

# Objectively Innocent

By Tom Percy QC

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**"What do you do if you think your client is guilty?" It's a question that defence lawyers get asked on a regular basis. The answer is pretty simple. You never really know.**

**W**ith most serious offences involving complex and subjective issues such as intent, belief or consent, there is usually no way of knowing with any certainty whether an accused person is guilty as charged.

That is a question properly left to a jury, who will hopefully resolve it correctly. If they get it wrong, there is sometimes (but not always) an appeal process that will get it right.

But there are a number of cases – mercifully not many – where for reasons not known until well after all avenues of appeal are long exhausted, the guilty verdict remains, and it is wrong.<sup>1</sup>

Until comparatively recent times, when advancements such as DNA and other scientific evidence came into the criminal process, objective innocence was difficult to assert with any certainty.

So where do you go if you think that there might be this sort of new evidence that could prove your innocence?

In Australia, there is nowhere to go. Neither the courts nor the politicians will be interested unless you are able to mount a very strong case to show that the matter should go back to the courts, where you've already had one bite at the judicial cherry.

The sort of scientific and technical expertise you will need doesn't come cheap. And it's pretty hard to do from a prison cell, with most, if not all, of your assets already used up in your initial defence.

Your best chance is to get a journalist to take an interest in your case and mobilise a campaign on your behalf. This might take years of unpaid work, and require a large team of *pro bono* supporters, if you can get them.

But the Colleen Egans and Estelle Blackburns of this world don't grow on trees.<sup>2</sup> As you'd expect, unless there was a book or a series of big stories in it for them, there's not much chance they would be interested.

In other parts of the world, the options for the wrongly convicted are not nearly so grim.

In Britain, an independent, government-funded body – the Criminal Cases Review Commission – was set up as a result of the *Criminal Appeal Act 1995*, to investigate such cases.<sup>3</sup> In the US, there is a similar body, the Innocence Project.<sup>4</sup>

Both have been spectacularly successful in exposing wrongful convictions.

In the US over the past eight years alone, the Innocence Project has overturned some 154 dubious convictions in 32 states on DNA evidence alone, including 16 death row cases. Since 1973, 129 death row cases have been overturned by similar evidence.

In 84 of those cases, the true perpetrator has been identified.

In the UK, the Criminal Cases Review Commission has been successful in setting aside more than 250 wrongful convictions, including four historical cases where the wrongly convicted person was hanged.

In Australia, there is no such official body to deal with this problem, despite the certainty that wrongful convictions must presumably occur here at the same rate as anywhere else. Wrongly convicted persons continue to be left to their own devices. Most will languish indefinitely, with the true perpetrator never known.

In WA, the desperate need for some sort of publicly funded body akin to the CCRC or the IP is borne out by the bitter experience of a number of well-documented recent cases.

But still nothing happens.

The state has a responsibility to ensure that guilty persons are prosecuted efficiently and dealt with severely.

But government also has a responsibility to ensure that, in every case where there is the real possibility that an objectively innocent person may have been failed by the system, it should provide and fund an official re-investigation process.

More importantly, the experience of projects such as the CCRC and the IP is that in 98 per cent of cases the system gets it right, and there is an enormous public interest in this being demonstrated.

If either of the major parties in the present WA state election could detach themselves from the monocular bidding war over harsher sentencing laws, they might see an opportunity to bring us into line with the rest of the civilised world. ■

**Notes:** **1** For example, Lindy Chamberlain, John Button and Darryl Beamish – the murder convictions of the latter two were quashed

in 2001 and 2005 respectively in WA, 40 years after the event. More recently, Andrew Mallard's murder conviction was quashed after he spent 12 years in prison. **2** The work of campaigning journalist, Colleen Egan, helped to secure the eventual release of Andrew Mallard; and Estelle Blackburn fought tirelessly for both John Button and Darryl Beamish. **3** See [www.ccrc.gov.uk](http://www.ccrc.gov.uk). **4** See [www.innocenceproject.org](http://www.innocenceproject.org).

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By Lexi Legis

LEXAEDICITY

## Post-party-season blues

**I**'m not sure what is more exhausting in the lead-up to Christmas.... the mad dash of last-minute settlement conferences, or the staggering number of social functions.

Rewind to December 2010: the party season is in full force. It's midnight on a Thursday night and I have just come home from my tenth consecutive night of socialising (with yet another party tomorrow). I stagger in the door with my high heels dangling around my wrist and lie down thinking 'I'll just rest for a second'. The next thing I know, it's 4am, I'm still lying on the bed fully clothed, make-up on, and I think, 'If I go out for one more of these big nights I think I will die of alcohol poisoning...'. Of course, by the time I'm popping on my lippy at 5pm the next day ready to do it all again, I'm thinking, 'I love this time of year.'

I realise that those two thoughts may seem fairly incompatible. Why on earth would I love a time of year that leaves me feeling exhausted and looking like hell? I think it must be because it can be so very, very entertaining. And let's face it, we lawyers need a bit of excitement in our lives from time to time...

For instance, watching the office party shenanigans is a great source of entertainment. Didn't Bridget Jones receive some advice on this? 'Never dip your nib in the office ink'. Yet somehow, you can almost guarantee that when party time comes, someone will be dancing on the table to some 80s classic and snogging the mail boy. I'm sure it always seems like a really good idea at the time and of course these poor people must assume that, in their beer (or in my case, champagne) coat, they are completely invisible to the rest of their colleagues. Of course, I have never done that sort of thing (at least, not that anyone can prove...)

Once January ticks around, though, and everyone is back at work refreshed and full of good intentions, such debauchery has been superseded by the next piece of gossip. In my experience, gossip in the legal industry is never in short supply.

And speaking of new years' resolutions: this year I've actually made one that I can keep. That is, not to make new years' resolutions! Last year, I made the usual commitment to re-join the gym, drink less, not rack up too much on my credit cards, meet every deadline, do proper file reviews in a timely manner... the list goes on. By late February, I'm invariably receiving calls from said gym asking whether I'm still alive, since I haven't attended in weeks; a number of local bars already have my drink of choice poured when I walk through the door, the credit card has crept up and I'm already scanning the internet at lunchtime checking the best deals on balance transfers.

What is it about the New Year that makes us set all these unrealistic expectations of ourselves that, surely after years of experience, we must realise we'll never keep? Is it that committing to improve or change something somehow alleviates the guilt of past conduct? And why is it that nobody (least of all ourselves) holds us to account for failing to keep such resolutions? Mind you, I think if we were held to account, the queues at the shrinks' office would rival that outside the Apple Store when the iPhone went on sale.

On my first day back after the break, I was complimented on how refreshed and well-rested I looked. What was my secret – new diet, exercise regime, something fabulous, surely? (The embarrassing truth was that all I had done over my two-week break was impersonate my cats – lots of sleeping, eating and drinking). Then I got back into it: preparing for upcoming hearings; drafting submissions about the unfairness of personal injury laws; taking endless phone calls... About two days post-break, the dark circles under my eyes started re-appearing and I was pondering when I could reasonably take my next holiday.

How sad, the silly season is over for another year, and now we all have to pretend to be sensible once again. ■