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## **Submission to the Inquiry into Forensic DNA Testing in Queensland**

Thank you for the opportunity to make a submission to the Commission of Inquiry into forensic DNA testing in Queensland.

The Bridge of Hope Innocence Initiative ('BOHII') is a joint venture between RMIT University and The Bridge of Hope Foundation, with the aim to investigate claims of wrongful conviction and to prevent future miscarriages of justice through advocacy and reform.

BOHII is part of an international network of innocence projects, sometimes referred to as the "innocence movement", which seeks to create a fair, compassionate, and equitable system of justice for everyone.

The interim findings of the *Report Concerning Use by Queensland Health Forensic and Scientific Services of Certain Evidentiary Statements* (hereafter "the Sofronoff Report"),<sup>1</sup> are shocking. We share the goals of The Commission to resolve issues raised by these findings promptly and fairly with respect to the varied interests involved.

The following outlines particular issues of concern from the perspective of the innocence movement with the aim of limiting the potential for miscarriages of justice.

### **The Potential For Wrongful Convictions**

We are greatly concerned that potentially misleading "insufficient DNA" statements by Queensland Health Forensic and Scientific Services (hereafter "Queensland forensic services") may have led to wrongful convictions in the state.

The potential for DNA testing to exculpate suspects and the wrongfully convicted has been a key theme of the innocence movement since its inception.

The US-based Innocence Project, the most well-known innocence initiative, was established in 1992 to utilise forensic DNA testing as a tool for exonerating individuals who have been wrongly convicted. Since its establishment, 375 people in the United States have been exonerated by post-conviction DNA testing.

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<sup>1</sup> Report released 15 September 2022  
<[https://www.health.qld.gov.au/\\_data/assets/pdf\\_file/0036/1174977/Report-concerning-use-by-QHFSS-of-certain-evidentiary-statements.pdf](https://www.health.qld.gov.au/_data/assets/pdf_file/0036/1174977/Report-concerning-use-by-QHFSS-of-certain-evidentiary-statements.pdf)>

DNA testing is not only a crucial tool in post-conviction review, it is also an important step within criminal investigations to exclude potential suspects. Failure to undertake forensic DNA testing during an investigation, if potentially exculpatory, can play a major role in the investigative “tunnel vision” that imprisons the factually innocent.<sup>2</sup>

As Gans and Urbas (2002) noted in their review of DNA identification evidence within the Australian criminal justice system:<sup>3</sup>

*If a known person’s profile is inconsistent (even in part) with a profile from a crime sample then that person is excluded as a source of that sample. In the right circumstances, exclusions may divert resources from fruitless inquiries and point investigators to the real perpetrator. More importantly, a timely exclusion that clears a suspect may save that suspect from the ordeal of a criminal investigation and even an erroneous conviction based on unreliable traditional investigative methods.*

The Sofronoff Report appears to downplay the likelihood that potentially misleading statements by forensic services could have resulted in wrongful convictions. It concludes that “there would be few cases...where there has been a miscarriage of justice due to wrongful conviction” on the basis that “the lack of DNA evidence is often an advantage to the defence”.<sup>4</sup>

However, the report also notes key circumstances where DNA evidence has potential to shape both investigation and prosecution, often in ways that increase the risk of wrongful conviction:<sup>5</sup>

*First, the absence of DNA evidence when it was actually available might have resulted in a line of investigation by police being unnecessarily weakened or abandoned. Second, a prosecutor might have decided not to commence criminal proceedings or might have decided to discontinue proceedings because of the absence of such evidence when it might have been obtained.*

We share the concerns of the Bar Association of Queensland that potentially misleading statements made by Queensland forensic services have the potential to shut down lines of inquiry for both the prosecution *and* defence, and may have allowed exculpatory evidence for the accused to remain undetected.<sup>6</sup>

The exclusion of samples for further processing, raises the real possibility that alternative suspects may not have been detected early in investigation by Queensland Police. This poses a very real risk that convictions may have been wrongfully obtained.

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<sup>2</sup> Findley, K A, & Scott, M 'The multiple dimensions of tunnel vision in criminal cases' (2006) *Wisconsin Law Review* 291.

<sup>3</sup> Gans J & Urbas G 'DNA identification in the criminal justice system' (2002). Trends & issues in crime and criminal justice no. 226. Canberra: Australian Institute of Criminology. <https://www.aic.gov.au/publications/tandi/tandi226>.

<sup>4</sup> Sofronoff, W 'Report Concerning Use by Queensland Health Forensic and Scientific Services of Certain Evidentiary Statements' 12 September 2022, [123].

<sup>5</sup> Ibid, [124].

<sup>6</sup> Letter from the Bar Association of Queensland to Walter Sofronoff QC, 15 August 2022.

The need for this scrutiny was recently underscored by the decision of the US Baltimore State's Attorney's Office to dismiss charges against Adnan Syed, who was featured in the well-known podcast *Serial*. Re-testing of DNA evidence excluded Syed as a suspect in a 1999 murder and implicated two alternate suspects.<sup>7</sup>

The Sofronoff Report stated that a wrongful conviction would only be likely if an unexamined sample was subsequently tested, and the results excluded the convicted person as the offender but that, 'for practical reason this would be a rare case'. However, the rarity of a wrongful conviction occurring can only be determined by rechecking all the impugned samples.

The actual incidence of wrongful conviction in Australia is unknown.<sup>8</sup> Existing data is based on reported cases only or extrapolated from international data. Consequently, there is no substantive evidentiary basis for describing the likelihood for a wrongful conviction as rare.

It is crucial that the potential for wrongful convictions is front of mind as part of this inquiry, and all steps are taken to identify and analyse (if possibly) potentially exculpatory evidence.

### **Full Disclosure**

Non-disclosure of potentially exculpatory evidence to the defence by police and prosecutors is a widely recognised factor in wrongful convictions.

In the UK, a 2018 report by a House of Commons Select Committee found that "disclosure errors" were widespread, and a direct result of police and prosecutors failing to recognise disclosure as a core component of their jobs.<sup>9</sup>

It's unclear how common disclosure errors are in Australia, however our review of wrongful convictions indicates a real risk that a culture of non-disclosure is just as prevalent as overseas.<sup>10</sup>

Non-disclosure often occurs when police or prosecutors independently conclude that a piece of evidence is not "materially relevant" posing real concerns for the next steps of this Inquiry if:

- Police and/or prosecutors fail to notify relevant suspects, defendants or their lawyers that their case has been impacted by potentially misleading statements by Queensland forensic services.

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<sup>7</sup> 'Baltimore State's Attorney's Office abruptly drops case against Adnan Syed of 'Serial,' citing DNA of others on victim's shoes' The Baltimore Banner 11 October, 2022 at <https://www.thebaltimorebanner.com/community/criminal-justice/baltimore-states-attorneys-office-drops-case-against-adnan-syed-J5717FJYUNBUHNE7Q5DSROXOUI/>

<sup>8</sup> Hamer D, 'Wrongful Conviction, Appeals, and the Finality Principle: The Need for a Criminal Cases Review Commission' (2014) 37 UNSWLJ 270-311, 272.

<sup>9</sup> <https://publications.parliament.uk/pa/cm201719/cmselect/cmjust/859/85902.htm>

<sup>10</sup> Ruyters, M., Stratton, G., & Bartle, J..The culture of non-disclosure and miscarriages of justice (2021). *Alternative Law Journal*, 46(4), 299–306. <https://doi.org/10.1177/1037969X20987009>

- Police and/or prosecutors receive results of further DNA analysis by Queensland forensic services and fail to disclose this information to relevant suspects, defendants or their lawyers.

It's crucial that any review of impacted DNA samples is conducted transparently with all relevant parties promptly notified. It should not be left to the discretion of police or prosecutors to decide whether further analysis is required.

Further, impacted DNA samples will need to be stored safely for a period beyond the standard time limits for forensic samples, should suspects, defendants and their lawyers discover the material relevance of such evidence at a later date.

### **Improving Queensland Forensic Services**

In light of the interim findings of the Sofronoff Report, it's crucial that there is a comprehensive review of resourcing and training within Queensland forensic services.

It should be noted that comparisons between forensic laboratories nationally have noted oddities in the results obtained in Queensland compared to other jurisdictions. A 2021 study which analysed success statistics for DNA sampling from major and volume crime exhibits between February 2018 and September 2019 found discernible differences in profiling success between collection methods.<sup>11</sup>

There is a need for a comprehensive review of forensic services in Queensland to ensure systemic issues are promptly identified and remedied. To that end, the Victorian case of Farah Jama, wrongfully convicted of rape in 2006 as a result of a cross-contaminated DNA sample, and the subsequent Vincent review, should inform the recommendations of this Inquiry.

Although dealing with a different kind of forensic error, key recommendations from the Vincent review that should be adopted by this Inquiry include:

- Ensuring local forensic services are in accord with National and International practices as soon as practicable (Recommendation 1).
- The establishment of clear processes within both forensic services and police so that upon the first indication of a possible forensic error, the defence is notified (Recommendation 7)
- Greater training of forensic and general policing staff on the use and limitations of DNA evidence (Recommendation 9).
- Greater training for legal practitioners on the use and limitations of DNA evidence (Recommendation 10)

Further recommendations that should be considered include:

- Evaluating the current funding of legal aid in light of the findings of the report. Legal practitioners need to be sufficiently resourced to identify whether potentially

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<sup>11</sup> Krosch, M.M. 'Variation in forensic DNA profiling success among sampled items and collection methods: a Queensland perspective', (2021) 53(6) *Australian Journal of Forensic Sciences* 612-625, 622.

misleading statements by Queensland forensic services have relevance to their client's matter. This can only occur through increased funding to review files.

- Regular monitoring of laboratory findings to compare against other Australian jurisdictions and international benchmarks, which would identify any significant departures from international best practice.
- Stronger protections for whistle-blowers within Queensland police and as well as Queensland forensic services.

Thank you for the opportunity to provide feedback on this Inquiry. Please let us know if we can assist further.

Yours sincerely,



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