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MISCARRIAGES OF JUSTICE IN AUSTRALIA: THE IMPACT OF WRONGFUL IMPRISONMENT ON INDIGENOUS EXONEREES AND AUSTRALIA' NON-COMPLIANCE WITH UNITED HUMAN RIGHTS OBLIGATIONS

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Key Points

This Bill should be amended to include a provision to provide restitution for exonerees, as required under international Human Rights law,

1. The International Covenant on Civil and Political Rights (at Article 14(6)) provides for compensation in certain limited circumstances to people wrongfully convicted, where there has been a miscarriage of justice. This Queensland bill does not.

2. The bill does not include laws to guarantee protection against unlawful Indigenous incarceration, in accordance with international law. It is seriously open to question as to whether this bill does anything to actually protect the fundamental right of freedom and liberty of Aboriginal Queenslanders.

3. The wrongfully convicted In Queensland are disproportionately Indigenous, and will be denied fundamental human rights under this bill. Rather than closing the gap, this bill just opens the prison gates wider for Indigenous Queenslanders. This human rights bill does little to reduce high suicide rates for Indigenous persons in custody, a critical element of the Closing the Gap strategy.

4. Queenslanders who have been judicially exonerated have fewer legal rights than someone who slips on an onion at Bunnings.

5. There is no logical or humanitarian justification as to why the ACT Human Rights Act (at Section 23) should not be adopted into this Bill. The ACT provision is a very modest provision in the extent of its coverage of exonerees (dealing only with the worst miscarriages of justice), and will not open the "floodgates".

6. It is the mark of a civilised society that it will seek to right its own mistakes to those it has wronged.

7. A human rights bill which does not adopt this fundamental proposition is fatally flawed,

Recommendation

The Queensland Human Rights Bill should be amended to include a provision to provide restitution for judicial exonerees, as required under international Human Rights law, and to address inequality and injustice of human rights for innocent Queenslanders, particularly indigenous exonerees, who have suffered serious miscarriages of justice and served long periods wrongly in prison.

This Bill should be seen by the community as supporting in its human rights laws the reduction of indigenous incarceration rates, in particular for indigenous exonerees, who face particular challenges in having their wrongful convictions recognised and remedied.

This fundamental amendment should be in the following terms:

> **"Compensation for wrongful conviction**
>
> (1) This section applies if—
>
> (a) anyone is convicted by a final decision of a criminal offence; and
>
> (b) the person suffers punishment because of the conviction; and
>
> (c) the conviction is reversed, or he or she is pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice.
>
> (2) If this section applies, the person has the right to be compensated according to law.
>
> (3) However, subsection (2) does not apply if it is proved that the nondisclosure of the unknown fact in time is completely or partly the person's own doing."

This wording is the model provision for compliance with Article 14(6) of the International Covenant on Civil and Political Rights (ICCPR). The recommendation for inclusion in the Bill is adopted in its entirety from Section 23 of the ACT *Human Rights Act 2004*, which mirrors the ACT's international obligations in this regard.

A Second Fundamental Deficiency in the Bill – Banning Children being Imprisoned with Adults

There should be a second fundamental amendment to the Bill to include a provision to comply with the other principal deficiency of this Bill towards our human rights obligations: that children who break the law should not be put in a prison with adults, in accordance with Article 10 2(a) and 2(b) of the ICCPR, and Article 37 of United Nations Convention on the Rights of The Child (UNCRC).

This second fundamental deficiency is not dealt with in this submission, as it is the subject of submission by other organisations, such as Amnesty International. The omission herein should not be taken to minimise in any way the importance of the need for this second fundamental amendment.

QUEENSLAND'S HUMAN RIGHTS BILL CONTRAVENES INTERNATIONAL HUMAN RIGHTS LAW FOR JUDICIAL EXONEREES – IT PERPETUATES INJUSTICE TO THE INNOCENT

One of the most fundamental human rights is freedom from unlawful punishment by the state – the right to a fair trial, freedom from punishment except under due process, the presumption of innocence – all matters which underpin the fundamental right to liberty itself. But sometimes these freedoms are not honoured – whether by improper purpose or force of circumstance – and the citizen is sometimes grievously wronged by the State and deprived of his/her liberty.

And it happens way too often in Queensland.

Wrongful imprisonment is the stuff of nightmare dreams for the victim. It is the mark of a civilised society that, when cognisant, that it will seek to right its own mistakes to those it has wronged, and thereby demonstrate to all citizens that the State is deserving of the confidence of the citizens in the integrity of the State's institutions.

A Human Rights Bill which does not adopt this fundamental proposition is fatally flawed, and is not worthy of acceptance by the Queensland community. As it stands, this Bill ignores fundamental rights for those the State itself has wronged. Whatever existing privileges and non-binding aspirations may elsewhere be included, this Bill fails to honour liberty – and the concomitant right to restitution where liberty is trampled on - as fundamental cornerstones of the social contract between itself and the citizens it has wronged. Consequently, this Bill, as presently constituted, should be rejected if it remains unamended.

International Human Rights Law Mandates Restitution for Exonerees

The Queensland Human Rights Bill continues to deny the existence of international obligations to exonerees. All developed countries except Australia have either directly legislated - or the majority of their constituent states have so legislated; or

have published guidelines - in conformity with Article 14 (6) of the International Covenant on Civil and Political Rights (the ICCPR). No other developed country in the world has a poorer record than Australia for recognising the plight of innocent citizens wrongly sent to prison.

The Australian Capital Territory is the lone exception to this flagrant breach if international law in Australia. Section 23 of the ACT *Human Rights Act 2004* is a model provision for compliance with the ICCPR's international obligation. It has not opened the floodgates in the ACT. Only persons who have exhausted their civil remedies in the courts, and who have not contributed to the circumstances of their own conviction, are entitled to seek restitution. It is a modest provision which balances the competing public policy interests of proper protection of the rights of the citizen against the reasonable enforcement of the criminal law.

Queensland has cherry-picked other provisions from the ACT Human Rights Act. But it has deliberately excluded this fundamental human right. There has been no explanation forthcoming as to why this ACT provisions is unacceptable in Queensland, and as to why it has therefore not been adopted.

Why should Queenslanders support a Human Rights Bill which itself contravenes international law, and embodies the lowest common denominator when it comes to its treatment of exonerees?

What will happen to exonerees in Queensland under this Bill? More misery

There are no laws or guidelines in Queensland to provide restitution when a person is judicially exonerated after years in prison. There is no assistance provided for housing relief, for employment assistance, nor for counselling for the exoneree and his family. Nor is there any apology or financial restitution for the loss of the victim's income and superannuation, and for other costs, human and financial, incurred by the victim's family over those lost years.

The Attorney-General's criminal law system demonstrably fails whenever it wrongly jails innocent Queenslanders for long years. If it is the High Court or Supreme Court that quashes a conviction after a manifestly unfair trial, after successive victims have spent long years in prison, it is the High Court or Supreme Court process that is working, not the Attorney General's criminal law process.

There is also a clear and unacceptable conflict of interest herein. All other developed nations have completely or in large part reformed their processes by legislating to repair and protect the rights of their in innocent citizens wrongly convicted. When the Attorney General, whose criminal law system has, according to the Courts, failed a particular exoneree, that Attorney remains unaccountable for any decision relating to restitution for exoneree. There is no right of review or appeal available to an exoneree in the courts. There are no published guidelines an exoneree can turn to. So, when the courts find her/his justice processes have made a dreadful mistake, the Attorney General can (and, in the experience of the author of

this submission, mostly does) fail to properly take into account the comments of the courts.

The present laws for judicial exonerees in Queensland are plain wrong - This Bill promises perpetuation of the same injustices

Existing legal remedies for exonerees in Queensland, such as they are, are hopelessly outdated and unfair. The tort of malicious prosecution dates back to 1700s England, and has existed almost unchanged since then. It has been authoritatively rejected as an inadequate remedy for victims, given its costs, its usually insurmountable burdens of proof, and the unlimited pockets with which the State is equipped to defend any actions against it. Negligence is not a remedy either, as the law precludes a victim from bringing an action in negligence against the State where the police or prosecutors have been negligent against a victim in a criminal investigation. The ICCPR provision, if enacted into legislation (as the ACT has done), overcomes these problems.

According to Professor Archibald Kaiser, a leading authority on restitution for wrongful imprisonment,

> "citizens acquire a profound right not to be convicted of crimes of which they are innocent. This right is one of the cornerstones of an orderly society."
>
> "Where there is no payment [of compensation] as of right and discretion is retained by the executive, the state has clearly indicated the low priority it gives to the plight of the wrongly convicted." [1]

This Human Rights Bill clearly indicates the low priority this Queensland government gives to the human rights of the wrongly convicted.

The Human Rights Bill - Opening wide the Prison gates for Indigenous Queenslanders

According to the *Wrongfully Convicted Database*, maintained by the US-based Forejustice.org, [2], there have been around two hundred cases of known wrongful conviction cases in Australia the last 20 years. Most of these resulted in significant terms of imprisonment being served before the conviction was overturned. In Queensland, there were 40 known cases of judicial exoneration during the same period, or put another way, 20% of the nations' wrongful convictions happened in Queensland. A disturbing number of these were convictions for the most serious

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[1] Kaiser, Archibald, *Wrongful Conviction and Imprisonment: Towards an End to the Compensatory Obstacle Course*, Windsor Yearbook of Access to Justice, Vol 9, 1989, University of Windsor (Nova Scotia, Canada) Faculty of Law), at p 102-3.

[2] Wrongfully Convicted Database, maintained by Forejustice and *Justice Denied* magazine, http://forejustice.org/db/location/innocents_l.html

offences, involving wrongful conviction for offences carrying a maximum life sentence.

I do not propose to list individual Queensland cases herein. As time passes, the public identification of the history of their cases often involves tragic memories for these people. I am however able to provide their names and circumstances (in the probably over optimistic hope that the Committee would be interested enough to ask me), several of whom I have legally represented.

The number of Indigenous exonerees is not apparent from the Forejustice.org database, but a list of serious cases of indigenous Queenslanders wrongly convicted are critically analysed in some detail in a paper by Canadian Professor Kent Roach, Prichard Wilson Chair in Law and Public Policy at the University of Toronto.

In his 2015 comparative Australia/Canada study of wrongful convictions among indigenous citizens, Professor Roach found that there exist significant discrepancies in incarceration rates and lack of restitution for indigenous exonerees. Professor Roach says: [3]

> "the most likely explanation is that Indigenous people face particular challenges in having their wrongful convictions recognised and remedied."

There are an unknown number of even more undiscovered wrongful convictions, when the gross over-representation of Aboriginal people among prisoners are considered. As Professor Roach further notes: [4]

> "Any list of wrongful convictions will be partial and incomplete, but something can be learned from the lists that are available. It is clear from the Australian and Canadian lists that Indigenous people are grossly over-represented among the wrongfully convicted in relation to their small percentage in the Australian and Canadian populations."

An examination if the individual cases, shows that, in all but one case, successive Attorneys General have refused to apologise or make restitution, even when the courts have said that it that the relevant Attorney's criminal law system did in fact fail.

The Queensland policy, which has been stated by a succession of Attorneys General, is that compensation will only be paid when the Attorney General herself declares "there are exceptional circumstances". Recalling that it was the State's criminal law system that put them in prison in the first place, the inescapable sad conclusion is that, if all of these cases are not exceptional, then it must simply be normal practice or business as usual to lock up innocent blackfellows in Queensland.

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3 Roach, Kent, *The wrongful conviction of Indigenous people in Australia and Canada* , Prichard Wilson Chair in Law and Public Policy, University of Toronto, (2015) 17 *Flinders Law Journal*. 203 http://classic.austlii.edu.au/cgi-bin/download.cgi/au/journals/FlinLawJl/2015/6

4 Roach, Kent, op cit at note 2.

Conclusion – Queensland is Righting the Wrong Wrongs - Close the Gap Now

When one of the greatest legal challenges to indigenous Australians' human rights is the unacceptable and tragic level of indigenous incarceration, this bill does nothing to reduce incarceration rates for indigenous Queenslanders, when it so easily could. Indigenous children will still be locked up with adults, and innocent indigenous Queenslanders will continue to be grossly over represented in the Queensland population. The number of deaths in custody for these two groups will continue to remain an unacceptable stain on our treatment of indigenous Queenslanders. Queensland has failed to right the human wrongs by rejecting what should have been a golden opportunity through the passage of this Human Rights Bill. Instead of closing the gap, we are throwing open the gates of Queensland prisons to our innocent indigenous brothers, sisters and children.

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