evidence. While it is only relevant in a small percentage of cases, DNA innocence testing can uncover wrongful convictions and assist with identifying the true perpetrators of the crimes. To date, almost 50 per cent of the 314 DNA exonerations in the US have also resulted in the identification of the true suspect or perpetrator (Innocence Project 2013a). All 50 US States now have legislative schemes to enable DNA innocence testing. Only New South Wales, via ss 96 and 97 of the *Crimes (Appeal and Review) Act 2001* (NSW), and Queensland via the *Guidelines for Applications to the Attorney-General to Request Post-conviction DNA Testing* offer some legal structure for post-conviction DNA testing in Australia, and these are limited in their application (Weathered 2013).

International obligations and options for Australia

The Australian Human Rights Commission, among others, has expressed concern that the current system does not provide an adequate process for the review of wrongful conviction claims and consequently may not meet international obligations under act 14 of the *International Covenant on Civil and Political Rights* (Australian Human Rights Commission 2011; Sangha and Moles 2014). Other countries have introduced substantial new measures to investigate claims of wrongful conviction. The Criminal Cases Review Commission ('CCRC') was first established in Birmingham with jurisdiction over England, Wales and Northern Ireland. Similar bodies were subsequently created in Norway and Scotland. Canada established a Criminal Conviction Review Group to expand upon and make more transparent the mercy provisions previously applying to claims of wrongful conviction — the previous provisions were similar to those that still apply in Australia.

Internationally, the CCRC is considered the most comprehensive measure employed in addressing wrongful conviction because of its independence, funding, extensive investigative powers, and powers of referral to appellate courts (Roach 2012; Weathered 2012). The potential establishment of a CCRC in Australia was first raised in 2003 within the Australian Law Reform Commission's Inquiry into the Protection of Human Genetic Information in Australia (Australian Law Reform Commission 2003). The need for a CCRC at either the national or state level has been debated since that time, with strong support from a number of bodies, including the Law Council of Australia and the Australian Human Rights Commission, but it has to date been rejected. The Legislative Review Committee in South Australia specifically considered whether a CCRC should be established for that state. It determined, however, that the size of South Australia did not justify the resources required for such a body (Legislative Review Committee 2012:81). It further noted jurisdictional difficulties that may arise if such a body was created at a national level (Legislative Review Committee 2012:81). Without mechanisms that increase post-conviction investigatory powers and allow for increased appellate access, many cases of innocence will simply be left untested and these individuals will remain incarcerated.

Post-exoneration: Consequences of wrongful conviction

Innocence adds an unparalleled dimension of difficulty for exonerees during their incarceration, and after their release it makes their experience unique from ex-offenders and guilty prisoners. For example, exonerees tend to serve longer sentences in prison than other inmates, since they do not participate in rehabilitation and treatment programs that require them to admit guilt or demonstrate remorse (Campbell and Denov 2004). They are ineligible for re-entry services designed to assist parolees with work placements, accommodation in halfway houses, and access to community services (Grounds 2004). They are responsible for expunging their criminal records, as this is not done automatically and is essential for obtaining long-term employment and housing. They may also experience the consequences of unwanted notoriety for either the crime for which they were falsely convicted or their subsequent exoneration.

Exonerees may seek redress for wrongful conviction by filing civil claims against police officers, legal counsel or other state officials they believe to be responsible for their wrongful convictions, though it is difficult to prove that parties acted with malice or the ill intent that is required for a successful tortious claim (Sheehy 1999). They may seek compensation through the state legislature, which outlines the specific monetary award paid to the exoneree (Hoel 2008), though this is rarely pursued in Australia (Dioso-Villa 2012). Exonerees may be eligible to apply for ex gratia payments awarded by the state. Given that there are no guidelines or criteria to award payments, however, ex gratia payments are not automatically awarded for wrongful conviction. Rather, they are typically awarded if there is demonstrable injury or loss experienced as a result of the wrongful conviction, evidence of gross state misconduct, or the case received a lot media attention (Dioso-Villa 2012).

Because of the lack of financial resources to pursue civil suits, the rarity of political connections to draft and lobby a specialised Bill and the discretionary nature of ex gratia awards, Australia lacks any meaningful form of legislated redress for wrongful conviction (Dioso-Villa 2014). Currently, with the exception of the Australia Capital Territory ('ACT'), there is no law or statutory right to compensate for wrongful conviction and wrongful imprisonment (*Human Rights Act 2004* (ACT)). Other countries, such as the US, have compensation legislation that primarily provides monetary payments for wrongful conviction and incarceration and some states provide additional support for lost wages, child support and legal fees incurred (Innocence Project 2010).

Federal compensation legislation in Australia can be designed to address the economic and non-economic loss experienced by exonerees (Armbrust 2004; Lonergan 2008). This could accommodate individual re-entry needs, including tuition deductions or state assistance to complete high school and college diplomas, access to skills training and work placements, and assistance to find affordable housing. Such a comprehensive and individualised approach could utilise Australia's existing infrastructure of specialised problem-solving courts, such as those in place for domestic violence, drug offenses and mental health offenders (Freiberg 2002). Simply put, if exonerees could access these resources upon release from prison, this individualised delivery of services could ensure that state resources are used effectively and would give exonerees the best chance at their successful re-entry into society. Any amendments to the current situation, through state or federal legislation, that address monetary compensation or services would place Australia on par with other countries in their post-exoneration treatment of the wrongfully convicted.

Conclusion

The systemic analysis presented in this article identified possible errors that can lead to a wrongful conviction and the pitfalls that can hinder its correction once errors are identified. At each stage, from investigation to exoneration, Australia is in a position to evaluate and address wrongful conviction through the detection and treatment of existing cases, redress for exonerees, and the prevention of future cases. However, there is no easy solution to address issues of wrongful conviction in Australia, nor are there for its prevention and treatment. Errors in evidence collection at the investigation stage affects what is presented as evidence at trial, which in turn affects the case verdict that can lead to an erroneous conviction. Once a conviction is established, given the legal constraints with the Australian appellate process, it is very difficult for the courts to overturn the decision. Additional issues arise after wrongfully convicted individuals are released from prison, since they receive little to no government assistance to help with their successful re-entry into the community.

This article is designed to start the discussion between academics, practitioners and lawmakers regarding wrongful conviction as a systemic issue that warrants a comprehensive systemic solution, rather than a rare or accidental occurrence. Rather than anomalies in the system, wrongful convictions can be regarded as rare opportunities to dissect how errors occur and compound at different stages of the criminal justice system that leads to systemic breakdown with the hope of detecting, correcting and preventing future occurrences.

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Juvenile Justice, Young People and Human Rights in Australia

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Abstract

This article identifies the key human rights issues that emerge for young people in juvenile justice in Australia. While there is a clear framework for respecting the human rights of children within juvenile justice, the article poses the question: To what extent does Australia actually operationalise and comply with these rights in law, policy and practice? In answering, it discusses various national and international reports, legislation, academic and other research and litigation on behalf of children. It identifies substantive and procedural human rights violations affecting young people in juvenile justice, many of which fall disproportionately on two over-represented groups: Indigenous young people, and those with mental health disorders and cognitive disability. While there are review and compliance mechanisms in place, respect for young people's rights within the broad area of juvenile justice remains problematic.

Keywords: juvenile justice – human rights – youth penality – comparative criminology

Introduction

In July 2016, Australian Prime Minister Malcolm Turnbull announced a Royal Commission into the Northern Territory ('NT') Child Protection and Youth Detention Systems. The announcement came following the wide publication of CCTV footage and images documenting routine abuse of children detained in youth detention centres in the NT. The terms of reference for the Royal Commission require, among other things, an examination of whether the treatment of detainees breached laws or the detainees' human rights (Attorney-General 2016). Within weeks of the announcement of the NT Royal Commission, the Queensland Government announced an independent review of its youth detention centres following allegations of the use of excessive force against detainees (D'Ath 2016) and the

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Tasmanian, New South Wales ('NSW') and Victorian Governments have announced inquiries into similar problems at their detention centres (ABC 2016; Gerathy 2015; Tomazin 2016).

We argue that the events in the NT, NSW, Queensland, Victoria and Tasmania are not isolated incidents, but are emblematic of systemic, widespread violations of the human rights of children in contact with the juvenile justice system.[1] Although the more egregious abuses may occur in detention centres, questions of human rights compliance extend throughout juvenile justice. In supporting this argument, we identify various national and international reports, legislation, academic and other research and evidence where human rights abuses have been raised. The article examines a number of substantive and procedural human rights violations affecting young people in juvenile justice. These violations have occurred despite a seemingly robust framework governing the protection of human rights for children and young people in juvenile justice (Australian Children's Commissioners and Guardians 2016:80–8). The fact that monitoring bodies use human rights standards to raise issues of substantive concern adds a level of complexity to the analysis. We do not suggest that knowledge of or compliance with human rights are absent in Australia. Rather, there are systemic problems that give rise to human rights abuses; further, there is a lack of political will to address these problems.

The United Nations *Convention on the Rights of the Child* ('CRC') has been described as the most ratified of all international human rights treaties, but also the most violated with apparent impunity (Goldson and Muncie 2015). The primary relevant conventions for juvenile justice in Australia are the CRC, the *International Covenant on Civil and Political Rights* ('ICCPR') and, to a lesser extent, the *Convention Against Torture* ('CAT') and the *Convention on the Rights of Persons with Disabilities* ('CRPD'). These conventions have been augmented by a number of guidelines and rules adopted by the United Nations.[2] While there is a clear framework for respecting the human rights of children within juvenile justice, we ask the question: To what extent does Australia actually operationalise and comply with these rights in law, policy and practice?

Before discussing specific rights violations, it is important to acknowledge the broader context of young people in conflict with the law. Research consistently shows juvenile justice systems are filled with the most vulnerable children in our community, those who come from backgrounds of entrenched disadvantage, have poorer education outcomes, drug and alcohol addiction, unstable living arrangements, as well as histories of trauma and abuse, and periods in out-of-home care (AIHW 2016; Fernandez et al 2014; Indig et al 2011; Kenny et al 2006; McFarlane 2010). Indigenous young people experience a number of these disadvantages at a higher rate (Indig et al 2011). This broader picture of disempowerment and profound social disadvantage provides the overarching context in which the abuse of children's rights occurs within juvenile justice. It raises the wider issue of the extent to which children's rights are

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1 Juvenile justice refers to the laws, policies and practices that define the interaction of young people in conflict with the (criminal) law. Some laws are specific to young people (for example, various young offender legislation); other laws are general in application but have either negative or discriminatory impacts on young people (for example, 'move-on' legislation). We take the juvenile justice system to include those justice agencies specifically dealing with young people: the police; government departments responsible for administering various supervision orders, delivering young offender programs and operating detention centres; and the courts responsible for sentencing young people. Discussion of a 'system' does not imply that there no competing or different interests among the agencies involved (Cunneen et al 2015:86–7).

2 These include the *Standard Minimum Rules for the Administration of Juvenile Justice* ('Beijing Rules'); *Guidelines for the Prevention of Juvenile Delinquency* ('Riyadh Guidelines'); *Rules for the Protection of Juveniles Deprived of their Liberty* ('Havana Rules'); *Standard Minimum Rules for Non-Custodial Measures* ('Tokyo Rules'); *Standard Minimum Rules for the Treatment of Prisoners* ('The Nelson Mandela Rules'); and the *Guidelines for Action on Children in the Criminal Justice System.*