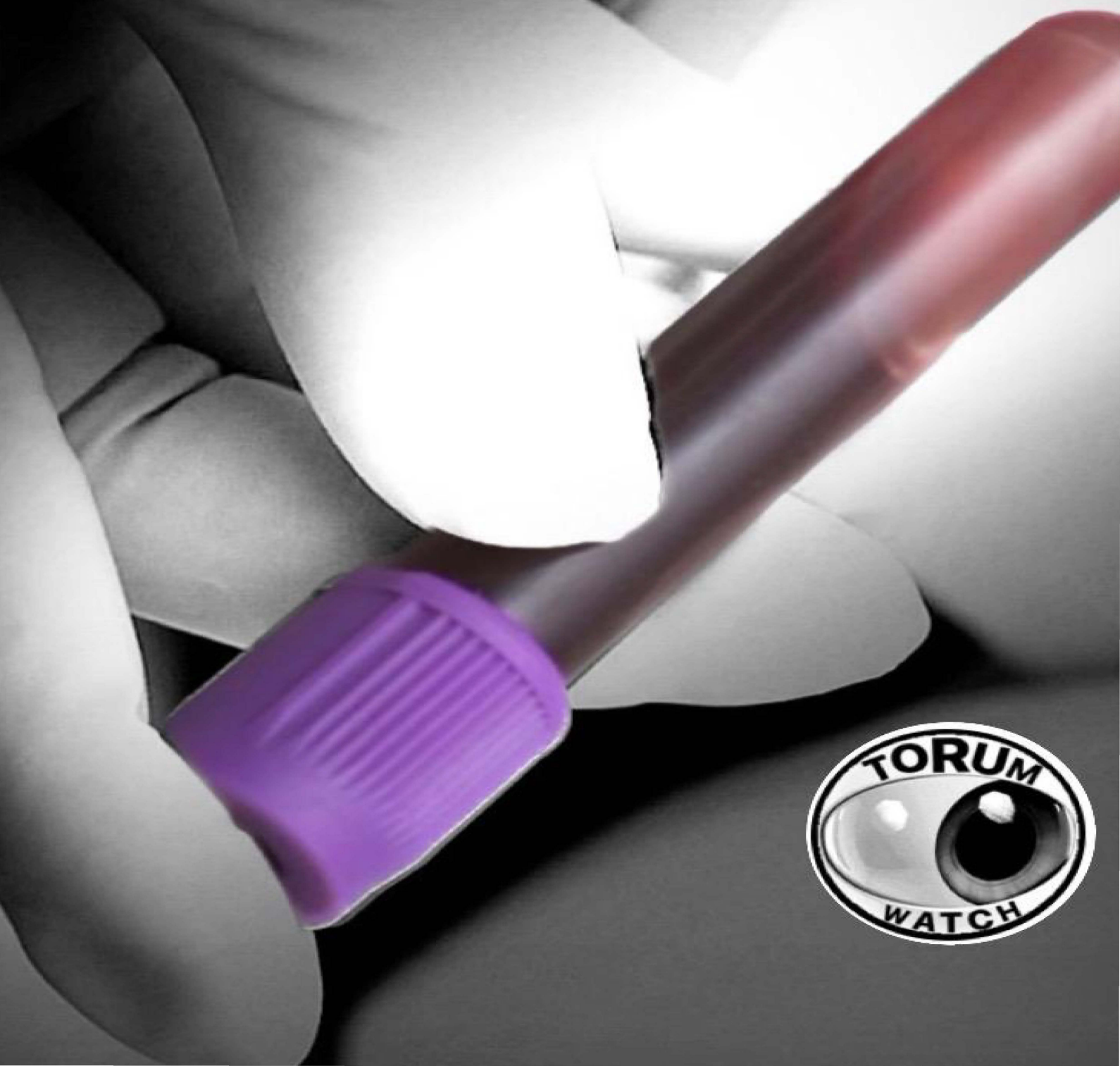


GROOMING GUILTY



The Honourable Tom Bathurst AC KC
Chairperson
NSW Law Reform Commission
Selborne Chambers
SYDNEY NSW 2000
nsw-lrc@dcj.nsw.gov.au

21st March 2024

RE: REVIEW of SERIOUS ROAD CRIME OFFENCES and OTHER RELEVANT MATTERS

Question 2.3: Circumstances of aggravation for dangerous driving
(1) Should the element of “very substantially impaired” (Crimes Act 1900 (NSW) s 52A(7)(d)) be amended to remove the word “very”? Why or why not?

Does the term ‘very substantially impaired’ best meet the Legal metrology priorities standards 2023–24 of the Department of Industry Science and Resources Measurement Law Reform along with aims to harmonise Australia's legislation Nationally and Internationally? ^{1 2}

As a means of measurement for road safety impairment, Evidential Breath Alcohol Analyser programs, have been found to discriminate by age, stature and gender in a large independent UK research review published November 2023. A Profile of Women Detected Drink Driving via Roadside Breath Testing (RBT) in Queensland, Australia, between 2000 and 2011 published in 2014 concluded there were unique circumstances and divergent needs of female drink drivers compared to male drivers and for different groups of female drivers. Gender differences are not addressed by Australia's states & territories drink driving legislation. ^{3 4}

Measuring What Matters: Australia's First Wellbeing Framework in July 2023, aims to track progress towards a more healthy, secure, sustainable, cohesive and prosperous Australia. Internationally, governments have been increasingly recognising the value of broader measures of wellbeing. Countries such as Canada, Germany, New Zealand, Scotland and Wales have used wellbeing frameworks to raise the profile of non-economic outcomes and improve policymaking. #MeasuringMatters ⁵

¹ Legal metrology priorities 2023–24 | Department of Industry Science and Resources
<https://www.industry.gov.au/publications/legal-metrology-priorities-2023-24>

² The Australian Government is reforming measurement legislation | Department of Industry Science and Resources
<https://www.industry.gov.au/news/australian-government-reforming-measurement-legislation>

³ Can all healthy adults use the current evidential breath alcohol analysers? An investigation using a large spirometry database - Galen Ives, Laura Scaffi, Peter A Bath, 2023
<https://journals.sagepub.com/doi/full/10.1177/00258172231178419>

⁴ Profile of women detected drink driving via Roadside Breath Testing (RBT) in Queensland, Australia, between 2000 and 2011 - PubMed
<https://pubmed.ncbi.nlm.nih.gov/24631978/>

⁵ Measuring What Matters | Australian Public Service Commission
<https://www.apsc.gov.au/initiatives-and-programs/workforce-information/research-analysis-and-publications/state-service/state-service-report-2023/aps-future/measuring-what-matters>

TOP 10 most common offences

The majority of offences women and girls are sentenced for are on the lower end of seriousness – this is consistent with the research literature.

Unlicensed driving was the most common offence with 17.4 per cent of cases, followed by drink or drug driving comprising 12.5 per cent of cases. Minor drug offences and public nuisance were the next most common offences.

Table 2: Most common offences sentenced

1		Unlicensed driving	17.4%
2		Drink or drug driving	12.5%
3		Possessing dangerous drugs	9.1%
4		Possession of drug utensils	8.4%
5		Public nuisance	7.8%
6		Contravene direction of police officer	7.0%
7		Shoplifting	6.7%
8		Stealing	6.0%
9		Breach of bail - failure to appear	5.3%
10		Assault or obstruct police officer	4.9%

Men and boys have similar common offences with unlicensed driving (17.1% of cases) and drink or drug driving (14.3% of cases) as the top offences. Public nuisance is ranked slightly higher for men and boys (9.5% of cases) – see Tables 1, 4 and 5 of the *Baseline Report* for comparison.¹⁷⁰

Fig. 2 Sentencing Stats. (QSAC).⁶

⁶ Engendering justice The sentencing of women and girls in Queensland, p.29, (s3.1)
https://www.sentencingcouncil.qld.gov.au/_data/assets/pdf_file/0008/735425/Sentencing-profile-on-womens-and-girls.pdf

Question 3.5: Mandatory minimum sentences - Should any serious road crime offences in the Crimes Act 1900 (NSW) have mandatory minimum sentences? If so, what should these be?

Non-Drinking drivers are being caught up in flawed Breathalyser regimes internationally and in Australia. Non-Drinking drivers are being wrongfully convicted of Failing to Provide a Breath Specimen. Non drinking drivers are being denied a statutory option to blood testing as given to registered medical/disabled drivers. Non-Drinking drivers are being given harsh life changing mandatory sentences.

Experiencing cruel and unusual punishment akin to double, third and final licence jeopardy. Non-Drinking drivers have received mandatory 5 year licence disqualification for CHOOSING not to participate in expensive Alcohol Interlock Programs (AIP) due to disadvantage, (i.e not owning a vehicle). As 5 years is the largest licensing renewal period the licence automatically extinguishes. ⁷

Number of defendants finalised for a charge pursuant to Transport Operations (Road Use Management) Act 1995 at specified Queensland Courts by court, legal representation, indigenous status and year for the period 1 July 2017 to 30 June 2022

Court	Legal representation	Indigenous status	Year									
			2017-18		2018-19		2019-20		2020-21		2021-22	
			No. of defendants	% of defendants	No. of defendants	% of defendants	No. of defendants	% of defendants	No. of defendants	% of defendants	No. of defendants	% of defendants
Magistrates Court	Yes	Yes	4,302	8.24%	4,496	8.40%	3,676	8.63%	5,607	11.05%	4,943	10.05%
	Yes	No	15,903	30.53%	17,057	31.78%	14,685	32.99%	18,658	35.29%	15,814	34.89%
	Yes	Unknown	285	0.55%	251	0.45%	194	0.41%	210	0.40%	171	0.38%
	Yes Total		20,490	39.11%	21,804	40.63%	17,965	42.03%	24,475	46.74%	20,928	44.22%
	No	Yes	1,272	2.48%	1,398	2.62%	1,971	2.53%	1,521	2.90%	1,190	2.66%
	No	No	29,301	56.82%	29,550	56.24%	22,872	54.06%	25,970	49.60%	22,594	50.43%
	No	Unknown	873	1.71%	504	0.94%	249	0.51%	183	0.35%	133	0.29%
	No Total		31,946	60.96%	31,295	58.86%	24,169	57.16%	27,834	52.84%	23,857	51.38%
	Unknown	Yes	0	0.00%	0	0.00%	0	0.00%	0	0.00%	7	0.02%
	Unknown	No	0	0.00%	0	0.00%	0	0.00%	0	0.00%	-5	0.00%
Unknown Total		0	0.00%	0	0.00%	0	0.00%	0	0.00%	2	0.00%	
Magistrates Court Total			51,736	99.46%	53,074	99.43%	42,137	99.18%	52,359	99.58%	44,853	99.62%
District Court	Yes	Yes	43	0.08%	39	0.07%	46	0.11%	25	0.05%	19	0.04%
	Yes	No	130	0.25%	174	0.33%	184	0.44%	125	0.24%	95	0.21%
	Yes	Unknown	-5	0.01%	-5	0.01%	-5	0.00%	-5	0.01%	-5	0.01%
	Yes Total		178	0.34%	218	0.41%	231	0.55%	155	0.29%	117	0.26%
	No	Yes	-5	0.00%	-5	0.00%	0	0.00%	0	0.00%	0	0.00%
	No	No	-5	0.00%	-5	0.00%	0	0.00%	0	0.00%	0	0.00%
	No Total		-5	0.00%	-5	0.00%	0	0.00%	0	0.00%	0	0.00%
	Unknown	Yes	15	0.03%	-5	0.01%	9	0.02%	-5	0.01%	5	0.01%
	Unknown	No	13	0.03%	6	0.01%	18	0.04%	11	0.02%	8	0.02%
	Unknown Total		28	0.05%	10	0.02%	27	0.06%	15	0.03%	13	0.03%
District Court Total			206	0.40%	227	0.43%	258	0.62%	168	0.32%	130	0.29%
Supreme Court	Yes	Yes	-5	0.00%	-5	0.01%	6	0.01%	-5	0.00%	-5	0.01%
	Yes	No	58	0.11%	59	0.11%	72	0.17%	37	0.07%	31	0.07%
	Yes	Unknown	-5	0.00%	-5	0.00%	0	0.00%	0	0.00%	0	0.00%
	Yes Total		62	0.12%	64	0.12%	78	0.19%	39	0.08%	35	0.08%
	No	Yes	0	0.00%	0	0.00%	-5	0.00%	0	0.00%	0	0.00%
	No	No	0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%
	No Total		0	0.00%	0	0.00%	0	0.00%	0	0.00%	0	0.00%
	Unknown	Yes	0	0.00%	0	0.00%	0	0.00%	-5	0.01%	0	0.00%
	Unknown	No	9	0.02%	8	0.02%	5	0.01%	7	0.01%	6	0.01%
	Unknown Total		9	0.02%	8	0.02%	5	0.01%	10	0.02%	6	0.01%
Supreme Court Total			71	0.14%	72	0.14%	84	0.20%	49	0.09%	41	0.09%
Grand Total			52,012	100.00%	53,272	100.00%	42,479	100.00%	52,578	100.00%	45,024	100.00%

Source: Queensland Wide Inter-linked Courts (QWIC)
 Date prepared: 20 February 2023
 Notes:
 1. As there is no unique identifier enabling the identification and subsequent reporting of unique defendants, defendants have been identified based on the national Report on Government Services counting methodology, i.e. same surname, first name, date of birth and date the offence was registered within QWIC.
 2. Although it is considered that the data does not contain information about an individual whose identity is apparent or whose identity could be reasonably ascertained, small numbers have been replaced with '-' to reduce the risk of possible identification of an individual.
 3. The QWIC system is a 'live' operational system in which records are updated as the status of court matters change (for example, a defendant being sentenced as a result of a Court of Appeal decision) and/or input errors are detected and rectified. This constant updating and data verification may result in a slight variance of figures over time.
 Prepared by:
 Chris Woier
 Senior Performance Information Advisor
 Courts Performance and Reporting Unit
 Department of Justice and Attorney-General

Fig.1 Self Representation vs Legal Representation (QWIC)

Technological court evidence with its supporting source documentation requires unobstructed, unhindered discovery for both defence lawyers and the ever increasing numbers of Self Representation Undefended Court Users (SRUCU) in the TORUM courts. Police Body Cam footage not made available in different format options breaches the government Digital services policy. Forensic Calibration logs require individual device ID's and open source access to tracking dashboards. Other police publication's i.e breathalyser manufacturers operating manuals, police traffic manuals are obligated to be lodged with the

⁷ Poverty Penalties as Human Rights Problems | American Journal of International Law | Cambridge Core
<https://www.cambridge.org/core/journals/american-journal-of-international-law/article/poverty-penalties-as-human-rights-problems/2C4FFED59EFF533F6CD0CF97CB708E41>

Supreme Court or State Libraries as legislated in part 8 of the Libraries Act 1988 (Qld) rather than being coercively controlled by police RTI processes. Electronic publications and recordings are included in the legal deposit.

“In North America there are more people acquitted, exonerated, cleared of a DUI impaired driving type offence than any other criminal offence. What that means is more people wrongly face a DUI than any other charge.” states Paul Doroshenko, K.C. an experienced Vancouver Criminal lawyer who devotes his practice exclusively to criminal defence, drunk driving law and driving cases.

As the only lawyer in British Columbia who owns and operates a vast collection of police breathalysers and Approved Instruments including the Alco-Sensor FST Approved Screening Device, Intoximeters Intox EC/IR II, BAC Datamaster, Alco-Sensor IV DWF, Alco-Sensor V XL, Alcometer SL2, Intoxilyzer 400 and the Intoxilyzer 5000. Paul has operated and calibrated the most commonly used Approved Screening Devices (ASD) used in British Columbia. With an understanding of the law, electronics, mechanical engineering and computers.

Paul shares valuable insights on TikTok and ‘Driving Law’ a podcast co hosted with his colleague, Kyla Lee. Speaking on the newly released UK breathalyser research, Paul believes that older women, many SRUCU’s, are disproportionately affected by drink driving legislation structural discrimination.^{8 9}

The Massachusetts Office of Alcohol Testing uploaded a YouTube video, Office of Alcohol Testing Certificate of Calibration Procedure for the Alcotest 9510, a response to the recent COMMONWEALTH v. HALLINAN (2023) ruling that forms part of the consolidated class action ANANIAS lawsuit. Attorney Joseph Bernard, lead attorney in the statewide litigation case that has challenged breath tests throughout the entire state of Massachusetts, is the only lawyer in Massachusetts who has been trained by Draeger, Inc., the company that manufactures the breath test machine in Massachusetts. The Draeger Alcotest 9510 is the only breath test device used in Massachusetts and Attorney Bernard is the only lawyer in Massachusetts who has received this unique training.^{10 11 12}

On August 31, 2017, Secretary of Public Safety and Security Daniel J. Bennett directed that the Executive Office of Public Safety and Security (EOPSS) legal staff conduct an investigation into the circumstances under which the Commonwealth had failed to provide certain documents maintained by the State Police Crime Laboratory's Office of Alcohol Testing to defence counsel in the case of Commonwealth v. Ananias et al., consolidated litigation addressing a variety of challenges to the scientific validity of the Commonwealth's breath testing program, and particularly the Draeger Alcotest 9510 breath testing instrument.

⁸ Paul Doroshenko structural discrimination
<https://vt.tiktok.com/ZSFmm6EEEd/>

⁹ Driving Law Podcast episode. 327 Obvious and Not So Obvious Issues With ASD
<https://open.spotify.com/episode/0cKSBZglt0K5YviBnGurJ?si=5XvPrrcXSpKh833irbrkrq>

¹⁰ Office of Alcohol Testing Certificate of Calibration Procedure for the Alcotest 9510
https://youtu.be/C11FMlyXLUU?si=_jF46eEqpdhXsau-

¹¹ COMMONWEALTH v. HALLINAN (2023) | FindLaw
<https://caselaw.findlaw.com/court/ma-supreme-judicial-court/2198188.html>

¹² Massachusetts OUI Attorney | The Law Offices of Joseph D. Bernard, P.C.
<https://www.bernardouidefense.com/>

The EOPSS legal team concluded that OAT leadership made serious errors of judgement in its responses to court-ordered discovery, errors which were enabled by a longstanding and insular institutional culture that was reflexively guarded, which frequently failed to seek out or take advantage of available legal resources, and which was inattentive to the legal obligations borne by those whose work facilitates criminal prosecutions.

As a result, failed to provide prosecutors with hundreds of “incomplete” certification worksheets, documentary evidence that breath testing instruments had failed to properly calibrate during OAT certification process; OAT generated records that reflected when breath test instruments were sent to their manufacturer for repair; and internal testing records that would appear to fall squarely into the category of documents that had been ordered to be produced in pending criminal prosecutions. These failures left prosecutors in the position of unwittingly representing to the court, and to defence counsel, that the Commonwealth had complied with its discovery obligations, when in fact it had not.

In addition, prosecutors have a solemn obligation to identify and produce exculpatory evidence” evidence that would tend to assist the defendant's case, or call into question the strength of the government's case. The guarded and withholding nature of OAT's approach to Consistent with the Commonwealth's collective bargaining obligations, individuals who were members of the Massachusetts Organization of State Engineers and Scientists (MOSES) and the National Association of Government Employees (NAGE) were given opportunities to have counsel and a representative of their union organization present for all interviews sharing information with prosecutors left those prosecutors unable to adequately carry out their responsibilities.¹³

CRIMINAL CASES REVIEW COMMISSION

On February 16, 2023, the Minister of Justice and Attorney General of Canada introduced a bill to amend the Criminal Code to establish an independent commission to review, investigate, and decide which criminal cases should be returned to the justice system due to a potential miscarriage of justice.

Canada joins the UK (England, Wales and Scotland) who established their Criminal Cases Review Commission by Section 8 of the Criminal Appeal Act 1995 in 1997, Norway which established a CCRC in 2004 following amendment to the Criminal Procedure Act 1981, and New Zealand that set up a similar body in 2019.^{14 15 16 17}

Australia remains out of step. Australia's Human Rights Commission submitted to the Legislative Review Committee of South Australia Inquiry into the states Criminal Cases Review Commission Bill 2010. The Law Council of Australia published their Policy Statement

¹³ Discovery Practices at the Office of Alcohol Testing October 16, 2017
<https://int.nyt.com/data/documenthelper/1925-discovery-practices-at-the-office-of-alcohol-testing/d785cd5b0e65bdc10755/optimized/full.pdf>

¹⁴ The proposed Miscarriage of Justice Review Commission Act (David and Joyce Milgaard's Law)
<https://www.justice.gc.ca/eng/csj-sjc/pl/mjrca-lcees/index.html>

¹⁵ Home page - Criminal Cases Review Commission
<https://ccrc.gov.uk/>

¹⁶ Frontpage | Gjenoptakelse
<https://www.gjenoptakelse.no/en/?v=1693741167144&cHash=55a121c612294831cb12c1de2ccc8be0>

¹⁷ Criminal Cases Review Commission | New Zealand Ministry of Justice
<https://www.justice.govt.nz/justice-sector-policy/key-initiatives/criminal-cases-review-commission/>

on a Commonwealth Criminal Cases Review Commission in 2012. In 2021 High Court Justice, Michael Kirby, AC CMG, reiterated his view that such a commission is needed.

18 19 20 21

Wrongful convictions thus far most closely approximate those adopted in the International Covenant on Civil and Political Rights (ICCPR), however the Australian Institute of Criminology suggests a broader definition could encompass situations where people are:

- arrested and detained but released without being charged
- detained and charged but whose charges are dropped prior to trial
- tried and acquitted but who have been remanded and denied bail
- convicted but whose conviction has been quashed on appeal (this can also be divided into people who have, or have not, been granted bail prior to trial and/or after being convicted and the conviction being overturned)
- convicted and have been sentenced to a non-custodial sanction that has been served/enforced prior to the appeal being heard (but whose conviction has been quashed on appeal)
- tried and convicted, have exhausted all appeals but who later have their convictions quashed in an extraordinary appeal and no retrial ordered, or are found not guilty at such a retrial or have been pardoned (Huff 2002a; New Zealand Law Reform Commission 1998).²²

With a Taskforce Deliver 2018 Investigation into the falsification of Preliminary Breath Tests within Victoria Police, a June 2022, independent Commission of Inquiry into Forensic DNA Testing in Queensland conducted by the former President of the Court of Appeal, retired judge Mr Walter Sofronoff KC, an October 2023 independent Commission of Inquiry into Forensic DNA testing in Queensland to examine concerns regarding Project 13 raised following the conclusion of Sofronoff's DNA Inquiry and the government response excluding Toxicology from moving with DNA scientific services into Queensland's Justice Department, part of the new FORENSIC SCIENCE QUEENSLAND BILL 2023, implementing Forensic DNA and Toxicology Science BODYCAMs for tracking of practice, procedures and calibrations seems reasonable, inflicting mandatory sentencing does not.^{23 24 25 26}

¹⁸ Hamer, David --- "Wrongful Convictions, Appeals, and the Finality Principle: The Need for a Criminal Cases Review Commission" [2014] UNSWLawJl 12; (2014) 37(1) UNSW Law Journal 270

<http://classic.austlii.edu.au/au/journals/UNSWLawJl/2014/12.html>

¹⁹ Inquiry into the Criminal Cases Review Commission Bill 2010 | Australian Human Rights Commission

<https://humanrights.gov.au/our-work/legal/inquiry-criminal-cases-review-commission-bill-2010>

²⁰ Law Council of Australia Policy Statement on a Commonwealth Criminal Cases Review Commission

<https://lawcouncil.au/publicassets/0e6c7bd7-e1d6-e611-80d2-005056be66b1/120421-Policy-Statement-Commonwealth-Criminal-Cases-Review-Commission.pdf>

²¹ Miscarriages of Justice in Australia: Unfinished Business By Michael Kirby, AC CMG, Global Journal of Management and Business Research: G Interdisciplinary Volume 21 Issue 3 Version 1.0 Year 2021 Type: Double Blind Peer Reviewed International Research Journal Publisher: Global Journals Online ISSN: 2249-4588 & Print ISSN: 0975-5853

https://globaljournals.org/GJMBR_Volume21/1-Miscarriages-of-Justice-in-Australia.pdf

²² TRENDS & ISSUES in crime and criminal justice No. 356 Compensation for wrongful conviction Adrian Hoel

<https://www.aic.gov.au/sites/default/files/2020-05/tandi356.pdf>

²³ With a Taskforce Deliver 2018 Investigation into the falsification of Preliminary Breath Tests within Victoria Police Neil Comrie AO APM 9 November 2018

<https://www.police.vic.gov.au/sites/default/files/2019-05/TaskforceDeliverReport2018.pdf>

²⁴ The Commission of Inquiry into Forensic DNA Testing in Queensland | Queensland Health

<https://www.health.qld.gov.au/research-reports/reports/review-investigation/commission-of-inquiry-forensic-dna-testing#:~:text=The%20inquiry%2C%20conducted%20by%20the.criminal%20justice%20context%20in%20Queensland.>

²⁵ New Commission of Inquiry to examine DNA Project 13 Concerns - Ministerial Media Statements

<https://statements.qld.gov.au/statements/98860>

²⁶ FORENSIC SCIENCE QUEENSLAND BILL 2023 Committee Details | Queensland Parliament

<https://www.parliament.qld.gov.au/Work-of-Committees/Committees/Committee-Details?cid=170&id=4311>

As Australia's Justice systems become more dependent on software for evidentiary and other legal applications the Proprietary Code dilemma resulting in the Massachusetts Supreme Court ordered audit, highlights, "Every government contract for breath alcohol detectors needs to include the requirement for public source code." ²⁷

"Unless the defence can see how the breathalyser works," the judges wrote, the device amounts to "nothing more than a 'mystical machine' used to establish an accused's guilt." ²⁸

Thank You For Your Time

Loretta Woolston

²⁷ Buggy breathalyzer code reflects importance of source review
<https://arstechnica.com/tech-policy/2009/05/buggy-breathalyzer-code-reflects-importance-of-source-review/>

²⁸ Breathalyzer source code must be disclosed | ZDNET
<https://www.zdnet.com/article/breathalyzer-source-code-must-be-disclosed/>