NSW GOVERNMENT | Attorney General & Justice

The DNA Review Panel

Review of Division 6 of Part 7 of the Crimes (Appeal and Review) Act 2001

2013

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Executive Summary

The DNA Review Panel provides a scheme for review of convictions in NSW, based on DNA evidence. The Panel can consider applications by people convicted prior to 19 September 2006 of an offence attracting a maximum penalty of at least 20 years imprisonment.

Under the *Crimes (Appeal and Review) Act 2001,* the Panel has a limited lifespan and automatically comes to an end on 22 February 2014. The Act makes provision to extend the Panel's operation for three years, by proclamation.

This Review considers the operation of the Panel to date, to determine whether a proclamation should be made to continue the Panel's operations until 22 February 2017.

The Review concludes that there is an ongoing need for post-conviction review based on DNA evidence, but that this should be provided for through existing review mechanisms, with a number of enhancements. The retention of the Panel is not recommended.

In coming to this conclusion, the Review notes that in six years the Panel has considered only 31 applications and has made no referrals to the Court of Criminal Appeal. This is compared with other review mechanisms, which have resulted in 69 applications and the quashing of at least 5 convictions.

Currently, convicted people seeking review of their conviction on the basis of DNA evidence may apply to the DNA Review Panel, or may use the other options for review set out in Part 7 of the Act. Applicants who seek review based on other (non-DNA) fresh evidence, however, do not have access to the Panel and must rely on Part 7 alone. This reflects the unique nature of DNA evidence, and the necessity of retaining it in its original form in order to facilitation conviction review.

The recommendations of this Review would create a streamlined process whereby all applicants for review rely on the same provisions in Part 7. However, the Review recognises the importance of retention of biological exhibits, and providing access to forensic testing in appropriate cases. As such, the Review recommends that provisions requiring retention of exhibits, and facilitating access to those exhibits for testing, should be retained in Part 7 of the Act.

1. About this review

Introduction

DNA evidence 'is to the 20th century what fingerprints were to the 19th century'.[1] It provides an invaluable investigation tool to assist in the identification of offenders, but is equally valuable in 'excluding a possible offender as being the perpetrator of the crime'.[2]

The following brief description explains how DNA is used in criminal investigations:

> Forensic scientists can use DNA found in blood, semen, skin, saliva, sweat or hair at a crime scene to identify a perpetrator. This process is called DNA profiling.
>
> Comparison of DNA molecules does not require analysis of the entire DNA molecule as about 99.9% of DNA is common to all people. Rather, DNA comparison need only focus on a portion of the remaining 0.1% which is sufficiently variable to be unique to individuals …
>
> The identification can be very complicated if the sample has DNA from several people.
>
> DNA found in crime scene samples can be derived from many different materials and areas. It is possible to obtain samples of DNA from fabrics, cigarettes, tools and utensils as well as from minute amounts of biological material, even where this material has been deposited many years earlier, has been degraded or is not even visible to the naked eye.
>
> However, the quantity and quality of biological samples affect DNA analysis and therefore not all samples found at crime scenes are forensically useful.
>
> When two samples do not match it can be said definitively that they do not come from the same source, but when two samples do match this means they **may** have come from the same source. When there is said to be a match it is put in terms of probability.[3]

DNA testing and the interpretation of results is an area that is subject to significant advances in technology. Technological improvements may yield results where older systems did not. As a result, there are instances where DNA evidence capable of exonerating an accused only becomes available after a convicted person has exhausted the usual avenues of appeal. The ability of a wrongfully convicted person to seek DNA testing and lodge an appeal against conviction on the basis of DNA evidence provides an opportunity to redress miscarriages of justice. This increases public confidence in the criminal justice system and may also have the benefit of identifying the real perpetrator.

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[1] Schiro, G, 'Forensic Science and Crime Scene Investigation: Past, Present, and Future' *American Lawman* (Spring 2000).
[2] *R v Button* [2001] QCA 133.
[3] DNA Review Panel, *DNA in crime investigation*, <http://www.dnarp.lawlink.nsw.gov.au/dnarp/dnarp_dna_crime.html,c=y> at 28 March 2013.

DNA evidence may come to light before a convicted person has exhausted all avenues of appeal, as occurred in the Queensland case of *R v Button*.[4] In those cases, a person's conviction may be quashed during the ordinary appeal process. However, in some cases, particularly those where conviction occurred prior to the widespread use of DNA testing, DNA evidence may not be available until a much later date.

In some countries, pro bono organisations provide legal and investigative services to assist individuals seeking to prove that they have been wrongfully convicted. Organisations in the United States, including the Innocence Project, have exonerated 306 wrongfully convicted individuals due to post-conviction DNA testing, and have identified the actual perpetrator in almost half of those cases.

In 2000, the Innocence Panel was established in NSW, providing a scheme of post-conviction relief for people whose claim of innocence may be supported by DNA evidence. The Innocence Panel was succeeded by the DNA Review Panel in 2006.

The current scheme is set out in Division 6 of Part 7 of the *Crimes (Appeal and Review) Act 2001* (**the Act**) and has two main components:

- the establishment of the DNA Review Panel (**the Panel**), which has powers to refer matters to the Court of Criminal Appeal for its consideration where DNA evidence raises reasonable doubt as to the guilt of a convicted person
- provisions requiring police to retain biological material evidence obtained in the course of an investigation.

These provisions were included following passage of the *Crimes (Appeal and Review) Amendment (DNA Review Panel) Act 2006*, which was assented to on 19 October 2006 and commenced on 23 February 2007.

Under the Act, the Panel is tasked with:

- considering any application by an eligible convicted person to assess whether DNA evidence would affect that person's claim of innocence
- arranging searches for, and DNA testing of, biological material
- referring matters to the Court of Criminal Appeal for review of a person's conviction, where this is appropriate following receipt of DNA test results
- making reports and recommendations to the Minister regarding the use of DNA technology in assessing claims of innocence.

The Act also creates an obligation on Police and other state officers to retain biological material obtained during investigations or prosecutions, and creates an offence for knowingly destroying such material.[5]

The sunset provision in section 97 of the Act provides that the Panel is to be abolished on the seventh anniversary of its establishment, unless extended following review by the Minister.

Purpose of the Review

Section 97 of the Act provides that:

[4] *R v Button* [2001] QCA 133.
[5] *Crimes (Appeal and Review) Act 2001,* s 96.

(1) The DNA Review Panel is abolished and ceases to have any functions under this Division (and the duty imposed under section 96 ceases) on:

(a) the seventh anniversary of the establishment of the Panel, except as provided by paragraph (b), or

(b) a later date (being not later than the tenth anniversary of the establishment of the Panel) appointed by proclamation before that seventh anniversary and after the review of this Division under subsection (2).

(2) The Minister is to review this Division to determine whether the DNA Review Panel should continue to operate beyond the seventh anniversary of its establishment. The review is to be undertaken as soon as practicable after the fifth anniversary of its establishment and the report of the outcome of that review is to be tabled in each House of Parliament within 12 months after that anniversary.

The Act was assented to on 19 October 2006 and commenced on 23 February 2007. Under the sunset provision the Panel will be abolished and cease to function on 22 February 2014 unless extended by proclamation, under which its operation may be extended up until 22 February 2017.

This Review considers whether the operation of the Panel should be extended beyond 22 February 2014.

Submissions to the Review

Submissions were invited from nineteen key stakeholders in early 2012. Submissions were received from the following:

- NSW Forensic & Analytical Science Service (formerly the Division of Analytical Laboratories), NSW Health
- DNA Review Panel
- The Law Society of NSW
- The NSW Director of Public Prosecutions
- Griffith University Innocence Project
- Victims Advisory Board
- Enough is Enough Anti Violence Movement
- Ministry for Police and Emergency Services.

2. The DNA Review Panel

Establishment of the Panel

The Innocence Panel

In 2000, NSW established an administrative body called the Innocence Panel to facilitate searches for, and DNA testing of, nominated pieces of evidence. The Panel reported to the Minister for Police.

The Innocence Panel was intended to provide an independent process by which prisoners could apply for DNA testing of evidence after they had been convicted. It was intended to build on the United States' Innocence Project, by facilitating easy access to DNA evidence by convicted people, without lengthy court battles.[6] In introducing the Innocence Panel, the then Police Minister noted:

> DNA testing is about justice; it is about sending the guilty to gaol and freeing the innocent; it is about justice for victims of crime and justice for those wrongly accused of committing a crime. There could be few worse things than being stripped of one's freedom for something one did not do.[7]

The Innocence Panel was suspended in 2003, following a high profile application. The system of post-conviction DNA testing was subsequently reviewed by the Chair of the Innocence Panel, the Honourable Mervyn Finlay QC.

The Finlay Review noted that, in the majority of the cases the Innocence Panel considered, the evidence that the applicant sought to have tested could not be found.[8] To avoid this problem, in 2002, the then Deputy Commissioner of Police had issued a moratorium on the destruction of crime scene evidence that may be capable of DNA testing. Despite the moratorium, in 2003 the Innocence Panel requested a search for two items which, it transpired, were destroyed after the moratorium had been issued and before the applicant's appeal processes had been exhausted.[9]

The Review concluded that while the Innocence Panel had an excellent working relationship with NSW Police, the protocol and procedures of NSW Police with respect to the retention and storage of forensic samples was not, at that time, satisfactory. On the other hand, the report noted that the Division of Analytical Laboratories (now the Forensic & Analytical Science Service) followed best practice protocols for the storage of forensic samples.

The Review recommended:

- Establishment of a Panel with a legislative basis, under the Attorney General's portfolio and with the power to make direct referrals to the Court of Criminal Appeal.

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[6] NSW, *Parliamentary Debate,* Legislative Assembly, 16 August 2000, 8252 (P Whelan).
[7] NSW, *Parliamentary Debate,* Legislative Assembly, 16 August 2000, 8252 (P Whelan).
[8] Finlay M, *Review of the NSW Innocence Panel* (2003) p 17.
[9] Finlay M, *Review of the NSW Innocence Panel* (2003) p 19.

- Legislation to ensure long-term retention of exhibits by Police and to require Police to document the destruction or return of crime scene exhibits

- Independent audits and integrity tests to ensure that evidence retention requirements are complied with, with penalties for breaches.

These recommendations were adopted and in 2006 the Panel was given an independent, legislative basis through the enactment of the *Crimes (Appeal and Review) Amendment (DNA Review Panel) Act 2006.* The intention of that Act was to:

- recognise that justice may require some old cases to be put to fresh scrutiny, and provide a targeted mechanism for any doubts about existing convictions to be investigated and resolved
- maintain a fair and balanced criminal justice system where, 'as far as humanly possible, no innocent person is wrongly imprisoned and where no guilty person walks free due to abuses of the legal system or despite fresh evidence of their crime'
- ensure that victims are kept informed of the progress of applications to the Panel
- ensure that biological material evidence is retained by police and other authorities.[10]

The provisions that regulate the Panel's operations are set out in Appendix A.

About the Panel

The Panel is comprised of six members, with the following expertise:

- a former judicial officer appointed as Chairperson of the Panel,
- a member nominated by the Premier to represent the victims of crime,
- the Director-General of the Attorney General's Department or an officer nominated by the Director-General
- the Senior Public Defender or an officer nominated by the Senior Public Defender
- the Director of Public Prosecutions or an officer nominated by the Director, and
- a former police officer nominated by the Commissioner of Police.[11]

The Panel may consider applications from an 'eligible convicted person', that is, a person convicted prior to 19 September 2006 for an offence punishable by imprisonment for life or for 20 years or more. Other offences may also qualify if the Panel considers that there are special circumstances warranting the application.

Applicants are only eligible if their claim to innocence may be affected by DNA testing. Eligibility ceases once the applicant is no longer subject to a sentence, or an order under the *Crimes (High Risk Offenders) Act 2006.*[12]

Upon receipt of an application, the Panel obtains court files, DPP files, transcripts, sentencing remarks and other relevant documents and analyses the case to determine whether the application should be accepted. If an application is accepted, registered victims are notified and Police are requested to arrange a search for the exhibit identified

[10] NSW, *Parliamentary Debate,* Legislative Assembly, 19 September 2006, 1813 (M Iemma).
[11] *Crimes (Appeal and Review) Act 2001* (NSW) s 90.
[12] *Crimes (Appeal and Review) Act 2001* (NSW) s 89.

in the application. If the item is found, it is sent to the NSW Forensic & Analytical Science Service for testing.[13]

Following testing, the Panel may refer a matter to the Court of Criminal Appeal if it considers that there is a reasonable doubt as to the guilt of the convicted person.[14] No referral has been made to date.

What has the Panel achieved?

According to its most recent Annual Report,[15] the Panel has considered 31 applications since it commenced operation in June 2007. Of those, 26 applications had been finalised by the reporting date, with the following outcomes:

- Nine applicants (35%) would not have been assisted by DNA evidence
- Seven applicants (27%) were out of time, or otherwise excluded under the Act
- Seven applicants (27%) identified items which the Panel sought searches for
    - tests were conducted in six cases, with a DNA profile being obtained in five cases
    - the items could not be provided in one case
- Three applications (11%) could not be considered (one was from outside NSW, one did not provide sufficient detail, one had already had the conviction overturned)

To date, no DNA tests have provided evidence which was of assistance to the applicant's case and the Panel has not referred any matters to the Court of Criminal Appeal.

Shortcomings of the NSW model to date

The 2006 time limit for eligibility and evidence retention

The Act contains a statutory time limit for applications, which is set out in s 89(3). That section states that a 'convicted person is not eligible to make an application to the Panel unless the person was convicted before 19 September 2006'.

The Act also provides in s 96 that Police must only retain exhibits that were in their possession on commencement of the section, that is, 23 February 2007.

The reason for including these limitations was as follows:

> These days there is widespread testing of biological material before the courts. The role of the panel is therefore appropriately limited to past *cases in which DNA technology may not have been fully utilised* (emphasis added).[16]

However, there are a number of issues with this analysis. A number of submissions to the Review noted that some items that may exonerate an accused might not be tested

[13] DNA Review Panel, *Annual Report 2011-2012* (2013) p 30-31.
[14] *Crimes (Appeal and Review) Act 2001* (NSW) s 94.
[15] DNA Review Panel, *Annual Report 2011-2012* (2013) p 31-32.
[16] NSW, *Parliamentary Debate,* Legislative Assembly, 19 September 2006, 1813 (M Iemma).

during investigation. Further, ongoing advances in DNA technology may provide matches where previous systems did not.

The Legislation Review Committee, in considering the Bill which established the Panel, noted Australia's international obligation to provide equality before the law. The Committee considered that 'the different treatment of similarly situated persons based merely on the date of their conviction, without compelling justification, violates this right'.[17]

The Panel has advocated for the removal of the time limit for some time,[18] and the proposal had strong support among stakeholders.

The Panel submitted that there may be many cases decided after 2006 which could benefit from the increased sensitivity of DNA testing and its ability to test degraded sample or problematic crime scenes with greater accuracy.

The DPP, Victims Advisory Board, Law Society and Griffith University Innocence Project all argued that the 2006 limit should be removed due to ongoing improvements in DNA technology. The Law Society suggested that the limited number of applications to date indicated that the removal of the 2006 cut-off would be unlikely to lead to the "flood-gates" being opened or to dire economic consequences, and that it would instead allow for a greater role to be played in correcting miscarriages of justice within NSW.

Both the DPP and the Panel raised recent changes to Police protocols for testing of DNA evidence as an argument for retaining the Panel. The Panel noted that officers of the Forensic & Analytical Science Service previously decided what evidence should be tested for a DNA profile, but that this decision is now made by Police. The Panel submitted that this raises the possibility of a narrow investigation, leaving items that could exonerate the accused untested. NSW Police advise that, in practice, officers with expertise in forensic science are involved in decisions about whether to conduct testing of particular exhibits.

While noting that retention of exhibits obtained after 2007 would have some resource implications, the Griffith University Innocence Project submitted that:

> If the vast majority of states in the United States are able to incorporate preservation of evidence for the purpose of DNA innocence testing for a prison population of over one and half million people as they do, then the storage requirements for NSW with a prison population of approximately 10,000 is manageable.

Lack of advocacy for applicants

The 2003 Review of *Crimes (Forensic Procedures) Act* noted that the Panel did not function as an advocate for applicants, and that this left the Panel open to criticism, since:

> if an applicant to the Panel is not currently legally represented and is in a correctional facility (which is one of the basic criteria for eligibility), it may be difficult for them to obtain access to legal and scientific advice and yet more

[17] Legislation Review Committee, *Legislation Review Digest* (26 September 2006), vii.
[18] DNA Review Panel, *Annual Report 2009-2010.*

> difficult for the analysis of any relevant forensic material to be explained to them.[19]

In his submission to the South Australian Legislative Review Committee's Inquiry into the Criminal Cases Review Commission Bill, Professor Ross Vining, a former member of the Innocence Panel in NSW noted the following:

> In many cases, there was no substance to [the applications]. It was just, 'I'm innocent. I want you to show that I'm innocent'.

The Act provides that the Panel may only consider a person's application if the person's claim of innocence may be affected by DNA information obtained from biological material specified in the application. The applicant must identify the particular evidence which they think will establish their innocence.

Requiring the applicant to identify particular evidence for testing without legal advocacy may limit the scheme's accessibility. Applicants who are not experts in DNA evidence may not recognise the capacity of a particular exhibit to exonerate them. Further, it may not be clear to applicants what items were tested during the initial investigation, and what the impact of DNA evidence was at their trial. The US Innocence Project describes schemes that require individuals to effectively 'solve the crime' before they can access DNA testing as presenting 'insurmountable hurdles'.[20]

[19] M Findlay, *Independent Review of the Crimes (Forensic Procedures) Act 2000* (2003) p 90-91. The Review's comments referred to the Innocence Panel, but are equally applicable to the DNA Review Panel, which has no advocacy function.

[20] Innocence Project, *Access to Post-Conviction DNA Testing*, Fact Sheet, <www.innocenceproject.org> at 12 August 2013.

3. Wrongful conviction DNA review schemes

What leads to wrongful convictions?

False confessions – The case of J Button[21]

In the US, approximately 30% of the wrongful convictions proved by DNA testing involved a false confession, admission, or guilty plea.[22]

In Australia, the Western Australian case of *Button v The Queen* demonstrates the ability of forensic evidence to establish innocence, notwithstanding significant evidence pointing to the convicted person as the offender.

John Button was convicted of manslaughter in 1963 after he confessed to running down his friend, Rosemary Anderson, with his car. He was sentenced to imprisonment for 10 years. In addition to his confession, evidence available at trial included:

- evidence of damage to Mr Button's car
- evidence from two witnesses who saw Mr Button placing Ms Anderson's body into his car after she had been hit

Mr Button's Counsel had strongly objected to the admission of his confession at trial, arguing that it had been obtained after several hours of detention, after it became clear that police did not accept his claims of innocence, so that he could go home.

Following Mr Button's conviction, Eric Cooke, an offender who had deliberately run down a number of other women, admitted to killing Ms Anderson prior to his execution. On the basis of Mr Cooke's confession, Mr Button applied to the Court of Criminal Appeal in 1963 for an extension of time within which to appeal against his conviction. His application was dismissed. In 1964 he applied for special leave to appeal to the High Court. His application was refused.

It was only in 2002, following a petition to the Attorney General that the matter was referred back to the Court of Criminal Appeal, where fresh forensic analysis revealed that the damage to Mr Button's car was inconsistent with having hit a pedestrian. The Court noted that there had been major advances in vehicle crash investigations since the original trial, and that:

> The Court is entitled to re-examine a previous conviction when there have been developments in technology or investigative techniques which indicate that a miscarriage of justice may have occurred.[23]

Mr Button's conviction was quashed.

[21] *Button v The Queen* [2002] WASCA 35.
[22] Innocence Project, 'Access to Post-conviction DNA Testing', *Fact Sheet* <www.innocenceproject.org> at 12 August 2013.
[23] *Button v The Queen* [2002] WASCA 35 [69].

Mistaken eyewitness identification and insufficient investigation – the case of F Button[24]

In the US, mistaken eyewitness identifications are the most common element in wrongful convictions that are later overturned as a result of DNA evidence.[25]

Frank Button was convicted and sentenced in Queensland to seven years imprisonment for the rape of a 13 year old victim, who identified him as her assailant.[26]

DNA testing of vaginal swabs had been undertaken prior to trial but no DNA profile could be obtained from the swabs at that time. Bedding from the bed where the offence occurred was collected by investigators, but was not tested because it 'would not be of material assistance in identifying the appellant as the perpetrator of the crime'.

It was only through the insistence of Mr Button's lawyers that the bedding was tested for the purposes of exonerating Mr Button. This subsequent testing established that Mr Button was not the perpetrator and identified another individual, who had other convictions for sexual assault, as the offender.[27]

The Queensland Court of Appeal, in quashing Mr Button's conviction, described the matter as 'a dark day in the history of the administration of criminal justice in Queensland'. The court noted that DNA testing should not only be used to identify a perpetrator of a crime, but also to exclude possible suspects from an investigation.

Noting that laboratory testing may be expensive, the Court stated that 'the cost to the community of that testing is far less than the cost to the community of having miscarriages of justice such as occurred here. The cost to the community in a case like this includes not only the costs of both sides of the aborted trial, but the costs to the appellant of the fact that he has been in custody'.

Forensic errors and tunnel vision – the case of Jama[28]

In 2008, Mr Jama was convicted of rape and sentenced to imprisonment for six years. The conviction related to an incident in Victoria in 2006, where a woman was found unconscious in a night club toilet cubicle. The woman had no recollection of a sexual assault having taken place, but attended a hospital for testing, to ascertain whether she had been assaulted.

The doctor had, 28 hours earlier at the same location, taken samples from another woman who had engaged in sexual activity with Mr Jama.

There was no evidence that Mr Jama had been present at the night club in question. The presence of Mr Jama's DNA on a swab taken from the complainant was the only evidence connecting him to the alleged assault.

The question of contamination had been raised and dismissed during the police investigation and a decision was made to proceed with the prosecution, notwithstanding that it relied solely on DNA evidence.

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[24] *R v Button* [2011] QCA 133
[25] Innocence Project, *Eyewitness Identification*, <www.innocenceproject.org> at 12 September 2013.
[26] Kirby M, 'The urgent need for forensic excellence' (2008) 32 *Criminal Law Journal* 205.
[27] *R v Button* [2011] QCA 133.
[28] *R v Jama* [2009] VSCA 764 (unreported)

Following his conviction, new solicitors were engaged on Mr Jama's behalf for an appeal. In the course of preparing for the appeal in 2009, the Office of Public Prosecutions became aware of the possibility that there had been contamination of the samples. The Victorian Supreme Court of Appeal found that there had been a miscarriage of justice and ordered that a verdict of not guilty should be entered.

He was subsequently acquitted and awarded $525,000 compensation by the Victorian Government.

In reviewing the circumstances that led to Mr Jama's conviction, the Honourable Frank Vincent AO QC noted that:

> The DNA evidence appears to have been viewed as possessing an almost mystical infallibility that enabled its surroundings to be disregarded. The outcome was, in the circumstances, patently absurd.
>
> It became clear that the DNA evidence was perceived as so powerful by all involved in the case that none of the filters upon which our system of criminal justice depends to minimise the risk of miscarriage of justice, operated effectively …
>
> This was particularly so in the case of those involved in the legal processes. There were ample warning signs along the way that suggested that something was amiss, but they were simply not read.

This tendency to perceive DNA evidence as irrefutable is supported by research, which indicates that incriminating DNA evidence significantly increases conviction rates, and that surveyed jurors who admitted difficulty in understanding DNA expert evidence nevertheless proceeded to convict.[29]

In its submission to this Review, the Victims Advisory Board noted that better DNA testing has increased the sensitivity of tests to traces of DNA. This may result in innocent people being linked to crimes through the contamination of evidence with trace amounts of their DNA.[30]

Why is access to review after the appeals process necessary?

In its 2003 Report, Essentially Yours, the Australian Law Reform Commission considered the need for a Commonwealth post-conviction review scheme to consider allegations of wrongful conviction due to the use of, or failure to use, DNA evidence in criminal proceedings.

The Report noted that a person seeking to quash a conviction on the basis of DNA evidence in the absence of a specific mechanism faces considerable difficulties:

> First, appellate courts narrowly interpret the grounds upon which they may overturn a conviction, and are reluctant to 'usurp the function of the jury'. Second, there is the requirement that new evidence on appeal must be 'fresh and cogent', and the High Court's inability to receive fresh evidence in a criminal appeal. Third, there are costs

[29] J Goodman-Delahunty and L Hewson, 'Improving jury understanding and use of expert DNA evidence' (2010) Australian Institute of Criminology, *Technical and Background Paper* 37.
[30] K Ballantyne, A Poy, R van Oorschot, 'Environmental DNA monitoring: beware of the transition to more sensitive typing methodologies' (2013) *Australian Journal of Forensic Sciences* <www.tandfonline.com/loi/tajf20>.

and difficulties in obtaining access to forensic material and having such material independently examined.[31]

It noted that the principle issue faced by someone seeking post-conviction review is obtaining access to crime scene samples, and having those samples tested. It recommended that the Commonwealth establish (and the states and territories also consider establishing) a process to consider applications for post-conviction review by people who allege that DNA evidence may call their conviction into question. The Commission envisaged that the process would facilitate access to, and testing of, crime scene samples, and that existing avenues for administrative or executive review could then be used to overturn a conviction.

There are a number of reasons why access to DNA testing and a resultant case review may be required after a person has exhausted their ordinary appeal rights. Possible reasons include that:

1. the case is so old that DNA testing was not available or regularly used at the time of the original offence or trial

2. there was insufficient testing of biological samples at the time of the trial

3. the increased sensitivity of DNA testing may result in an innocent person being linked to a crime through the contamination of evidence with trace amounts of their DNA

4. improvements in DNA profiling technology mean that a profile can be obtained from evidence that did not yield results using older technology.

New technology

A new DNA analysis system introduced in NSW in 2012 has significantly improved the sensitivity of DNA profiling and interpretation of results.[32]

Where the previous profiling kit analysed 9 sites in the DNA, the new system analyses 20 sites, which increases the ability to distinguish between profiles and obtain results from mixed samples. The new system:

- dramatically increases the chances of obtaining a DNA profile from a sample
- provides more information as part of a DNA match, which will result in a greater chance of excluding an innocent person
- enables results to be obtained from some samples that did not yield results under the previous system, for example, degraded samples from criminal casework and remains from unidentified deceased
- improves the ability to obtain results from low levels of DNA
- provides information in approximately 30% more cases.[33]

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[31] Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia,* Report 96 (2003) p 1125.

[32] The new analysis system uses a kit called Powerplex 21 and a software package called STRmix.

[33] Australia New Zealand Policing Advisory Agency, *Advancing DNA Analysis*, information brochure <www.anzpaa.org.au/current-initiatives/advancing-dna-analysis-project> at 29 May 2013.

The NSW Forensic & Analytical Science Service advises that weak results using previous technology may need to be retested, as part of the transition to the new systems.[34]

These improvements increase the capacity of DNA testing to identify people. It may identify people who have been wrongly convicted, for example, by eliminating them as a suspect (where previous tests did not provide enough information to eliminate them), or by identifying the actual perpetrator (where previously a profile could not be obtained). Conversely, it may confirm the identity of the offender and put to rest any doubt that the accused was the perpetrator.

In its submission to this Review, the NSW Forensic & Analytical Science Service noted that DNA analysis has undergone, and is still undergoing, significant change since police began routinely using it in investigations. The Service suggested that there may still be cases that will benefit from a new generation of advanced DNA testing, noting that 'samples that a couple of years ago would not give a result may now give a result that could be used both to inculpate as well as exculpate an individual'.

Opportunities for acquittal and exoneration in NSW

Besides the Panel, a number of mechanisms exist in NSW for serious offenders seeking to appeal or review their conviction on the basis of new DNA evidence.

It is important to note that this framework deals only with the mechanisms for bringing a matter back before the courts. It does not deal with matters such as retention of evidence or access to DNA testing.

Appeal

If DNA evidence is discovered before a person has exhausted their ordinary appeal rights, as in the case of Mr Button and Mr Jama, the person may have grounds to appeal against their conviction by applying to the NSW Court of Criminal Appeal (**CCA**).

A person convicted of a criminal offence in NSW has 28 days to give the CCA notice of an intention to appeal, or notice of intention to apply for leave to appeal. The appeal must be lodged within six months of the notice being filed. If no notice of intention is filed, the appeal must be filed within three months of the date of conviction or sentence. The CCA may extend these time limits at its discretion.[35] Appeals against conviction may be on a question of law alone or, with the leave of the CCA, on a question of fact alone, a mixed question of fact and law, or any other ground that the CCA considers sufficient.[36]

The CCA may quash a conviction if the jury's verdict is unreasonable or cannot be supported by the evidence, or if the court made the wrong decision on a question of law, or if there has been a miscarriage of justice. Even if the grounds argued by the appellant are made out, the CCA may dismiss the appeal if it is of the view that there has not actually been a substantial miscarriage of justice.[37]

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[34] The Service suggested that discussions should take place between the case biologist and the legal representative to determine the appropriateness of retesting on a case-by-case basis: NSW Forensic & Analytical Science Service, '2012: A DNA Odyssey', presentation to Public Defenders (12 December 2012).
[35] *Criminal Appeal Act 1912* s 10.
[36] *Criminal Appeal Act 1912* s 5.
[37] *Criminal Appeal Act 1912* s 6.

Appeal to the High Court may be of limited utility in a case where a convicted person claims that DNA evidence will establish their innocence, as the High Court cannot receive fresh evidence in a criminal appeal.

Review

Individuals who wish to have their case reviewed on the basis of DNA evidence after their appeal rights have been exhausted have three options available (in addition to an application to the Panel):

- Making an application for an inquiry to the Supreme Court under s 78 of the *Crimes (Appeal and Review) Act 2001.* If the Court considers the application and it appears that there is a doubt or question as to the convicted person's guilt, mitigating circumstances or any part of the evidence in the case, the Court may direct a judicial officer to undertake an inquiry, or refer the entire case to the CCA to be dealt with as an appeal.
- Making a petition to the Governor, which may result in the matter being referred to the CCA as an appeal, or to the Supreme Court as an inquiry (*Crimes (Appeal and Review) Act 2001* ss 76, 77).
- Making a request to the Governor to exercise the Royal Prerogative of Mercy. This is a common law power of the Governor to grant a pardon or clemency. A pardon does not automatically result in an acquittal, however, an application for quashing of a conviction may be made to the CCA following a pardon.[38]

The Governor or the Supreme Court may refuse to consider a petition or an application for an inquiry for any reason, including if the matter:

(i) has been fully dealt with in the proceedings giving rise to the conviction or sentence (or in any proceedings on appeal from the conviction or sentence)
(ii) has previously been dealt with under this Part or under the previous review provisions
(iii) has been the subject of a right of appeal (or a right to apply for leave to appeal) by the convicted person but no such appeal or application has been made, or
(iv) has been the subject of appeal proceedings commenced by or on behalf of the convicted person (including proceedings on an application for leave to appeal) where the appeal or application has been withdrawn or the proceedings have been allowed to lapse

and there are no special facts or circumstances that justify further action being taken.[39]

As with Criminal Cases Review Commission (discussed below), the review mechanism in s 78 of the Act provides an opportunity that is not time-limited for a wrongly convicted person to have their case considered by someone removed from the political process, that is, the Supreme Court.

During the period 2007-2013 (the period of the Panel's operations), the Supreme Court received 69 applications for review under Part 7 of the Act.[40] The Review was unable to obtain details on the outcome of these applications, however, it is known that the same

[38] *Crimes (Appeal and Review) Act 2001* s 84.
[39] *Crimes (Appeal and Review) Act 2001* ss 77(3), 79(3).
[40] Information provided by the Supreme Court of NSW.

number of applications were received in the period 1994-2003, resulting in at least 5 convictions being quashed and 1 re-trial being ordered.[41]

Alternative approaches to post-conviction review

Appeal and review provisions

A number of jurisdictions rely on enhanced appeal and review provisions to provide access to post-conviction review.

South Australia recently passed the Statutes Amendment (Appeals) Bill 2013, which amended the *Criminal Law Consolidation Act 1935* to create an avenue for a second or subsequent appeal to the Full Court of the Supreme Court if the Court is satisfied that there is fresh and compelling evidence that should, in the interests of justice, be considered on an appeal. The Court may allow an appeal if it considers that there has been a substantial miscarriage of justice.

Canada has a Criminal Conviction Review Group, which is connected to the process of Ministerial review under the Criminal Code. Under the Code, the Minister may review convictions and, if appropriate, order a new trial, or refer the matter to the Court of Appeal. The Criminal Conviction Review Group consists of Department of Justice employees, who review each application and provide a brief to the Minister. Investigations are overseen by a Special Advisor to the Minister, who is appointed from outside the Department of Justice. The Canadian model has been criticised for its failure to provide a review mechanism that is independent of the Executive.[42]

Retention of evidence in Canada is currently required under the Canadian Charter of Rights and Freedoms. The Charter provides a fundamental right not to be deprived of freedom, except in accordance with the principles of fundamental justice.[43] This creates a duty on the Crown to make full disclosure of all relevant information that may assist the accused in making a full answer and defence to charges against them.[44] This duty creates an obligation to preserve relevant evidence, although a breach will not occur if the Crown establishes that the loss or destruction of evidence was not due to unacceptable negligence.[45] The Supreme Court will shortly consider whether the Charter creates an ongoing obligation to retain evidence that may exonerate a convicted person after all appeal rights have been exhausted.[46]

Criminal Cases Review Commission

A number of countries, including the United Kingdom, Scotland and Norway have taken a broad approach to correction of wrongful convictions by establishing Criminal Cases Review Commissions.

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[41] Finlay M, *Review of the NSW Innocence Panel* (2003) p 13. Six applications were still awaiting hearing at the time the Finlay Review was published.

[42] K Scullion, 'Wrongful Convictions and the Criminal Conviction Review Process pursuant to Section 696.1 of the Criminal Code of Canada' (2004) 46(2) *Canadian Journal of Criminology and Criminal Justice* 189.

[43] *Canadian Charter of Rights and Freedoms*, s 7.

[44] *R. v. Stinchcombe,* 1991 CanLII 45 (SCC).

[45] *R. v. Egger*, 1993 CanLII 98 (SCC); *R. v. La*, 1997 CanLII 309 (SCC).

[46] *Chaudhary, Amina v. Attorney General of Ontario,* Listed in the Court of Appeal for Ontario 18 September 2013.

These commissions are not limited to considering claims of factual innocence. They can review any matter where there has been a potential miscarriage of justice related to either conviction or sentencing.

The UK Commission consists of 11 members and can refer a matter to the Court of Criminal Appeal if there is a real possibility that the conviction or sentence would not be upheld because of an argument or evidence not previously raised in proceedings.[47]

As at 30 June 2013, the Commission had received 16,458 applications and made 530 referrals to the Court of Criminal Appeal. Of those referrals, 498 matters had been heard, resulting in 341 convictions being quashed.[48]

The Commission operates with around 90 staff and an annual budget of over £6 million.[49]

Retention of evidence in the UK is regulated by Part II of the *Criminal Procedure and Investigations Act 1996* (UK), which mandates the creation of a code of practice for criminal investigations. The code is brought into operation under the Act and applies to all criminal investigations conducted by police in England and Wales.

Under the Code,

- investigators should pursue all reasonable lines of inquiry, whether these point towards or away from the suspect
- investigators must retain, at least for the duration of a convicted person's sentence (or period of detention in the case of a forensic patient), material obtained in a criminal investigation which may be relevant to the investigation. Material may be retained in the form of a copy in certain circumstances
- officers should prepare a schedule setting out each item of material that might satisfy the test for prosecution disclosure, and each item that is unlikely to form part of the prosecution case. There are specific provisions for the treatment of sensitive material, such as items revealing personal information about witnesses
- officers must disclose material to the accused on the request of the prosecutor, if it satisfies the test for prosecution disclosure or if a court has ordered its disclosure following an application from the accused. The accused may be given a copy of the material, or allowed to inspect it.[50]

A failure to comply with the Code does not, of itself, make a person liable to legal proceedings. However, the Code is admissible in evidence in both criminal and civil proceedings and the court may take failure to comply with the Code into account in determining a question in any such proceedings.

In 2012, the Legislative Review Committee of the Parliament of South Australia considered the need for a Criminal Cases Review Commission in South Australia. The Committee did not support a Commission, but recommended that consideration be given

[47] In relation to referral of a sentence, there must be an argument on a point of law that was not previously raised. *Criminal Appeal Act 1995* (UK), s 13.
[48] Note that referrals may be made for a range of reasons, not solely on the basis of DNA evidence. Criminal Cases Review Commission, *About the Criminal Cases Review Commission* <http://www.justice.gov.uk/about/criminal-cases-review-commission> at 16 August 2013
[49] Criminal Cases Review Commission, *Annual Report 2012/13* (2013).
[50] *Criminal Procedure and Investigations Act 1996 (s 23(1)) Code of Practice.*

to establishing a Forensic Science Review Panel, based on the DNA Review Panel, to enable the testing or re-testing of forensic evidence which may cast reasonable doubt on the guilt of a convicted person, and for results to be referred to the Court of Criminal Appeal.[51] Ultimately, the South Australian Government did not support the Committee's recommendation, which it considered unnecessary in light of new provisions creating a further appeal avenue in cases where 'fresh and compelling' evidence comes to light.[52]

The Legislative Review Committee recommended that South Australia introduce a provision based on s 96 of the NSW Act, requiring police and/or Forensic Science SA to retain material in their possession or control which may be relevant to future DNA review proceedings.[53] The South Australian Parliament was silent on this issue when it considered the Committee's recommendations in 2013.[54]

Innocence projects

In some countries, pro bono organisations provide legal and investigative services to assist individuals seeking to prove that they have been wrongfully convicted. These projects use volunteer lawyers, or sometimes law students, to assist people claiming innocence to access DNA testing of crime scene exhibits, and pursue exoneration through available legal avenues.

Organisations in the United States, including the Innocence Project, have exonerated 311 wrongfully convicted individuals due to post-conviction DNA testing, and have identified the actual perpetrator in almost half of those cases.

Innocence projects rely on effective legislative frameworks that require the preservation of, and access to biological exhibits for DNA testing purposes.

The Griffith University Innocence Project, which operates in Queensland where there is no legislative framework for exhibit retention or DNA testing, notes that:

> It has become abundantly clear through the experience of the Griffith University Innocence Project, that without legislation or guidelines, no process or rights exist for access to information and/or DNA innocence testing and the way forward for wrongly convicted people becomes hopelessly difficult to traverse.[55]

Legislative frameworks

All 50 US states have legislated to provide access to post-conviction DNA testing and about half the states have created legislation to ensure automatic retention of biological exhibits.

The form of legislation varies from state to state.

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[51] Legislative Review Committee (South Australia), *Inquiry into Criminal Cases Review Commission Bill* (2012).

[52] South Australia, *Parliamentary Debates,* Legislative Council 19 March 2013, 3460 (G Gago, Minister for Agriculture, Food and Fisheries, Minister for Forests, Minister for Regional Development, Minister for the Status of Women, Minister for State/Local Government Relations).

[53] Legislative Review Committee (South Australia), *Inquiry into Criminal Cases Review Commission Bill* (2012), p 86.

[54] South Australia, *Parliamentary Debates,* Legislative Council 19 March 2013, 3460 (G Gago, Minister for Agriculture, Food and Fisheries, Minister for Forests, Minister for Regional Development, Minister for the Status of Women, Minister for State/Local Government Relations).

[55] Griffith University Innocence Project, Submission.

Petitions for testing of exhibits may be made to a court and in most states there is no time limit for making an application for access. The criteria for granting an application vary, but in California for example, the Court is to grant the motion for testing if:

- The identity of the perpetrator was in question in the case
- The requested test would raise a reasonable probability that, in light of all the evidence, the convicted person's verdict or sentence would have been more favourable had the results been available at trial
- The requested test uses a method generally accepted in the scientific community
- The motion is not made solely for the purpose of delay
- The evidence was not tested previously, or was tested previously but the new test would provide more discriminating results, or have a reasonable probability of contradicting prior results.

Requirements to retain exhibits also vary widely. Some states provide for automatic retention, while others require the court convicting a person to make an order for preservation.

For example, Arkansas' provisions require any physical evidence secured in relation to a trial, and sufficient documentation to locate that evidence to be securely stored for:

- 7 years in the case of any other felony for which a defendant may be compelled to provide a DNA sample
- 25 years in the case of sex offences
- permanently in the case of violent offences[56]

The Code of Virginia takes quite a different approach, requiring a court that convicts a person, on the person's motion, to order the storage, preservation and retention of biological material for up to fifteen years (or longer at the court's discretion). The clerk then transfers the relevant material to the Department of Forensic Science for storage. If the evidence is not in the custody of the clerk, the order requires the government agency in possession of the evidence to transfer the evidence to the Department of Forensic Science.[57]

The US Government has also passed Federal legislation, which enables a person serving a sentence of imprisonment to apply to the court in which they were convicted for DNA testing of specific evidence. The legislation also requires retention of biological evidence obtained in the course of investigating a federal offence, while the defendant is serving a sentence of imprisonment for the offence.[58]

Essential features of an effective DNA review scheme

As discussed above, different jurisdictions have a range of approaches to reviewing wrongful convictions.

[56] Innocence Project, *National View* <http://www.innocenceproject.org/news/LawViewstate2.php?state=AR> at 13 September 2013.
[57] [57] Innocence Project, *National View* <http://www.innocenceproject.org/docs/laws/pres/VA-19.2-270.4-1.pdf> at 13 September 2013.
[58] Innocence Protection Act of 2004.

In relation to DNA based exonerations, there are a number of 'minimum standards' which have been identified as important elements of a review scheme, regardless of which approach to review is taken. These features are set out below.

Preservation of evidence

Biological exhibits differ from other types of evidence. While a photographic record of other exhibits may be sufficient to enable future forensic examination (as was the case in *Button v The Queen*),[59] biological evidence cannot be preserved, other than in its original form. Destroying biological exhibits destroys any prospect of establishing a wrongful conviction on the basis of DNA evidence.

Retaining exhibits allows re-testing as technology improves. In many cases, the ability to re-test exhibits has a direct impact on community safety, by enabling the identification of the actual perpetrator. This was the case in *R v Button,* and in almost half of the DNA based exonerations in the Unites States.[60]

The 2003 Finlay Review of the Innocence Panel in NSW noted that the issue of long-term retention and storage of evidence was a critical requirement of justice.[61]

The Australian Law Reform Commission noted that establishing innocence on the basis of DNA evidence depends on long-term retention and appropriate storage of crime scene samples.[62]

In its submission to the Australian Law Reform Commission's review of the protection of human genetic information, Victoria Police noted the value of retaining crime scene samples for identifying serial offenders, and resolving long-term investigations.[63] However, it also submitted that there should not be a requirement to retain exhibits permanently, as this would be resource intensive. NSW Police agreed, stating:

> The retention of forensic material retrieved from crime scenes or from items collected at crime scenes would certainly have its advantages in some instances in view of the rapid technological scientific advances that are occurring. However, there would need to be some criteria established in relation [to] what was worthy of being retained and, once again, such a policy would pose problems in relation to storage.[64]

Ultimately the Commission did not recommend permanent retention, instead finding that only evidence found at the scene of serious crimes need be retained, and that there should be a time limit on the retention - 'long enough to ensure that any person convicted of a criminal offence would have access to the crime scene sample throughout the maximum period of imprisonment for the offence and for some period afterward'.[65]

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[59] *Button v The Queen* [2002] WASCA 35
[60] The Innocence Project, <www.innocenceproject.org/know>.
[61] Finlay M, *Review of the NSW Innocence Panel* (2003) p 23.
[62] Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia,* Report 96 (2003) p 1120.
[63] Australian Law Reform Commission, *Protection of Human Genetic Information,* (Discussion Paper 66, 2002) 865.
[64] Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia* (Report 96, 2006) [45.16] – [45.19].
[65] Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia* (Report 96, 2006), recommendation 45–1.

Currently in NSW, s 96 of the Act requires police and other state officers to retain biological material obtained during investigations or prosecutions, for the duration of a person's sentence and any extended supervision or continuing detention order made under the *Crimes (High Risk Offenders) Act 2006*. Only evidence that was already in police possession as at 23 February 2007, in respect of a person convicted before 19 September 2006, is required to be retained.

Biological material is defined as human blood, semen, hair, saliva, skin tissue or other biological material from which DNA information may be obtained, whether the material separately identified or present in other material.[66] It is an offence under the Act to knowingly destroy such material in contravention of s 96, punishable by imprisonment for 10 years.

The Act provides limits to the requirement to retain exhibits, for example, where the evidence is of a size or nature that would make its retention impractical, only a portion of the material must be retained. Further, Police need only retain the material while the person is an eligible convicted person, that is, while they are still subject to the sentence imposed or an order under the *Crimes (High Risk Offender) Act 2006.*

There are arguments for retaining exhibits, even where this is not mandated under the Act. For example, in *R v Slattery* [2002] NSWCCA 367, the Court of Criminal Appeal quashed Mr Slattery's conviction after a key piece of evidence was destroyed prior to finalisation of his case. The evidence had been retained for over four years, but there were delays in finalising the matter as Mr Slattery had initially been unfit to stand trial. The trial judge failed to warn the jury that the destruction of the evidence had substantially disadvantaged the defendant, as he could not effectively test the evidence.

Access to evidence and forensic testing

Retention of evidence achieves nothing if applicants cannot access relevant exhibits for testing.

The Australian Law Reform Commission described the difficulties in obtaining access to evidence for testing, in the absence of legislative provisions:

> Generally, prisoners can apply to the Office of the Director of Public Prosecutions in the relevant jurisdiction, or to the relevant police service, for access to a crime scene exhibit or sample …
>
> If an initial request for access to a crime scene sample is unsuccessful, a prisoner could seek access to the sample through a court order. Where the prisoner has lodged an appeal against conviction, the court may order production of the crime scene sample in relation to those proceedings. Where the prisoner has exhausted all avenues of appeal, he or she may be able to rely on some form of administrative law proceedings to obtain a court order for the production of the sample.

In its submission to the Review, the Griffith University Innocence Project noted that, without legislative provisions, it is 'difficult, if not impossible' for wrongly convicted people to access relevant information and DNA testing. While the Panel can facilitate access to evidence in NSW, 'applicants elsewhere in Australia may wait many years, or never hear back at all'.

Weathered and Blewer write:

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[66] *Crimes (Appeal and Review) Act 2001* s 74.

> In reviewing claims of wrongful conviction it is imperative to ascertain what DNA tests, if any, have previously been undertaken and what DNA samples of crime scene evidence remain in existence for the purpose of testing or re-testing. Confirming the existence of crime scene evidence is a purely administrative task and should not be controversial. However, it is still problematic in this country because rights of access to information in place during trial and appeal cease once these hearings are concluded. Therefore, in attempts to access information about their case, wrongful conviction applicants may resort to Freedom of Information (FOI) requests. This legislation is not designed, nor adequate for the investigation of wrongful conviction claims. Investigation requires access to all relevant documents known to exist and access to other information that may not have been initially disclosed. Problems with FOI applications include that firstly, confirmation of the existence of evidence does not come within FOI parameters as this information is not itself a 'document'; secondly, one must know of the existence of a specific document to be able to request it, so potentially exculpatory evidence that has been previously withheld is likely to remain that way; and thirdly, information identified as in existence can be either withheld altogether or only partially provided because it will be deemed as unavailable to the applicant within that legislative framework.[67]

Filtering of unmeritorious applications

In considering the need for a Commonwealth Criminal Cases Review Commission, the Law Council of Australia noted the review provisions in Part 7 of the NSW Act. Noting that the NSW model was superior to the post-conviction review mechanisms in other jurisdictions, the Council nonetheless preferred an independent commission, because such a commission could filter unmeritorious applications:

> These provisions are intended to be utilised in cases where a matter has already been finally disposed of by the courts. They are intended to provide a safety net in extraordinary cases, without creating the impression that a verdict or sentence of the court may be subject to ongoing questioning, review and revision. For that reason, it is preferable that an independent, objective, statutory body, which is removed from the trial process and the court system, conducts the inquiry into whether and when a matter should be able to be referred back to the appeal court. The court should not become involved in a matter, and a person should not be seen to have access once more to the courts to re-agitate his or her case, until an independent determination has been made that it is indeed a case where the principle of finality must be set aside in order to avert a likely miscarriage of justice.[68]

Filtering may be undertaken by a Review Panel or similar body, using statutory eligibility criteria. Although applications under Part 7 may be made direct and are not filtered, applications made to the Panel are, with the Panel assessing the merit of applications before they reach a court. In other jurisdictions, filtering is achieved by legal professionals (such as Innocence Project volunteers) taking forward only meritorious applications. However, without a formal review mechanism, such as a panel, well-resourced applicants who are not reliant on pro bono representation or Legal Aid could bring forward spurious or repeated applications.

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[67] L Weathered and R Blewer, 'Righting wrongful convictions with DNA innocence testing: Proposals for legislative reform in Australia' (2009)11 *Flinders Journal of Law Reform* 43, 63.

[68] Law Council of Australia, *Policy Statement on a Commonwealth Criminal Cases Review Commission* (2012).

It is worth noting that, in NSW, applicants seeking review on the basis of DNA evidence are not compelled to make an application to the Panel. They may instead apply to the Supreme Court for an inquiry into their conviction and thereby 'bypass' the Panel's filtering mechanisms.

Independence

All jurisdictions in Australia have provisions which allow the State Attorney General to refer a case to an appellate court for review.

The Law Council of Australia notes that these provisions have two major shortcomings. First, there are no statutorily prescribed criteria to guide the exercise of the Minister's discretion. Second, the Executive rarely conducts its own inquiries. It relies on the information provided by the petitioner. As a result, the process requires a convicted person to conduct his or her own inquiry. As well as the prohibitive costs that may be associated with such a task, applicants have no power or authority to compel the production of information, interview witnesses, or conduct scientific testing.[69]

The Law Council notes that Royal Commissions are an exception to this, but that these inquiries are expensive and very rare.

In respect of Royal Commissions, submissions to the recent South Australian Legislative Review Committee Inquiry into the Criminal Cases Review Commission Bill stated that:

> In each case, the process … has been time consuming, tortuous, legally demanding and very costly …; in addition, it causes undue mental distress to all concerned. The process often involves third parties to an extraordinary level, such as the galvanising of public opinion, petitions and media backing to circumvent the constraints and rigidity of our legal system

and

> Royal Commissions … are only set up if the government so chooses; and that choice is often driven by political expediency, usually as the result of public agitation and pressure. That is, it is a political process.[70]

NSW, and now South Australia, have addressed these concerns by providing further avenues for appeal and review through the courts. In South Australia, this is through the new provisions enabling second or subsequent appeals in cases where there is fresh and compelling evidence. In NSW, an applicant may apply to the Supreme Court for an inquiry into their conviction or sentence.

The Panel represents a second independent referral mechanism in NSW, operating independently from both the courts and the Attorney General.

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[69] Law Council of Australia, *Policy Statement on a Commonwealth Criminal Cases Review Commission* (2012).

[70] Legislative Review Committee (South Australia), *Inquiry into Criminal Cases Review Commission Bill* (2012), p 22-23.

4. Options

Based on the experience of other jurisdictions and commentary on the subject, the Review concludes that a system of DNA based review of wrongful convictions in NSW should ideally have the following characteristics:

1. It should be legislatively based;[71]
2. It should provide an avenue for review that is independent of the Executive;[72]
3. It should require the preservation of biological exhibits;[73]
4. It should provide a mechanism for applicants to access exhibits for DNA testing;[74]
5. It should limit the scope for unmeritorious applications to reach the court.[75]

Three options for reform have been identified. The first option, allowing the sunset clause to take effect, does not achieve points 3 or 4 above. The second and third options achieve all of the above points, in different ways.

Option 1: Do nothing (allow the sunset clause to take effect)

Allowing the sunset clause to take effect means that the essential principles identified above are lost, as:

1. The Panel would cease to operate and there would be no independent mechanism to filter applications for review applications based on DNA evidence.
2. There would be no requirement to retain biological material, as this requirement sits in s 96 of the Act, which is subject to the sunset clause.
3. There would be no means for a convicted person to access biological material for testing, should it by chance be retained.

From one perspective this simply means that the cohort convicted before 2006 would then be in the same position as any other convicted offender who to date has not had the advantage of the DNA Review Panel provisions.

On the other hand, the loss of these mechanisms is contrary to the findings of a number of reviews and interstate and international experience which highlights the need to formalise the means to respond to the possibility of wrongful convictions.

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[71] Griffith University Innocence Project, Submission; Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia,* Report 96 (2003); Finlay M, *Review of the NSW Innocence Panel* (2003); M Findlay, *Independent Review of the Crimes (Forensic Procedures) Act 2000* (2003).

[72] Legislative Review Committee (South Australia), *Inquiry into Criminal Cases Review Commission Bill* (2012); Law Council of Australia, *Policy Statement on a Commonwealth Criminal Cases Review Commission* (2012).

[73] Legislative Review Committee (South Australia), *Inquiry into Criminal Cases Review Commission Bill* (2012)*;* Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia,* Report 96 (2003); Finlay M, *Review of the NSW Innocence Panel* (2003).

[74] L Weathered and R Blewer, 'Righting wrongful convictions with DNA innocence testing: Proposals for legislative reform in Australia' (2009)11 *Flinders Journal of Law Reform* 43;
Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia,* Report 96 (2003).

[75] Law Council of Australia, *Policy Statement on a Commonwealth Criminal Cases Review Commission* (2012).

Two options have therefore been identified which respond in different ways to the issues raised by allowing the sunset clause to lapse.

Option 2: Retain the Panel

At the time the Panel was established, it was anticipated that it would become redundant before the sunset clause took effect. As DNA technology is now used as a matter of routine in criminal trials, with widespread testing of biological material, it was considered that only old cases would require consideration and that all relevant applications could be dealt with within a relatively short space of time. This was the basis for including a sunset clause in the Act.[76]

However, the Panel has not become defunct as predicted. It continues to receive a small number of applications and, at the time of this Review, had five applications on foot.

The routine use of DNA technology in criminal trials does not negate the continued need for a mechanism to review existing convictions.

This is demonstrated by the Queensland case of *R v Button* [2001] QCA 133. In that case, DNA testing had been undertaken prior to trial but no DNA profile could be obtained from those tests. The focus of DNA tests conducted prior to trial was to attempt to identify the perpetrator. It was only through the insistence of Mr Button's lawyers that further items were tested for the purposes of exonerating Mr Button. This subsequent testing established that Mr Button was not the perpetrator and identified another individual, who had other convictions for sexual assault, as the offender.

There is an argument that routine DNA testing in fact increases the need for the Panel's continued operation. The Victims Advisory Board noted in its submission that better DNA testing has increased the sensitivity of tests to traces of DNA. This may result in innocent people being linked to crimes through the contamination of evidence with trace amounts of their DNA.[77] The consequences of contamination were clearly demonstrated in the 2008 case of *R v Jama* [2009] VSCA 764 (unreported). Mr Jama was wrongly convicted on the basis of DNA evidence that had been contaminated during testing in an unrelated matter. He was subsequently acquitted and awarded $525,000 compensation by the Victorian Government.

The Griffith University Innocence Project submitted that the Panel is a relatively simple and cost-effective method of exposing wrongful convictions or addressing lingering questions regarding a person's guilt or innocence, and that:

> if NSW was to abolish the DNA Review Panel and its accompanying legislative avenue … without immediately providing in its place another more expansive form of DNA innocence testing legislation or an alternative mechanism for the review of a wider range of wrongful conviction applicants…it would be a devastating step backwards for justice not only in New South Wales but for Australia. Indeed, as a minimal response to the problem of wrongful conviction, it is the expansion of DNA innocence testing legislation into the criminal justice

[76] NSW, *Parliamentary Debate,* Legislative Assembly, 19 September 2006, 1813 (M Iemma).
[77] K Ballantyne, A Poy, R van Oorschot, 'Environmental DNA monitoring: beware of the transition to more sensitive typing methodologies' (2013) *Australian Journal of Forensic Sciences* <www.tandfonline.com/loi/tajf20>.

systems of other States and Territories, not its abolishment in NSW that is required in a modern, responsive criminal justice system.

The majority of submissions to this Review considered that the Panel continues to play an important role and should be preserved. However, the Ministry for Police and Emergency Services did not support the continued operation of the Panel, on the basis that there have been no referrals to the CCA since the Panel commenced operations.[78]

In its submission, the Panel noted that it performs a unique and economical function within the criminal justice system, which should be maintained because:

- it provides an important, targeted mechanism to address claims of innocence based on DNA evidence
- the administration of justice within NSW has been assisted by its power to require the production of specific exhibits, and the duty this imposes on the Police Force. There are now appropriate protocols for the ordered and systematic retention of exhibits that did not exist before the Panel was established

The NSW Director of Public Prosecutions (DPP), Victims Advisory Board, Law Society of NSW and Griffith University Innocence Project all supported the continuation of the Panel, noting its importance as a safeguard against miscarriages of justice and its role in improving public confidence in the criminal justice system.

However, as discussed in Chapter 2 above, there have been shortcomings in the Panel's operations to date. The ability of the Panel to provide an accessible scheme for review may be limited by the fact that applicants receive no assistance in making applications, and by the limited scope of the Panel's eligibility criteria. Most submissions to the Review agreed that the Panel's eligibility criteria required amendment.[79]

Further, it should be noted that in six years of operation, the Panel has considered only 31 applications, and has made no referrals to the CCA. The Ministry for Police and Emergency Services submitted that this was a basis for not extending the Panel's operation. This may simply be the result of the individual cases considered by the Panel. However, it does raise questions about whether the Panel's application process adds value to the review mechanism in s 78 of the Act. Under that section, 69 applications were considered during the period of the Panel's operation, and at least five convictions were quashed.

In summary, although retention of the Panel was the option preferred by the majority of submissions to the Review, there are sufficient deficiencies in the model to prompt consideration of an alternative approach. Option 3 presents an alternative that relies on existing review mechanisms in Part 7 of the Act, strengthened by additional provisions to ensure preservation of, and access to, biological exhibits for DNA testing.

If Option 2 is adopted and the Panel is retained, the Review recommends that the 2017 sunset clause be repealed. The current provisions of the Act provide a mechanism for extending the operation of the Act, by making a proclamation under s 97. Making a proclamation would provide a legislative basis for the Panel to continue for a further

[78] One submission, by Enough is Enough, suggested that there would be no benefit to maintaining the Panel without amendments to its terms of reference. However, the submission did not indicate how those terms of reference should be amended.

[79] Enough is Enough Anti-Violence Movement; Law Society of NSW; NSW Director of Public Prosecutions; Griffith University Innocence Project; Victim's Advisory Board; DNA Review Panel.

three years, until 23 February 2017. A further review prior to the activation of the sunset clause would require significant resources, but would be unlikely to provide any benefit, because the factors supporting retention of the Panel are unlikely to vary between the date of this Review and February 2017.

Option 3: Replace the Panel with an alternative scheme

In its submission to the 2003 Finlay Review of the Innocence Panel, the University of Technology Sydney's Innocence Project noted that 'if proper legislation about the custody, storage, retention and access to forensic samples is made there may be no need for any Panel'.

Unlike many other jurisdictions, wrongfully convicted people in NSW have access to a court-based review system, in the form of Supreme Court inquiries under s 78 of the Act. This review mechanism provides an additional opportunity for review without relying on Ministerial petitions or applications for mercy, which have been criticised as lacking independence and being subject to political pressures. The mechanism in s78 has been utilised far more frequently than the provisions in Division 6 and, unlike applications to the Panel, applications for Inquiries have resulted in a number of convictions being quashed.

On its own, the referral mechanism under Division 6, Part 7 of the Act does not add benefit to wrongfully convicted people seeking relief. It could be repealed without detriment to them.

However, Division 6 also contains the elements identified by this and other reviews as being essential to people seeking DNA testing to establish innocence. These aspects could not be repealed without detriment.

Option 3 has a number of elements:

- expansion of the current requirements to retain biological exhibits
- provisions to enable a convicted person or their legal representative to obtain information about the existence of biological exhibits, and to arrange for testing of that material.

Expansion of the exhibit retention provisions in s 96

The evidence retention provisions in s 96 of the Act should be retained. There are two aspects to those provisions. First, they apply to evidence in police custody when the provision commenced (23 February 2007), which was obtained in the investigation or prosecution of an offence attracting a maximum penalty of imprisonment for 20 years or more, where the offender was convicted prior to 19 September 2006. Second, they apply to all relevant biological material unless:

(a) the material is required, by the order of any court, to be returned to the person to whom the material belongs, or

(b) the owner of the material is the victim of the offence concerned and the material is required to be returned promptly to minimise inconvenience to the victim, or

(c) the material is of such size or nature as to render its retention impracticable (but only if steps have been taken to retain a portion of the material sufficient for DNA testing), or

(d) the material has already been subject to DNA testing and the testing indicates that it relates only to the eligible convicted person concerned, or

(e) the eligible convicted person concerned ceases to be an eligible convicted person, or

(f) the material is required by or under any Act to be given to another person or destroyed.

As discussed, the 2006 cut-off contained in Division 6 of the Act has been criticised as breaching the right to equality before the law.

New advances in DNA technology also demonstrate why the assumption that DNA based review would not be required after 2006 no longer applies. It is therefore proposed that the conviction date threshold in s 96 be removed.

It is noted that offences under s 61I and 66C of the *Crimes Act* are not currently captured by s 96, but are offences for which DNA evidence may be highly relevant. It is proposed that these offences be specifically included in s 96.

The retention of exhibits requires police resources. It is appropriate that there be appropriate limitations on the obligation, to avoid police being required to retain an excessive number of exhibits. The Review considers that it would be appropriate, not only for retention to be limited by way of offence type, but for s 96 to be limited to exhibits obtained for matters that proceed on indictment, where the convicted person is sentenced to a term of imprisonment.

Under s 96(3)(c), where material is of such size or nature that it is impractical to retain the item itself, police may currently retain a portion of the material sufficient for DNA testing. In practice, for matters falling outside the scope of s 96 (for example, investigations after 2006), Police commonly obtain samples and swabs of biological exhibits for testing, rather than retaining the entire item. Police make decisions about the process for testing individual exhibits using a triaging process.

Under the triaging process, exhibits are vetted by Senior Crime Scene Investigators at the rank of Sergeant or above prior to undertaking any forensic process. Triaging officers possess qualifications in forensic science and have significant ‘at-scene’ crime scene experience allowing them to make informed decisions. A majority of Triaging officers also hold a Certificate of Expertise in Crime Scene Examination issued by the Australasian Forensic Field Sciences Accreditation Board (AFFSAB).

Exhibits that require DNA or other forensic examination, are delivered to a forensic facility operated by NSW Police, where specialist forensic officers conduct examinations and identify whether laboratory analysis is required. If laboratory analysis is required, these specialist forensic officers collect samples from exhibits and forward them securely to the Forensic Analytical & Science Service for analysis.

Provided samples continue to be taken by appropriately qualified officers, the Review considers it appropriate that s 96(3)(c) be expanded to allow retention in the form of a swab or sample where it is impractical to retain the item itself. This would be consistent with the position in other jurisdictions. For example, in Virginia, where evidence is of such a nature, size or quantity that retention of all evidence is impractical, a representative sample may be gathered taking samples, cuttings or swabs of the evidence.

Facilitation of testing

New provisions enabling convicted persons to access exhibits for testing would also need to be introduced to Part 7.

Currently, under s 91(4) of the Act, the Panel may require the Commissioner of Police or other public authority to:

- provide information about biological material specified in an application under this Division (including information about whether the material exists or can be found), and
- provide any such biological material in their possession to the Panel.

The Act also authorises and requires the Commissioner of Police or a public authority to provide such information or biological material.

In the absence of a Panel, the provisions could provide that a convicted person, or their legal representative, could request information about existing biological material from NSW Police or another public authority, and request that particular material be tested. The provisions could permit (but not require) the Police or other public authority to disclose information about existing biological material to the applicant or their representative, and to forward material to the NSW Forensic & Analytical Science Service for testing, in line with existing protocols for chain of custody of evidence. To safeguard the integrity of the evidence, it is not recommended that evidence be released directly to the applicant or their representative.

The ability to facilitate testing by agreement will reduce the need for court ordered disclosure. However, in instances where police or a public authority refuse to disclose information or forward exhibits for testing, the provisions in Part 7 could enable a convicted person to make an application to the Supreme Court for provision of information or biological material.

The power to make an order could be entirely discretionary, without any limitation on eligibility. Alternatively courts could consider applications with reference to the current eligibility criteria in the Act, that is:

- the person's claim of innocence may be affected by DNA information obtained from biological material specified in the application, and
- the person continues to be subject to the sentence imposed on conviction (whether in custody or on parole), or subject to an extended supervision or continuing detention order under the *Crimes (High Risk Offenders) Act 2006,* and
- the person was convicted of an offence punishable by imprisonment for at least 20 years, or
- the person was convicted of any other offence punishable by imprisonment where special circumstances warrant the application.

Providing criteria by which a court should assess an application for testing of exhibits reflects the approach in some other jurisdictions.[80]

It is noted that information from the DNA database may already be accessed and disclosed for the purpose of a review or inquiry under Part 7 generally, not just Division 6. No amendment is required in this respect.[81]

The Review does not consider a new body such as the UK Criminal Cases Review Commission necessary in NSW at this stage. Given the relatively small numbers of people who apply to the Supreme Court for review, or to the Panel, such a commission would not be an appropriate use of resources. Further, the provisions in Part 7 of the Act provide a non-time-limited option for review of convictions.

[80] See, for example, the requirements in California, set out at p 20.
[81] *Crimes (Forensic Procedures) Act 2000* ss 92, 109.

The Review recommends that Option 3 be adopted to create a post-conviction DNA review scheme based on a system of Supreme Court inquiries, supported by provisions requiring retention of biological exhibits and permitting access to exhibits for testing.

The Panel was intended to provide a time-limited response to the need for post-conviction review by people who claim that DNA evidence will exonerate them. However, as discussed, there does appear to be an ongoing need to provide such a mechanism on a long-term basis. The Review therefore prefers Option 3, which integrates access to, and testing of, biological material into the ordinary appeal and review mechanisms available in NSW, creating a long-term response to the issue of DNA based review of convictions.

5. Summary and recommendations

The Review concludes that the Panel continues to serve a role in NSW, but there are other ways in which to achieve that role.

The review mechanism in s 78 of the Act provides an adequate framework to correct wrongful convictions, provided that legislation is put in place to provide for:

- the retention of biological evidence by police
- access to evidence and testing by convicted persons or their legal representatives

The Review recommends that these provisions should be put in place before the sunset clause in s 97 take effect.

If Option 3 is not supported, and the Panel is retained, the Review recommends repeal of s 97, on the basis that a further statutory review in two years would be resource intensive, yet unlikely to yield a different result to the current Review.

List of recommendations

1. The evidence retention provisions in s 96 of the *Crimes (Appeal and Review) Act* should be remade, with the following amendments:
    a. The 2006 time limit for eligibility should be removed.
    b. In addition to offences punishable by imprisonment for life, or for 20 years or more, the section should apply to the offences of sexual assault and sexual intercourse with a child under sections 61I and 66C of the *Crimes Act*.
    c. The section should apply where a matter proceeds on indictment and the convicted person receives a sentence of imprisonment.
    d. Retention of biological material may be by way of retention of a portion of the material, or a swab or sample from the material taken by a qualified officer.

2. Police guidelines on retention and disposal of exhibits should note the obligations to retain biological material evidence and the penalties for knowing destruction of such exhibits.

3. Part 7 of the *Crimes (Appeal and Review) Act* should include provisions that permit the police or other agency to:

    - provide information about what biological material exists in relation to the offence for which the person was convicted
    - provide any identified biological material in their possession to the NSW Forensic & Analytical Science Service for testing

    on the request of the convicted person, or their legal representative

4. Part 7 of the *Crimes (Appeal and Review) Act* should include provisions that enable the Supreme Court, on the application of a convicted person, to order the police or another agency to

    - provide information about what biological material exists in relation to the offence for which the person was convicted

- provide any identified biological material in their possession to the NSW Forensic & Analytical Science Service for testing

and authorising the police or other agency to provide the information or material.

Such an order could be made where:

- the person's claim of innocence may be affected by DNA information obtained from biological material held by police or another public authority, and
- the person continues to be subject to the sentence imposed on conviction (whether in custody or on parole), or subject to an extended supervision or continuing detention order under the *Crimes (High Risk Offenders) Act 2006,* and
- the person was convicted of an offence punishable by imprisonment for at least 20 years, or an offence under section 61I or 66C of the *Crimes Act,* or
- the person was convicted of any other offence punishable by imprisonment where special circumstances warrant the application.

Appendix A – Legislative provisions

Crimes (Appeal and Review) Act 2001

74 Definitions

(1) In this Part:

biological material means human blood, semen, hair, saliva, skin tissue or other biological material from which DNA information may be obtained, whether the material separately identified or present in other material.

conviction includes:

(a) a verdict of the kind referred to in section 22 (1) (c) or (d) of the *Mental Health (Forensic Provisions) Act 1990*, being a verdict that the accused person committed the offence charged or an offence available as an alternative to the offence charged, or

(b) an acquittal on the ground of mental illness, where the mental illness was not set up as a defence by the person acquitted.

DNA Review Panel or ***Panel*** means the DNA Review Panel constituted by section 90.

judicial officer means a judicial officer (or former judicial officer) within the meaning of the *Judicial Officers Act 1986*.

previous review provisions means the provisions of:

(a) Part 13A of the *Crimes Act 1900* as in force before the repeal and transfer of those provisions to this Part by the *Crimes (Appeal and Review) Amendment (DNA Review Panel) Act 2006*, or

(b) section 475 of the *Crimes Act 1900*, or section 26 of the *Criminal Appeal Act 1912*, as in force before the repeal of those sections by the *Crimes Legislation (Review of Convictions) Amendment Act 1993*.

sentence includes a sentence or order imposed or made by any court following a conviction.

(2) In this Part, a reference to a review of, or an inquiry into, a conviction or sentence includes a reference to a review of, or an inquiry into, any aspect of the proceedings giving rise to the conviction or sentence.

89 Previously convicted persons eligible to apply for review of conviction under this Division

(1) For the purposes of this Part, an ***eligible convicted person*** is a convicted person who is eligible in accordance with this section to make an application under this Division to the DNA Review Panel.

(2) A convicted person is eligible to make an application to the Panel if, and only if, the person's claim of innocence may be affected by DNA information obtained from biological material specified in the application.

(3) A convicted person is not eligible to make an application to the Panel unless the person was convicted before 19 September 2006 and the conviction was for a relevant offence. A relevant offence is:

(a) an offence that is punishable by imprisonment for life or for a period of 20 years or more, or

(b) any other offence punishable by imprisonment in respect of which the Panel considers that there are special circumstances that warrant the application.

(4) In determining whether there are special circumstances that warrant an application under subsection (3) (b), the Panel is to have regard to the following matters and any other relevant matter:

(a) the nature and seriousness of the offence concerned,

(b) the length of any sentence currently being served by the applicant,

(c) whether the applicant has exhausted all avenues of appeal,

(d) the current workload of the Panel,

(e) the interests of justice.

(5) A convicted person is not eligible to make an application to the Panel unless the person:

(a) continues to be subject to the sentence imposed on conviction (whether the person is in custody or has been released on parole), or

(b) is subject to supervision or detention under the *Crimes (High Risk Offenders) Act 2006* in connection with the offence for which the person was convicted.

90 Establishment of DNA Review Panel

(1) There is established by this section a DNA Review Panel.

(2) The Panel consists of 6 members appointed by the Governor.

(3) Of the members of the Panel:

(a) one is to be a former judicial officer appointed as Chairperson of the Panel, and

(b) one is to be a person nominated by the Premier to represent the victims of crime, and

(c) one is to be the Director-General of the Attorney General's Department or an officer nominated by the Director-General, and

(d) one is to be the Senior Public Defender or an officer nominated by the Senior Public Defender, and

(e) one is to be the Director of Public Prosecutions or an officer nominated by the Director, and

(f) one is to be a former police officer nominated by the Commissioner of Police.

(4) Schedule 2 has effect with respect to the members and procedure of the Panel.

Note. Clause 4 of Schedule 2 enables the appointment of deputies of members.

91 Functions and powers of DNA Review Panel

(1) The functions of the DNA Review Panel are as follows:

(a) to consider any application under this Division from an eligible convicted person and to assess whether the person's claim of innocence will be

affected by DNA information obtained from biological material specified in the application,

(b) to arrange, if appropriate, searches for that biological material and the DNA testing of that biological material,

(c) to refer, if appropriate, a case to the Court of Criminal Appeal under this Division for review of a conviction following the receipt of DNA test results,

(d) to make reports and recommendations to the Minister on systems, policies and strategies for using DNA technology to assist in the assessment of claims of innocence (including an annual report of its work and activities, and of statistical information relating to the applications it received).

(2) In exercising its functions, the Panel is to have regard to the following:

(a) the interests of and the consequences for any registered victim of the offence to which the application to the Panel relates,

(b) the need to maintain public confidence in the administration of criminal justice in the State,

(c) the public interest,

(d) any other relevant matter.

(3) For the purpose of exercising its functions, the Panel may engage persons to provide expert assistance to the Panel.

(4) The Panel may require the Commissioner of Police or other public authority:

(a) to provide information about biological material specified in an application under this Division (including information about whether the material exists or can be found), and

(b) to provide any such biological material in their possession to the Panel.

(5) The Commissioner of Police or a public authority:

(a) is authorised and required to provide biological material or information about any such material that the Commissioner or authority is required to provide under subsection (4), and

(b) is authorised to provide any other specified information that the Panel requests in order to determine an application under this Division.

(6) The Panel has such other functions as are conferred on it by or under this or any other Act.

92 Applications to DNA Review Panel

(1) An application under this Division may be made to the DNA Review Panel in writing by an eligible convicted person or by any other person on the convicted person's behalf.

(2) The application is to specify the biological material from which DNA information may be obtained to support the convicted person's claim of innocence.

(3) If the Panel is satisfied that the application is made by or on behalf of an eligible convicted person, it may (subject to this Division):

(a) arrange searches for biological material specified in the application and the DNA testing of that biological material, and

(b) prepare a report of its findings with respect to the application.

93 Refusal or deferral of consideration

(1) The DNA Review Panel may refuse to consider or otherwise deal with an application under this Division.

(2) Without limiting subsection (1), the Panel is to refuse to consider or otherwise deal with an application if:

(a) it appears that the matter:

(i) has been fully dealt with in the proceedings giving rise to the conviction (or in any proceedings on appeal from the conviction), or

(ii) has previously been dealt with under this Division, or

(iii) has previously been dealt with under Division 2 or 3 (or the corresponding provisions of the previous review provisions), and

(b) the Panel is not satisfied that there are any special facts or special circumstances to justify the taking of further action under this Division.

(3) Without limiting subsection (1), the Panel is to refuse to consider or otherwise deal with an application if it appears that the biological material specified in the application does not exist or cannot be found.

(4) The Panel may defer consideration of an application if:

(a) the time within which an appeal may be made against the conviction (without leave to appeal out of time) is yet to expire, or

(b) the conviction is the subject of appeal proceedings (including proceedings on an application for leave to appeal) that are yet to be finally determined, or

(c) the matter is being dealt with under Division 2 or 3, or

(d) the application fails to disclose sufficient information to enable the matter to be properly considered.

94 Referral of matter to Court of Criminal Appeal

(1) The DNA Review Panel may refer a matter (together with a copy of its report under section 92 (3) (b)) to the Court of Criminal Appeal for consideration of the question of whether the conviction should be set aside if the Panel is of the opinion that there is a reasonable doubt as to the guilt of the convicted person.

(2) The Panel cannot refer a matter to the Court of Criminal Appeal unless the quorum present at the meeting of the Panel when the decision is made includes the Chairperson and the following members:

(a) the Senior Public Defender or the officer nominated by the Senior Public Defender,

(b) the Director of Public Prosecutions or the officer nominated by the Director.

(3) On receiving a reference under this section, the Court of Criminal Appeal is to deal with the case so referred in the same way as if the convicted person had appealed against the conviction under the *Criminal Appeal Act 1912*.

(4) In any proceedings on a reference under this section:

(a) the Crown has the right of appearance, and

(b) the Court of Criminal Appeal is to consider:

(i) the report prepared by the Panel under section 92 (3) (b), and

(ii) any submissions on any such report that are made by the Crown or by the applicant to whom the proceedings relate, and

(c) no other evidence is to be admitted or considered, except by leave of the Court of Criminal Appeal, and

(d) if leave to admit evidence is granted, the rules governing the admissibility of evidence do not apply to the proceedings.

(5) The convicted person is entitled to receive a copy of the report of the Panel under section 92 (3) (b) for the purpose of enabling the convicted person to make submissions on the report as referred to in subsection (4) (b).

95 Notification and secrecy provisions

(1) If an application is made under this Division by an eligible convicted person, the DNA Review Panel is to notify:

(a) the applicant and the registered victims of the offence concerned of any decision by the Panel to arrange searches for and DNA testing of biological material with respect to the application, and

(b) the applicant and those registered victims of the determination of the Panel with respect to the application.

The Panel may give such a notification by giving it to an Australian legal practitioner who is representing the applicant or registered victim.

(2) The Panel may also provide information about an application under this Division:

(a) to the Commissioner of Police, the Police Integrity Commission, the Independent Commission Against Corruption, the Commissioner of Corrective Services or the Director-General of the Department of Juvenile Justice, or

(b) to the Minister or Chief Justice, or

(c) to any other person or body prescribed by the regulations.

(3) A person must not disclose any information that was acquired by the person as a member of the Panel (or as a person engaged to assist the Panel) unless the disclosure is made for the purpose of the exercise of functions under this Division or in the circumstances authorised by this Division.

Maximum penalty: 100 penalty units or imprisonment for 2 years, or both.

(4) In this section, ***registered victim*** means a victim whose name is recorded on the Register of Victims under the *Crimes (Administration of Sentences) Act 1999*.

96 Duty of police and other State officers to retain biological material evidence relating to eligible convicted persons

(1) This section applies to physical evidence comprising or containing biological material:

(a) that was obtained by any member of the NSW Police Force in connection with the investigation or prosecution of the offence for which an eligible convicted person was convicted (but only if the person was convicted of an offence punishable by imprisonment for life or for 20 years or more), and

(b) that is in the possession or control of any member of the NSW Police Force on the commencement of this section,

referred to in this section as ***relevant biological material***.

(2) It is the duty of members of the NSW Police Force (or members of any other authority of the State) to retain relevant biological material in their possession or control.

(3) However, that duty does not apply to relevant biological material if:

(a) the material is required, by the order of any court, to be returned to the person to whom the material belongs, or

(b) the owner of the material is the victim of the offence concerned and the material is required to be returned promptly to minimise inconvenience to the victim, or

(c) the material is of such size or nature as to render its retention impracticable (but only if steps have been taken to retain a portion of the material sufficient for DNA testing), or

(d) the material has already been subject to DNA testing and the testing indicates that it relates only to the eligible convicted person concerned, or

(e) the eligible convicted person concerned ceases to be an eligible convicted person, or

(f) the material is required by or under any Act to be given to another person or destroyed.

(4) An authority of the State is not under a duty to retain biological material if the material is given to a court or another authority of the State and has not been returned.

(5) A person who, knowing that relevant biological material is required to be retained under this section, destroys or tampers with the material with the intention of preventing the material being subjected to DNA testing is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

97 Sunset provision

(1) The DNA Review Panel is abolished and ceases to have any functions under this Division (and the duty imposed under section 96 ceases) on:

(a) the seventh anniversary of the establishment of the Panel, except as provided by paragraph (b), or

(b) a later date (being not later than the tenth anniversary of the establishment of the Panel) appointed by proclamation before that seventh anniversary and after the review of this Division under subsection (2).

(2) The Minister is to review this Division to determine whether the DNA Review Panel should continue to operate beyond the seventh anniversary of its establishment. The review is to be undertaken as soon as practicable after the fifth anniversary of its establishment and the report of the outcome of that review is to be tabled in each House of Parliament within 12 months after that anniversary.