REMEDIES FOR MISCARRIAGE OF JUSTICE: WRONGFUL IMPRISONMENT

INTRODUCTION

This brief comment is intended to outline some of the current problems in seeking remedies for miscarriages of justice experienced by persons accused, convicted and imprisoned for criminal offences they did not commit. Wrongful imprisonment is, of course, only one species of injustice for which satisfactory remedies are arguably lacking. Others, which are not the subject of consideration here include: wrongful conviction (without imprisonment); excessive punishment in terms of sanction, quantum, conditions (in respect of persons properly convicted); controversy as to criminalisation of conduct (ie offence definition issue); improper exercise of prosecutorial discretion; and lack of adequate legal representation by reason of indigence.

WRONGFUL IMPRISONMENT

Although a superficially straightforward notion, it is by no means clear what is meant by "wrongful imprisonment". Nor is it apparent that each potential type of wrongful imprisonment necessarily entails a miscarriage of justice unless that term is used in a broad sense. There is also a danger of circularity of definition or at least tautology when one attempts to link wrongful imprisonment/miscarriage of justice to appropriate redress. Accordingly some precision in the use of these terms is required.

Wrongful imprisonment could include: the period of remand in custody of a person who is subsequently acquitted; the period of remand in custody of a person who is subsequently convicted and given a non-custodial sentence; the period in detention of a person who is convicted and subsequently acquitted by an appellate court or in a fresh trial ordered by such a court; the period in detention of a person who is convicted, given a prison sentence and is subsequently given a non-custodial penalty by an appellate court; the period in detention of a person who is convicted, whose conviction is upheld by a trial court and who is subsequently released following an inquiry. There are doubtless other permutations and combinations.

It should be observed that, as noted at the outset, for the purposes of this comment, only those situations involving imprisonment following wrongful conviction will be discussed here. So, the scenarios outlined above involving an ultimate non-custodial penalty following an unchallenged conviction, will not be considered.

Should each of the types of imprisonment following wrongful conviction attract some form of redress? Should it be the same option? If not, by what criteria does one decide on, say, the availability of compensation? The length of the period of detention? The presence or absence of negligence or malice in the conduct of police/prosecutorial authorities? A cost-benefit analysis?

It is obvious that there is a range of possibilities. Let us mention some of them.

(a) Each of the kinds of wrongful imprisonment mentioned necessarily entails a miscarriage of justice and all appropriate remedies (see below) should accordingly be available. A discretionary assessment would still be possible as to the form of redress and the amount (if relevant).

(b) Each of the kinds of wrongful imprisonment mentioned amounts to a miscarriage of justice deserving redress but the form of redress should vary according to the type of wrongful detention involved. This may involve constructing a hierarchy of types of wrongful detention and corresponding remedies.

(c) Only some kinds of wrongful detention amount to a miscarriage of justice for which a remedy (or remedies) should be available. This would involve a frank acknowledgment that not all wrongs attract a remedy. In selecting the types of detention which did, decisions would be required as to whether this depended on the character of the detention (eg awaiting trial, awaiting appeal etc) or some other aspect which transcended those categories (eg the length of the detention or the need to establish a causal relationship between some form of malice or misconduct with the period of detention). The more stringent the criteria, the fewer people "wrongfully detained" will be entitled to redress.

The options discussed above by no means exhaust the possibilities. However, they serve to illustrate some of the potential complexities which will confront reformers even in the narrowly designated area the subject of this comment.

The type of wrongful detention which has attracted most public attention is the wrongful imprisonment of a person who has exhausted all of his or her avenues of appeal, has succeeded in securing a judicial inquiry (often following a sustained political campaign) and has been exonerated by such inquiry.[1]

Over the last few years, there has been a significant number of cases falling into this category in Australia and elsewhere. However, although ex gratia compensation is sometimes offered to persons thus wronged, there are no satisfactory forms of legal redress for the harm suffered.

PREVENTING INJUSTICE

Before reviewing the existing and potential responses to miscarriages of justice involving wrongful imprisonment, it is important to emphasise the role of measures which can prevent or minimise injustice. Remedial responses to miscarriages should operate as a longstop, a complementary measure when the system has failed. Energy and resources must be committed to structural reforms which seek to minimise (because one cannot completely eliminate) injustice.

1 See generally Carrington, K et al (eds) *Travesty! Miscarriages of Justice* (1991).

Such structural, preventive measures include: crime definition; policing methods; exercise of police/prosecutorial discretion; bail reform; pre-trial process; speedy trial legislation; legal aid policy; forensic rules and institutions and sentencing reform. This is a fairly long shopping list but it could easily be expanded. Although none of these issues will be pursued here, the key influence of these areas on potential miscarriages of justice should at least be noted.[2]

REVIEW PROCEDURES

It is assumed, quite reasonably, by the criminal justice system that mistakes will be made in the process and that opportunities will exist to correct these errors. However, review procedures tend to be confined to review of the court process and even then the scope for review is rather narrow. There is a popular misconception that appeal courts fully ventilate all issues that are relevant to a potential miscarriage of justice. This reflects a misunderstanding of the technical limits of the review process. Moreover, the misconception is often invoked politically to resist calls for an inquiry on the basis that the complainant has his or her "day in court". This perception is slowly changing in the media as more examples of injustice uncovered by inquiries come to light.[3]

The mechanisms for review can be divided into formal and informal categories. The formal reviews include the traditional appellate process and the various types of inquiries, usually presided over by a judicial officer. In addition, there are the informal agencies which can be very influential in provoking a formal review rather than conducting one. These include the various forms of the media and the campaigns conducted on behalf of those who claim to be aggrieved by a miscarriage of justice. The crucial role of the latter in bringing matters to public attention has been well-documented.[4] It is extremely difficult for an aggrieved individual to obtain an inquiry without such support. Yet the factors which determine whether such support is forthcoming are not necessarily related to the merits of the case.

REMEDIES

On the assumption that the system has failed and that that failure has been demonstrated, there are a number of possible responses (not mutually exclusive) which can be conveniently divided into two groups: making amends to the person wronged and a punitive response to identifiable sources of the wrongful conduct.

Making Amends: This terminology is deliberately chosen because (as is often the case with a crime victim) it is not possible to reverse history and to restore an individual with complete integrity to her/his former position. Their lives have been changed. But it is

2 For a good discussion of reform issues directed at preventing injustice see Hogg, R, "Identifying and Reforming the Problems of the Justice System" in Carrington et al, above n1 at 232–270.

3 See Zdenkowski, G, Foreword in Carrington et al, above n1.

4 Hogg, R, in Carrington et al, above n1 at 255–260.

possible to take account of what has happened and to attempt to be responsive to those changes. The harm which has been sustained is complex and difficult to calibrate in a neat and clinical way: grief, loss, humiliation, damage to reputation, financial loss, impact on family, friends, employment etc. The various dimensions do not all lend themselves readily to the traditional legal remedy in our society for wrongs inflicted: monetary compensation. Yet clearly some forms of loss are amenable to such a remedy and a detailed jurisprudence as to modes of quantifying such losses in other areas has been developed. But in addition to financial compensation for quantifiable loss there is likely to be a need for comfort, counselling, recognition of the wrong suffered and fair punishment of those responsible for the harm.

These dimensions may need to be addressed in different ways in different cases. But the important thing is not to bury them. The adversarial situation in which victims of a miscarriage of justice find themselves long after the miscarriage has been identified by an inquiry, vis-a-vis the government, is deplorable. The most dramatic example, perhaps, was the Chamberlain case in which the battle to obtain compensation lasted 4 years after the exoneration by the Morling Inquiry.[5] In other cases, applicants have simply been denied compensation or other remedy. The issue of punitive responses is considered separately below.

MAKING AMENDS: EXISTING REMEDIES

What then are the existing remedies for persons who have not only suffered imprisonment following wrongful conviction but have actually succeeded in establishing this, usually following a painful, protracted and expensive inquiry?

It is clear that there is no legal right to compensation. Although monetary payment is the most common form of redress offered (but is certainly not always granted), it is always stressed by governments making such payments that they are under no obligation to do so and that the payment is made ex gratia. It follows that the principles applicable to compensation for normal tortious liability are irrelevant.

Although there is no legal right to compensation for imprisonment following wrongful conviction per se, it is possible to pursue civil remedies for damages in appropriate cases if it can be established that there was a malicious prosecution or that a statutory duty to exercise official duties with due care had been breached. In practice, it is very difficult to succeed in either situation.

There are also common law and statutory powers to remit penalties and grant conditional or unconditional pardons. Although strictly exercisable by the Government of a State (or the Governor-General in the federal context), such decisions are usually political ones made by the Executive Council (Cabinet). Moreover, it seems that in some jurisdictions even an unconditional pardon will not result in a quashing of the wrongful conviction.[6]

5 Morling T, *Report of the Royal Commission of Inquiry into Chamberlain Convictions* (1987) Darwin, Government Printer.

Following ratification by Australia of the First Optional Protocol to the International Covenant on Civil and Political Rights, persons aggrieved by a miscarriage of justice may apply by individual petition to the Human Rights Committee of the United Nations, in Geneva. Although the ratification was a significant human rights breakthrough in terms of individual access by Australian citizens to international agencies, there are substantial drawbacks to the procedure. A petitioner must first exhaust his/her domestic remedies; there is a three year delay in the hearing of such petitions; there is currently no legal aid available; and the decisions of the Human Rights Committee are not enforceable.[7]

MAKING AMENDS: POSSIBLE REFORMS

(a) *Statutory Right to Compensation:* An enforceable right to compensation could be established. It would be necessary to define entitlement criteria carefully, including the nature of the wrongful conduct, the nature of the harm sustained and the parties who may claim. The mode of determination of claims (tribunal/procedures) would require examination.

(b) *Pardons/Quashing Convictions:* Ambiguities in the law relating to the effect of pardons require clarification. A statutory power should be available to the Governor and a Supreme Court judge to quash a conviction which has been found to be unsafe and unsatisfactory. Perhaps such a finding should in itself have the effect of quashing a conviction?

(c) *Corrective Publicity Order:* A person should be able to apply to a court for an order that the state acknowledge (and pay for the statement of acknowledgment), in a public statement, with an appropriate level of prominence in the media, the error made and correct the error perpetrated.

(d) *Public Apology:* It is a rare phenomenon for public officials to acknowledge that they have inflicted harm on citizens. Even when compensation is paid it is only after embarrassing political campaigns and the payment is made reluctantly, with gritted teeth. Arguably all cases of wrongful conviction leading to imprisonment should be met with a public apology. In relatively minor cases, the individual concerned may be content with such a public apology and no more.

PUNITIVE RESPONSE TO WRONGDOER

A suggestion often mooted for curing the ills perpetrated by miscarriages of justice is the punishment of those responsible for producing that result. The options include criminal proceedings, disciplinary proceedings, dismissal, demotion and transfer.

The emotional appeal of a punitive response is powerful. The historical record indicates that action of this kind has often not been vigorously pursued.[8]

6 Molomby T, *Spies, Bombs and the Path of Bliss* (1986).

7 Zdenkowski G, "New Boost for Human Rights", *The Bulletin* 21 January 1992 at 39.

There is a range of potential explanations for this: political cowardice; diffusion of responsibility; inability to identify culpable individuals (where some individual is culpable); structural rather than individual default; lack of appropriate admissible evidence; lack of will or resources to investigate thoroughly to generate appropriate evidence; effluxion of time; failure to establish appropriate "after-care" responsibility for implementing/acting on adverse findings by an inquiry; and evidentiary rules relating to inquiries which prevent the recycling of evidence in subsequent court proceedings.[9]

But even assuming these problems can be overcome, there is an issue as to whether punishment of an individual is a desirable method of remedying injustice. Arguably the victim of the injustice may feel vindicated. However, there is a danger (not unlike that which exists in debates about punishment of offenders) of assuming that a severe punitive response is all that is needed. This can lead to scapegoating, vendettas and the deflection of attention from other needs which the victims of injustice might have (see above) and from structural reforms to the system of the kind mentioned earlier. This is not to say that punishment is irrelevant. Rather to sound a note of caution about its invocation as a cure-all for a set of problems which requires a more sophisticated and complex response.

CONCLUSION

The remedies available to persons wrongfully imprisoned are unsatisfactory. This comment has briefly considered some of the issues relating to remedies for imprisonment following wrongful conviction. Detailed consideration of these and related matters is being undertaken in a broader research project on remedies for miscarriage of justice.

GEORGE ZDENKOWSKI
Senior Lecturer in Law
University of New South Wales

8 See Zdenkowski G and Brown D, *The Prison Struggle: Changing Australia's Penal System* (1982) at ch 12, discussing the aftermath of the Nagle Report (*Report of the Royal Commission into NSW Prisons*, 1978). Cf Queensland Commission of Inquiry into Possible Illegal Activities and Associated Misconduct, *Reeport of a Commission of Inguiry Pursuant to Orders in Council* (the Fitzgerald Report), Government Printer, Brisbane 1988.

9 Zdenkowski, G, "Is that Inquiry Really Necessary" *The Bulletin* 28 May 1991.