

WITHOUT LEGAL OBLIGATION: COMPENSATING THE
WRONGFULLY CONVICTED IN AUSTRALIA

*Rachel Dioso-Villa**

ABSTRACT

After exoneration, some innocent individuals seek financial compensation and social services to aid with their reintegration into society. Since not all countries or jurisdictions have compensation legislation, exonerees are left with limited alternatives to address financial, psychological, and health issues that are often consequences of the wrongful conviction and incarceration. In common law jurisdictions, one compensation remedy is the application for ex gratia, “out of grace” payments, for wrongful convictions. Australia is one of the few common law jurisdictions that do not have state or federal compensation statutes for exonerees, leaving ex gratia payments as the primary means to seek restitution. However, there are no guidelines to evaluate cases or allocate awards. Furthermore, ex gratia decisions are indisputable without the chance of appeal. This article reviews successful and unsuccessful ex gratia applications for wrongful conviction in Australia from 1985 to 2011 and examines the state’s corresponding rationales for these decisions. Not surprisingly, the rationales lacked any precedent or transparency in the decision making process. This article concludes with suggestions for a comprehensive statute that addresses monetary and non-monetary consequences of wrongful conviction.

* Lecturer, School of Criminology and Criminal Justice, Griffith University; Ph.D., Department of Criminology and Criminal Justice, University of California, Irvine; and M.A., Hons.B.Sc. Centre of Criminology, University of Toronto. The author wishes to acknowledge the research assistance provided by Jacqueline Fuller, Jessica Craddock, and Lewis Glover and thanks Peggy Zoccola and Alexander Villa for their helpful critiques of an earlier draft of this article. Correspondence is welcome and may be addressed to r.diosovilla@griffith.edu.au, School of Criminology and Criminal Justice, Griffith University, Mt. Gravatt Campus, 176 Messines Ridge Road, Mt. Gravatt, Queensland, 4122 Australia.

I. INTRODUCTION

Wrongful convictions occur in Australia as they do in other common law jurisdictions such as the United States, Canada, New Zealand, and the United Kingdom.¹ In Australia, there is currently no reliable national data that provides an estimate of the prevalence of wrongful convictions,² though the causal factors in common law jurisdictions are the same.³ U.S. studies estimate the imprisonment of innocent individuals to fall within 0.5% to 5% of felony cases.⁴ This figure is considered a conservative estimate, since it is difficult to prove innocence unless errors are exposed post-conviction, such as through confessions by the perpetrator or forensic DNA testing of evidence.⁵ Nonetheless, wrongful convictions are an international problem whose remedy must include preventing future wrongful convictions, identifying wrongfully convicted and incarcerated persons, and a means of addressing the consequences of the conviction and the exoneree's successful reintegration back into the community.

To date, the literature on the study of Australian exonerees has consisted mostly of the investigation of the causal factors of wrongful conviction⁶ and the role of the innocence projects in the correction of wrongful conviction⁷ with little attention paid to post-

¹ Christine E. Sheehy, *Compensation for Wrongful Conviction in New Zealand*, 8 AUCKLAND U. L. REV. 977, 978 (1999) (Austl.); Lynne Weathered, *Investigating Innocence: The Emerging Role of Innocence Projects in the Correction of Wrongful Conviction in Australia*, 12 GRIFFITH L. REV. 64, 65 (2003) (Austl.).

² See Adrian Hoel, *Compensation for Wrongful Conviction*, TRENDS & ISSUES IN CRIME & CRIM. JUST. (Austl.), May 2008, at 4, available at <http://www.aic.gov.au/documents/2/9/9/%7B2990804F-F51D-4C80-809E-88A0E1C31C30%7Dtandi356.pdf>.

³ Weathered, *supra* note 1, at 69.

⁴ *Id.* at 65; see also C. RONALD HUFF ET AL., CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY, at xxii–xxiii (1996) (explaining a 0.5% error rate would produce 100,000 wrongful felony convictions annually); Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927, 947 (2008) (reporting a 2.3% wrongful conviction rate for death row inmates); D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 780 (2007) (proposing a rate of 3.3% to 5% of wrongful convictions for capital rape-murder cases in the 1980s).

⁵ Samuel R. Gross, *Convicting the Innocent*, in 4 ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE 173, 175 (John Hagan et al. eds., 2008).

⁶ See, e.g., Juliette Langdon & Paul Wilson, *When Justice Fails: A Follow-Up Examination of Serious Criminal Cases Since 1985*, 17 CURRENT ISSUES CRIM. JUST. 179, 186–92 (2005); Paul R. Wilson, *When Justice Fails: A Preliminary Examination of Serious Criminal Cases in Australia*, 24 AUSTL. J. SOC. ISSUES 3, 8–18 (1989).

⁷ See, e.g., Weathered, *supra* note 1, at 77–85; Lynne Weathered, *Does Australia Need a Specific Institution to Correct Wrongful Convictions?*, 40 AUSTL. & N.Z. J. CRIMINOLOGY 179, 180 (2007).

exoneration consequences and remedies.⁸ Wrongfully convicted individuals often undergo emotional, psychological, physical, and social challenges⁹ and seek compensation for injuries and loss of liberty.¹⁰ Without compensation legislation, the recourses available to exonerees in Australia are to apply for ex gratia awards, file a tort claim against liable parties, or propose an individualized compensation bill through Parliament.¹¹ Ex gratia payments are a viable option for most exonerees who do not have the resources or political influence to pursue private lawsuits or draft a personalized bill.¹² However, without guidelines for decision-makers or transparency in the process of awarding and allocating funds, ex gratia awards are often criticized as inadequate and arbitrary.¹³

This article attempts to address the gap in the literature by examining ex gratia cases and the state's corresponding rationale to justify these outcomes in the Australian context. If ex gratia payments are an established and favored method of receiving compensation, then understanding the reasons and patterns for their awards and denials would be of vital importance to exonerees. Moreover, if ex gratia payments are truly arbitrary, then this calls into question the fairness of the justice system and the adequacy of Australia's compensation remedies for the wrongfully convicted. This article reviews the consequences of wrongful conviction and incarceration, the reasons that exonerees might seek compensation after release from prison, and the options available to exonerees in Australia. The analysis provides an overview of known wrongful convictions in Australia where exonerees have filed an ex gratia claim and identifies salient factors in cases that are awarded and denied payments. This article also analyzes statements made by government officials who justify ex gratia decisions. The findings suggest that the reasons for allocating ex gratia payments articulated by the state may not necessarily correspond with the factors on which they base their decisions. Given the fairness and adequacy issues surrounding the ex gratia process, this article concludes by recommending that Australia adopt a compensation statute which tailors payments and aftercare services to exonerees'

⁸ *But see* Hoel, *supra* note 2, at 2–5.

⁹ *See* Sandra D. Westervelt & Kimberly J. Cook, *Coping With Innocence After Death Row*, CONTEXTS, Fall 2008, at 32, 34 [hereinafter *Coping With Innocence*].

¹⁰ *See* Sheehy, *supra* note 1, at 983–84.

¹¹ *See* discussion *infra* Part III.

¹² *See* discussion *infra* Part IV.

¹³ Hoel, *supra* note 2, at 3; Sheehy, *supra* note 1, at 980; Nick Taylor, *Compensating the Wrongfully Convicted*, 67 J. CRIM. L. 220, 220–24 (2003).

identified needs for their successful reintegration into society.

II. CONSEQUENCES OF WRONGFUL CONVICTION—INCALCULABLE LOSS

The consequences of wrongful conviction can affect an individual's ability to successfully reintegrate into society upon release.¹⁴ Long term incarceration can lead to negative health effects such as depression, post traumatic stress disorder, alcohol and substance dependence, and "enduring personality change[s]" that are similar to those experienced after a catastrophic event, such as feelings of emptiness, hopelessness, estrangement, and symptoms of paranoia.¹⁵ Both ex-offenders and exonerees experience the same post-release difficulties in finding housing, employment, and medical attention, which are exacerbated by the lack of financial support they receive when released from prison.¹⁶ After a long period of incarceration, former inmates and exonerees must cope with the challenges of reuniting with family who may reject them, the passing of a loved one while incarcerated, or the loss of time that may influence interactions with their spouses, children, siblings, or friends.¹⁷ They may also experience difficulty with coping with cultural changes and ordinary tasks due to changes in technology in the home, workplace, and social environment that may affect everyday living.¹⁸

While former inmates may experience similar psychological, medical, financial, and everyday challenges as do exonerees, the exonerees' innocence adds an unparalleled dimension to their experiences. Wrongfully convicted individuals tend to serve longer sentences in prison because of their inability to participate in behavior and rehabilitation programs that require them to take accountability for their crimes and admit guilt.¹⁹ Maintaining innocence while incarcerated proves to be, as Denov and Campbell describe, a "burden of innocence" by attracting the attention of the prison administration as a threat to recidivism.²⁰ The continual

¹⁴ Adrian Grounds, *Psychological Consequences of Wrongful Conviction and Imprisonment*, 46 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 165, 170–74 (2004).

¹⁵ See *id.* at 168–69.

¹⁶ *Coping With Innocence*, *supra* note 9, at 36.

¹⁷ Saundra D. Westervelt & Kimberly J. Cook, *Framing Innocents: The Wrongfully Convicted as Victims of State Harm*, 53 CRIME L. & SOC. CHANGE 259, 268–70 (2010).

¹⁸ Grounds, *supra* note 14, at 170–71.

¹⁹ See Gabe Tan, *Structuration Theory and Wrongful Imprisonment: From 'Victimhood' to Survivorship?*, 19 CRITICAL CRIMINOLOGY 175, 177–78 (2011).

²⁰ Kathryn Campbell & Myriam Denov, *The Burden of Innocence: Coping with a Wrongful*

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affirmation of their innocence also preoccupies their time while incarcerated through researching the facts of their cases and soliciting assistance from legal officials, and prison and public administrators for information or assistance with their ultimate exoneration.²¹

Upon release, exonerees are generally not eligible for government services, which are geared to support the reintegration of parolees into society.²² These services include housing assistance and placement, employment training and work release programs, and medical services to address psychological, emotional, or health related issues that have resulted from incarceration.²³ Rather, wrongfully convicted individuals are often released abruptly into the community once their exoneration is finalized without financial support or access to public services for housing, employment, or medical assistance.²⁴

Exonerees face additional burdens after their release from prison, because they receive little to no guidance or financial support.²⁵ For example, the expungement of their criminal record is not automatic and may require costly legal assistance.²⁶ Even when records are expunged, exonerees face difficulties re-entering the workforce with long unexplained gaps in their work histories.²⁷ Likewise, if exonerees choose to seek financial compensation for their erroneous conviction, a pardon, or wish to file a lawsuit against individuals whose negligence, malfeasance, or misconduct contributed to the conviction, this will require legal assistance and financial resources which rests wholly on the exoneree.²⁸

Another unique challenge that wrongfully convicted individuals may face is unwanted notoriety or continued apprehension in public, especially if the crimes received media attention or if there

Imprisonment, 46 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 139, 152 (2004).

²¹ *Id.* at 150.

²² See Shawn Armbrust, Note, *When Money Isn't Enough: The Case for Holistic Compensation of the Wrongfully Convicted*, 41 AM. CRIM. L. REV. 157, 167–70 (2004); Jennifer L. Chunias & Yael D. Aufgang, *Beyond Monetary Compensation: The Need for Comprehensive Services for the Wrongfully Convicted*, 28 B.C. THIRD WORLD L.J. 105, 111, 123–24 (2008).

²³ Chunias & Aufgang, *supra* note 22, at 111.

²⁴ See *id.* at 114–15; Armbrust, *supra* note 22, at 170.

²⁵ See Armbrust, *supra* note 22, at 169–70 (discussing the lack of post-release compensatory measures for exonerees and suggesting solutions).

²⁶ See Jessica R. Lonergan, *Protecting the Innocent: A Model for Comprehensive, Individualized Compensation of the Exonerated*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 405, 438 (2007–2008).

²⁷ See *id.* at 436.

²⁸ See *Coping with Innocence*, *supra* note 9, at 36.

are community members who dispute their innocence.²⁹ This may lead to stigmatization, ostracism, or hostility, which detracts from and hinders their successful reintegration.³⁰ The anger and bitterness for lost time while incarcerated is often targeted at the state³¹ and exonerees must cope with these feelings as a result of wrongdoings or misconduct by lawyers, police, or state officials. It is not uncommon for exonerees to seek some form of government apology beyond the clearing of their convictions and, by refusing to acknowledge its responsibility in the wrongful conviction, the state further harms and continues the victimization of the exoneree.³²

Taken together, it is clear that after exoneration, individuals need assistance to address and repair the psychological, physical, social, and financial injury that they suffer as a direct result of their wrongful convictions and imprisonment. Exonerees can seek compensation for these aftereffects in the forms of financial compensation, access to community services and reintegration programs, a state apology for their role in contributing to the exoneree's misfortune, or the state's public acknowledgment of failures of a justice system that convicts innocent persons.³³

III. COMPENSATING THE WRONGFULLY CONVICTED IN AUSTRALIA

Once exonerated, there are often no immediate support services available to assist exonerees with transition³⁴ and the main recourse for addressing harm and injury caused by wrongful conviction is to seek monetary compensation. In some countries there are indemnification laws in place for exonerees to file claims.³⁵ However, this can be a drawn-out process taking years to resolve after one's release.³⁶ Another option is for innocent individuals to

²⁹ Grounds, *supra* note 14, at 170, 172.

³⁰ See Westervelt & Cook, *supra* note 17, at 270–71.

³¹ Grounds, *supra* note 14, at 170.

³² Westervelt & Cook, *supra* note 17, at 262.

³³ See Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 97–101 (1999) (discussing different types of compensation for and struggles faced by the wrongfully convicted).

³⁴ See Chunias & Aufgang, *supra* note 22, at 121–22.

³⁵ See KARIN D. MARTIN, A MODEL STATE POLICY FOR THE TREATMENT OF THE WRONGFULLY CONVICTED 13–14 (2006) (discussing differences among countries in the context of wrongful convictions); INNOCENCE PROJECT, MAKING UP FOR LOST TIME: WHAT THE WRONGFULLY CONVICTED ENDURE AND HOW TO PROVIDE FAIR COMPENSATION 27–31 (2010), available at http://www.innocenceproject.org/docs/Innocence_Project_Compensation_Report.pdf (listing compensation statutes present in the United States).

³⁶ See INNOCENCE PROJECT, *supra* note 35, at 17.

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apply for an ex gratia payment from the state.³⁷ There is no legal obligation for the state to award payments for wrongful conviction nor is it automatically allocated upon exoneration.³⁸ Ex gratia decisions are at the discretion of a state official, such as the Attorney General, Solicitor General, or Governor.³⁹ Exonerees may elect to pursue civil litigation against state officials or other liable parties.⁴⁰ This option is not mutually exclusive with applying for ex gratia payment or for payment through indemnification laws. If such laws exist or if they are inadequate for the individual's circumstances, in some instances, exonerees may receive compensation through private bills that politicians lodge to the legislative body on the exoneree's behalf.⁴¹ In each of these scenarios, there is no guarantee of success and the onus lies with the exonerees to pursue the appropriate solutions.⁴²

In Australia, wrongfully convicted individuals do not have a statutory right to compensation in any state, with the exception of the Australian Capital Territory ("ACT").⁴³ The main remedies available to them are requesting for an ex gratia payment, filing a tortious claim against liable parties, or lobbying for a specialized bill.⁴⁴ The ACT based its compensation legislation⁴⁵ on the United Nations' International Covenant on Civil and Political Rights ("ICCPR") that outlined human rights and freedoms with a specific section on compensation for the wrongfully convicted.⁴⁶ Article 14(6) provides:

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has

³⁷ Hoel, *supra* note 2, at 2.

³⁸ *See id.*

³⁹ *See id.* at 2–3.

⁴⁰ *See id.* at 3.

⁴¹ *See* Bernhard, *supra* note 33, at 93 (discussing moral obligation bills); *see also* Alberto B. Lopez, *\$10 and a Denim Jacket? A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. REV. 665, 698–704 (2002) (providing examples of moral obligation bills).

⁴² *See supra* note 28 and accompanying text.

⁴³ *See* Hoel, *supra* note 2, at 2–3.

⁴⁴ *See id.*; MARTIN, *supra* note 35, at 21.

⁴⁵ *Human Rights Act 2004, 2010* (ACT) § 23 (Austl.). Compensation for wrongful conviction should be granted where:

(a) [the person] is convicted by a final decision of a criminal offence; and (b) the person suffers punishment because of the conviction; and (c) the conviction is reversed, or he or she is pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice.

Id.

⁴⁶ *Id.*; *see also* *United Nations Treaty Collection*, International Convention on Civil and Political Rights, at 177, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec (last visited Feb. 15, 2012).

been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.⁴⁷

This outlines who is eligible to apply for compensation, but does not outline or identify the criteria on which a decision is judged or which the government body will determine how much the compensation will entail.⁴⁸ To enforce the ICCPR to compensate for wrongful conviction, a country must incorporate the right into domestic law; however, even though Australia is a signatory of the ICCPR,⁴⁹ it has not yet included such a provision in domestic law since the ratification of the ICCPR in 1979.⁵⁰ Australia was one of the few countries which did not accept the ICCPR in its entirety.⁵¹ Australia reserved its right to have the compensation for miscarriages of justice considered by administrative provisions rather than legal ones.⁵²

A. *Ex Gratia Payments*

As “out of grace” payments, the state may award ex gratia compensation without explanation or obligation and its decisions are final and not reviewable.⁵³ In the current sample, 47% of known Australian exonerees filed an ex gratia claim before 2011.⁵⁴ There are currently no guidelines associated with ex gratia payments for wrongful conviction,⁵⁵ but awards are generally calculated by demonstrable damage or loss experienced as a result of the wrongful conviction.⁵⁶ Judicial interpretation can provide some lucidity to

⁴⁷ International Convention on Civil and Political Rights, *supra* note 46, at 177.

⁴⁸ See Jason Costa, *Alone in the World: The United States' Failure to Observe the International Human Right to Compensation for Wrongful Conviction*, 19 EMORY INT'L L. REV. 1615, 1624, 1648 (2005) (discussing the lack of criteria on which a decision will be judged).

⁴⁹ See *id.* at 1620, 1622.

⁵⁰ See *id.* at 1620–21 n.10.

⁵¹ See *id.* at 1630.

⁵² *Id.* at 1631.

⁵³ See Hoel, *supra* note 2, at 2–3; see also BLACK'S LAW DICTIONARY 613 (8th ed. 2004) (defining ex gratia).

⁵⁴ See *infra* Figure 1 (stating that twenty-seven of the sample pool of exonerees filed an ex gratia claim before 2011).

⁵⁵ See Hoel, *supra* note 2, at 3 (discussing guidelines as they may apply to ex gratia payments in Australia).

⁵⁶ Sheehy, *supra* note 1, at 979.

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the decision making process,⁵⁷ as can a public statement by a governmental body,⁵⁸ although neither is required.⁵⁹ Instead, consideration of the ex gratia applications are done in secrecy and the factors relevant to the decisions are undisclosed.⁶⁰ This lack of transparency has been criticized as unjust, inadequate, and one which produces awards that are arbitrary.⁶¹ The discretionary nature of these payments, whether to award, and the amount of payment creates a risk that the government will respond to high profile cases more so than cases that receive little media or political attention.⁶² These shortcomings may be highly problematic for jurisdictions, such as Australia, that rely on ex gratia payments as the primary method of compensation in the absence of compensation statutes.

B. Civil Litigation

Wrongfully convicted individuals may seek redress from police officers, lawyers, or state officials who they believe are responsible for the events that led to their wrongful convictions. A tortious claim may have a basis in false imprisonment, malicious prosecution, or misfeasance;⁶³ however, these claims may be difficult to demonstrate and doing so can be time consuming and expensive.⁶⁴ A person may be wrongfully convicted as a result of inevitable and unfortunate events, where police officers, lawyers, and state officials acted without ill intent or malice.⁶⁵ In all

⁵⁷ See Taylor, *supra* note 13, at 224.

⁵⁸ In addition to judicial interpretation, the current study examined public statements by government officials explaining the rationale for awarding or denying ex gratia payments.

⁵⁹ See generally Hoel, *supra* note 2, at 3 (“There are currently no publicly available guidelines in any Australian jurisdiction specifically dealing with ex gratia payments for wrongful conviction.”).

⁶⁰ See Costa, *supra* note 48, at 1624, 1648 (discussing the discretionary right to grant ex gratia compensation).

⁶¹ See Greg Walsh, *Injury by Justice: Inadequacy of Ex-Gratia Compensation for Wrongful Conviction*, 32 L. SOC’Y J. 32, 35 (1994) (Austl.) (“There is an urgent need in this State for serious consideration to be given to the implementation of the system that exists in England and Wales for the assessment of compensation following a miscarriage of justice.”).

⁶² See Hoel, *supra* note 2, at 3 (discussing governments’ assessments of whether to compensate). See generally Sheehy, *supra* note 1, at 979 (“As this is an act of the prerogative, ex gratia payments are discretionary.”).

⁶³ See Sheehy, *supra* note 1, at 979 (discussing traditional remedies for the wrongfully convicted).

⁶⁴ See Adele Bernhard, *Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated*, 52 DRAKE L. REV. 703, 706 (2004). See generally Lopez, *supra* note 41, at 672–74, 705–06 (examining methods of compensating the wrongfully convicted).

⁶⁵ See Lopez, *supra* note 41, at 666–68 (discussing the wrongful conviction of Michael Ray

instances, there is no guarantee whether their claims will be successful, how much compensation will be awarded, or how long the process may take. In the current sample, approximately 12% of the wrongfully convicted individuals filed a civil suit against allegedly liable parties.⁶⁶

C. *Specialized Bills*

Another form of compensation for the wrongfully convicted is private bills or special legislation. Private bills are created as a means of directly compensating the individual through state legislature for injustice incurred for the wrongful conviction and incarceration.⁶⁷ This option may not be viable for many exonerees, since he must enlist a politician to lobby the state legislature to pass a bill on his behalf.⁶⁸ In the current sample, only one exoneree out of fifty-seven had a specialized bill drafted and lodged in Parliament to award compensation,⁶⁹ which makes this a rare and isolated occurrence in Australia. This method is criticized as an inadequate compensation solution, since the success of private bills appears to depend on the political climate and the politician's influence.⁷⁰ Moreover, given the individualized nature and treatment of each bill, there is little uniformity between specialized bills proposed by exonerees and the conditions of the awards.⁷¹

IV. EX GRATIA CASES AND SALIENT FACTORS

Considering that few exonerees filed civil lawsuits⁷² or had the

Graham, Jr.).

⁶⁶ See *infra* Figure 1 (stating that seven of the exonerees in the sample pool filed civil litigation suits).

⁶⁷ See Bernhard, *supra* note 33, at 94; Sheehy, *supra* note 1, at 982.

⁶⁸ See Bernhard, *supra* note 33, at 94.

⁶⁹ See *infra* Table 1. Other wrongfully convicted individuals had specialized bills lodged in Parliament on their behalf to rule on exoneration matters and not compensation payment. See *infra* Part IV.A.5.

⁷⁰ See Bernhard, *supra* note 33, at 94.

⁷¹ See Bernhard, *supra* note 64, at 706–11.

⁷² A small proportion of the sample elected to file civil lawsuits, rather than apply for ex gratia compensation. See *infra* Figure 1. Of the seven exonerees that filed a tortious claim, three cases were successful and four were not. See *infra* Figure 1. Henry Landini served five years in prison for drug possession and was exonerated after it was later discovered that the arresting officers had planted the evidence in Landini's home. *Henry Landini*, WRONGFULLY CONVICTED DATABASE RECORD, <http://forejustice.org/db/Landini--Henry.html> (last visited Feb. 16, 2011). He was awarded AUD 5,000 for legal expenses, AUD 35,000 for injury due to the deprivation of liberty, AUD 30,000 for aggravated damages, and AUD 160,000 for exemplary damages due to the fabrication and manufacturing of the evidence, which works out to approximately AUD 46,000 for each year he spent in prison. See *id.*; Leonie Lamont,

privilege of having a specialized bill lodged in Parliament on their behalf, the following analysis focuses on the outcomes of ex gratia applications as the chief form of compensation for wrongful conviction in Australia. The analysis of successful ex gratia applications in comparison to unsuccessful cases is a means of identifying salient factors that can influence the decision-making process and the allocation of payments. From the following analysis, such factors include the length of imprisonment, presence of new evidence or state misconduct, political influence, and media exposure.⁷³ In comparison, unsuccessful ex gratia cases had distinct salient features, such as the absence of misconduct in the case and the culpability of the exoneree.⁷⁴ This bottom up approach complements a top down analysis in which I examine the state's articulated reasons for its decisions. Triangulating the data allows for a nuanced understanding of how ex gratia payments are allocated and what factors may be relevant in determining whether an exoneree is awarded or denied payment.

A. Cases and Compensation

Although the term “wrongful conviction” may encompass a multitude of situations;⁷⁵ this sample includes all known cases of wrongful conviction in Australia where: (1) individuals have had their sentences quashed at appeal; (2) individuals were acquitted at retrial; (3) the verdict was considered unsafe and the conviction was vacated; or (4) the individual received a pardon.⁷⁶ Case studies

Ex-Criminal Says Crooked Police Planted the Heroin, SYDNEY MORNING HERALD, Mar. 30 2006, <http://www.smh.com.au/news/national/excriminal-says-crooked-police-planted-the-heroin/2006/03/29/1143441215886.html>. In a similar case, Robert Kim Sloan was convicted of drug trafficking after police officers planted the evidence in his home. See John Silvester, *Police to Review Drugs Evidence*, THE AGE (Austl.), Apr. 29, 2002, <http://www.theage.com.au/articles/2002/04/28/1019441324936.html>. He served five months in prison before being exonerated after the arresting officer was jailed for drug trafficking. Nick McKenzie, *Police Pay Bokie Chief Over Raid*, THE AGE (Austl.), OCT. 23, 2006, <http://www.theage.com.au/news/national/police-pay-bokie-chief-over-raid/2006/10/22/1161455608843.html?from=rss>. He filed a civil suit against the drug task force to which the arresting officers belonged, which was later settled out of court for a payment of AUD 385,000. See *id.*

⁷³ See Sheehy, *supra* note 1, at 979–80.

⁷⁴ See *id.*

⁷⁵ Hoel, *supra* note 2, at 1–2 (defining wrongful conviction).

⁷⁶ The definition of the phrase “wrongful conviction” is varied in the literature. See Stephanie Roberts, *‘Unsafe’ Convictions: Defining and Compensating Miscarriages of Justice*, 66 MODERN L. REV. 441, 441 (2003) (U.K.). For the purposes of this article, the definition utilized is consistent with that proffered by Christine Sheehy. Sheehy, *supra* note 1, at 978 n.6 (“[W]rongful conviction’ is defined as the situation where a citizen has been indicted and

discussed in this article were collected through secondary sources, including academic articles, legal databases, newspaper articles, and wrongful conviction websites.⁷⁷ This is not an exhaustive list of all wrongful convictions in Australia and should be interpreted as a sample of the miscarriages of justice which have taken place. Table One outlines the name of the wrongfully convicted person,⁷⁸ the state, the charge(s), year of conviction, year of exoneration, sentence length, time served incarcerated (if known), whether or not the exoneree applied for compensation, and the status of the application.

The cases range from convictions in 1922 to 2008 and subsequent exonerations from 1956 through 2011 either at appeal or retrial (three cases received pardons only).⁷⁹ There are fifty-seven individuals in the sample exonerated for criminal offences resulting in imprisonment.⁸⁰ Sentences ranged between one year and life imprisonment and time served in prison ranged from two and a half months to fifteen years.⁸¹ Exonerees in this sample spent an average of approximately four and a half years in prison before their release and exoneration.⁸²

To determine whether exonerees in the sample sought compensation remedies, I searched and reviewed media sources including, news articles, books on cases, television and radio broadcasts, innocence project websites across Australia, government reports, academic articles, and published cases in legal databases.⁸³ The investigation specifically sought any evidence that an exoneree filed a lawsuit or lodged a specialized bill for compensation with particular focus on exonerees who filed *ex gratia* claims.

Of the fifty-seven cases reviewed, there were thirty-three instances where compensation was sought and twenty-four cases

convicted of a crime of which he or she was innocent.”).

⁷⁷ There are several academic articles specifically discussing Australian exonerees. See, e.g., Langdon & Wilson, *supra* note 6; Wilson, *supra* note 6. There are also several pertinent Innocence Project websites. See, e.g., INNOCENCE PROJECT WA, <http://www.innocenceprojectwa.org.au> (last visited Feb. 16, 2012); FOREJUSTICE, <http://forejustice.org> (last visited Feb. 16, 2012).

⁷⁸ See *infra* Table 1 (listing the names of wrongfully convicted individuals, some may have been tried together for the same crime).

⁷⁹ See *infra* Table 1.

⁸⁰ See *infra* Table 1.

⁸¹ See *infra* Table 1.

⁸² See *infra* Table 1. In comparison, U.S. exonerees spent an average of thirteen years in prison. INNOCENCE PROJECT, *supra* note 35, at 3.

⁸³ Unfortunately, I did not locate any centralized state or national database that records and reports the receipt of *ex gratia* claims. I am not aware that such a system exists in Australia.

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where it is not known if or when an exoneree will seek recompense.⁸⁴ Of those thirty-three cases, twenty-seven exonerees applied for ex gratia (seventeen awards; eight rejections; two pending), whereas seven sought civil litigation exclusively (three successful, four failed).⁸⁵ At least one exoneree in the sample filed a civil suit subsequent to the ex gratia claim and there may be others, although this was not detected at the time of data collection.

1. Length of Imprisonment

Compensation statutes outside of Australia that provide payment for wrongful conviction commonly base awards on the years the exoneree spent incarcerated.⁸⁶ This may be a useful measure of harm and injury, as well as a means of ensuring the uniformity of payments. For the Australian cases reviewed, it is clear that the length of time an innocent person spends wrongfully incarcerated does not determine the size of the award.⁸⁷ Ex gratia awards ranged from AUD 100,000 to AUD 3.5 million for prison terms of five months to eleven years.⁸⁸

For example, Paul Alister and Ross Dunn in New South Wales (“NSW”), convicted of conspiracy and attempted murder, served seven years in prison before they were exonerated.⁸⁹ Each received ex gratia payments of AUD 100,000 for their wrongful conviction and incarceration,⁹⁰ approximately AUD 14,300 per year imprisoned without reimbursement for legal expenses incurred through the trial, appeals, and exoneration processes. In another case in NSW, Douglas Harry Rendell, convicted and exonerated for murder, served eight years in prison and received AUD 100,000 through an ex gratia payment,⁹¹ AUD 12,500 per year imprisoned without reimbursement for legal expenses.

In contrast, Lindy Chamberlain in the Northern Territory (“NT”), convicted for the murder of her child, served four years in prison and received an ex gratia payment of AUD 900,000, AUD 225,000

⁸⁴ See *supra* Figure 1; see also *supra* Table 1.

⁸⁵ See *supra* Figure 1; see also *supra* Table 1.

⁸⁶ INNOCENCE PROJECT, *supra* note 35, at 13–14 (delineating a U.S. example).

⁸⁷ See *supra* Table 1.

⁸⁸ See *supra* Table 1.

⁸⁹ Mark Coultan, *\$100,000 Each For Ananda Marga Three*, SYDNEY MORNING HERALD, Mar. 5, 1987, at 3.

⁹⁰ *Id.*

⁹¹ See NSW, Parliamentary Debates, Legislative Assembly, 20 Nov. 1993 (Mr. John Mills) (AustL), available at <http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LA19930520005>.

for each year incarcerated, with an additional payment of AUD 415,000 for legal costs incurred during her trial, appeals, and reentry into the community.⁹² Similarly, Farah Jama of Victoria, convicted and exonerated of rape, received an ex gratia payment of AUD 525,000 for fifteen months served in prison, approximately AUD 350,000 per year incarcerated, with no consideration of legal expenses.⁹³

The amount of the ex gratia award does not appear to be proportional to the length of time the innocent individual spent incarcerated, although it may play a factor in whether or not an ex gratia payment is granted altogether. Those who received ex gratia payments served on average 6.7 years in prison compared to those who were denied and served an average 1.7 years in prison.⁹⁴

2. New Evidence⁹⁵

Nearly all individuals who received an ex gratia payment (sixteen awards) discovered new evidence after conviction that became instrumental in their exoneration.⁹⁶ This may take the form of forensic error, perjured testimony, false confessions, and unsolicited confessions by the true perpetrator. Only a quarter of non-compensated exonerees (two denials) discovered new evidence in their pursuits of innocence.⁹⁷

In the case of Farah Jama, in NSW, he was wrongly convicted of rape in 2006 and sentenced to six years of imprisonment based on DNA evidence.⁹⁸ He had no prior convictions and testified that he

⁹² Chips Mackinolty & Malcolm Brown, *NT Govt Awards Chamberlains A Payment of \$1.3M*, SYDNEY MORNING HERALD, May 26, 1992, at 4; *NT Government Follows the Mob*, SYDNEY MORNING HERALD, May 26, 1992, at 10.

⁹³ Reid Sexton, *Man Paid \$525,000 for Wrong Conviction*, THE AGE (Austl.), June 30, 2010, <http://www.theage.com.au/victoria/man-paid-525000-for-wrong-conviction-20100629-zjko.html>.

⁹⁴ See *infra* Table 1.

⁹⁵ For the purposes of this paper, “new evidence” refers to “fresh” evidence, which is newly uncovered evidence unavailable at the time of the trial and “new” evidence, which is evidence available at the time of the trial, but not presented. See Lynne Weathered, *Pardon Me: Current Avenues for the Correction of Wrongful Conviction in Australia*, 17 CURRENT ISSUES CRIM. JUST. 203, 210–11 (2005) (Austl.) (discussing the differentiation between terms within the context of exoneration).

⁹⁶ All individuals who received an ex gratia payment had some form of new evidence discovered post-conviction, with the exception of Diane Fingleton. See *Fingleton v The Queen* (2005) 227 CLR 166, 225, 232–33 (Austl.) (relying on principles of immunity to quash Fingleton’s conviction).

⁹⁷ See, e.g., *Jonathon Manley*, THE INNOCENCE PROJECT WA, http://www.innocenceprojectwa.org.au/jonathan_manley.html (last visited Feb. 17, 2012).

⁹⁸ See Sexton, *supra* note 93.

never visited the nightclub where the victim was found and that he was home with his family the night of the crime.⁹⁹ At appeal, the prosecution conceded that the DNA test had been contaminated and that the forensic officer who conducted the tests on the rape victim had also conducted an unrelated test using Farah Jama's DNA.¹⁰⁰ In light of the forensic errors, the case was overturned after he served fifteen months in prison.¹⁰¹

After Farah Jama's exoneration Victoria's Attorney General, Rob Hulls, requested a special inquiry into the circumstances of the case.¹⁰² In his final report to Parliament, former Australian Supreme Court Justice Frank Vincent placed doubt on the reliability of DNA evidence and stated, "[i]n this present case, the obviously unreserved acceptance of the reliability of DNA evidence appears to have so confined thought that it enabled all involved to leap over a veritable mountain of improbabilities and unexplained aspects that . . . could be seen to block the path to conviction."¹⁰³ He made recommendations to improve the collection and testing of DNA of which the state of Victoria has subsequently adopted.¹⁰⁴

Similarly, new evidence may surface from experts re-analyzing evidence in post-conviction investigations. For example, Alexander McLeod-Lindsay was sentenced to eighteen years of imprisonment for the attempted murder of his wife based on blood found on his jacket that experts interpreted at trial as impact or splatter evidence.¹⁰⁵ He appealed this decision and the appeal was dismissed.¹⁰⁶ With the assistance of a public citizen's group who had ties to Parliament,¹⁰⁷ Alexander McLeod-Lindsay

⁹⁹ Elissa Hunt, *Farah Jama, Wrongly Convicted of Rape, Walks Free After Prosecutors Admit There May Not Have Even Been A Crime*, HERALD SUN (Austl.), Dec. 7, 2009, www.heraldsun.com.au/news/man-jailed-for-rape-has-conviction-overturned-after-revelation-that-dna-evidence-may-have-been-contaminated/story-e6frf7jo-1225807656413; Sexton, *supra* note 93.

¹⁰⁰ Hunt, *supra* note 99; Sexton, *supra* note 93.

¹⁰¹ See Hunt, *supra* note 99; Sexton, *supra* note 93.

¹⁰² See *DNA Debacle: The Case of Farah Jama* (ABC Radio National broadcast May 11, 2010) (transcript available at <http://www.abc.net.au/radionational/programs/lawreport/dna-debacle-the-case-of-farah-jama/3102130>) (indicating that the Attorney General joined all of the recommendations made by Justice Vincent).

¹⁰³ Melinda Rout, *Blind Faith in Rape Evidence Slammed*, THE AUSTRALIAN, May 7, 2010, <http://www.theaustralian.com.au/news/nation/blind-faith-in-rape-evidence-slammed/story-e6frg6nf-1225863378417> (alteration in original).

¹⁰⁴ See *id.*

¹⁰⁵ See Malcolm Brown, *Absolved 'Ordinary Man' Dies*, SYDNEY MORNING HERALD, Sept. 19, 2009, <http://www.smh.com.au/national/absolved-ordinary-man-dies-20090918-fvcu.html>.

¹⁰⁶ *Id.*

¹⁰⁷ Malcolm Brown, *Exonerated 26 Years After His Conviction*, SYDNEY MORNING HERALD, Sept. 21, 2009, <http://www.smh.com.au/national/obituaries/exonerated-26-years-after-his->

unsuccessfully petitioned the Lieutenant-Governor to review his conviction and in light of the forensic evidence presented at trial.¹⁰⁸ After serving eight years in prison, McLeod-Lindsay was released on parole and applied for a second post-conviction inquiry into his case.¹⁰⁹ Justice Ray Loveday who led the inquiry said that he had “a feeling of unease and a sense of disquiet” about McLeod-Lindsay’s guilt,¹¹⁰ and rather than review the existing trial evidence, his judicial inquiry enlisted a renowned expert from the United States to re-examine the evidence.¹¹¹ The expert determined that the blood clotting on the jacket indicated that the blood may have been deposited after the wounds were inflicted, when McLeod-Lindsay attempted to rescue his wife, rather than during the assault.¹¹² McLeod-Lindsay was exonerated and received AUD 700,000 as an ex gratia payment.¹¹³

A number of successful ex gratia applications included cases that involved the discovery of perjured testimony or false confessions after conviction. In the Ananda Margo Trio case in NSW, Paul Alister, Ross Dunn, and Tim Anderson were convicted of conspiracy and attempted murder for planting a bomb outside of the Prime Minister’s hotel during a political meeting.¹¹⁴ At trial, a police informant testified that the three men were responsible for the bombing and that they had conspired to murder one of the politicians at the hotel.¹¹⁵ After two failed appeals¹¹⁶ and having served seven years in prison, the NSW government pardoned the three and released them based on a post-conviction inquiry that revealed that the informant’s testimony was without foundation.¹¹⁷ They each received AUD 100,000 ex gratia.¹¹⁸

Darryl Beamish from Western Australia (“WA”) was sentenced to

conviction-20090920-fwpv.html.

¹⁰⁸ See SUPREME COURT OF NEW SOUTH WALES SPECIAL INQUIRY, REPORT OF THE INQUIRY ALEXANDER LINDSAY (FORMERLY ALEXANDER MCLEOD-LINDSAY) 1 (1991).

¹⁰⁹ *Id.* at 1; Brown, *supra* note 107.

¹¹⁰ Brown, *supra* note 107.

¹¹¹ See *id.*

¹¹² See *id.*

¹¹³ See *id.*

¹¹⁴ NSW, Parliamentary Debates, Legislative Assembly, 9 Dec. 1991, 5938 (Mr. John Hatton) (Austl.).

¹¹⁵ Jennifer Thompson, *Carr Likely to Set Up Hilton Bombing Inquiry*, GREEN LEFT WEEKLY (Austl.), Aug. 2, 1995, <http://www.greenleft.org.au/node/8770>.

¹¹⁶ John Slee, *The Cost of Past Injustice*, SYDNEY MORNING HERALD, Mar. 10, 1987, at 12.

¹¹⁷ Alan Lander, *Maleny Man’s Hilton Bombing Memories*, SUNSHINE COAST DAILY (Austl.), May 25, 2008, <http://www.sunshinecoastdaily.com.au/story/2008/05/25/maleny-mans-hilton-bombing-memories>.

¹¹⁸ Slee, *supra* note 116, at 12.

death for murder and was later exonerated based on serial killer, Eric Edgar Cooke's, confession to the murder just before Cooke's execution.¹¹⁹ Beamish received AUD 425,000 as an ex gratia payment after serving fifteen years wrongfully incarcerated.¹²⁰ In similar circumstances, Ziggy Pohl (Johann Siegfried) from NSW was wrongfully convicted for killing his wife and sentenced to life imprisonment.¹²¹ He served ten years in prison before being released on parole.¹²² Seven years later, Roger Bawden confessed to the murder and was later convicted of the crime.¹²³ After the NSW Attorney General requested an inquiry into the case, the Governor granted Pohl an unconditional pardon¹²⁴ and he received AUD 200,000 in compensation.¹²⁵

In cases where the discovery of new evidence contributed to exoneration, not all ex gratia claims were awarded; of the seventeen successful claims, nearly all included new evidence, whereas of the eight rejected claims, two cases included new evidence.¹²⁶ This suggests that exonerations based on new evidence may hold some influence on politicians and state officials who allocate awards for wrongful conviction.

3. Gross Misconduct by State Officials

Of the seventeen successful ex gratia claims, eight cases revealed that misconduct by police, state officials, or prosecutors occurred at investigation or trial.¹²⁷ Coerced confessions, gross negligence, fraud,¹²⁸ and malfeasance by police and prosecutors are known

¹¹⁹ See *Ex Gratia Payment for Wrongly Jailed Man*, SYDNEY MORNING HERALD, June 2, 2011, <http://news.smh.com.au/breaking-news-national/ex-gratia-payment-for-wrongly-jailed-man-20110602-1fhq6.html>.

¹²⁰ See *id.*

¹²¹ See Bernie Matthews, *Australian Miscarriages of Justice*, 10 NAT'L LEGAL EAGLE 14, 15 (2004) (Austl.), available at <http://epublications.bond.edu.au/nle/vol10/iss1/6>.

¹²² See *id.*

¹²³ See *id.* at 15–16.

¹²⁴ NSW, Parliamentary Debates, Legislative Assembly, 22 Apr. 1993 (Mr. George Thompson) (Austl.) (discussing and advocating for ex gratia payment to be made to Ziggy Pohl).

¹²⁵ See Bret Christian, *Mallard Celebrates—But Others Wait*, POST NEWSPAPERS (Austl.), Nov. 25, 2006, <http://www.postnewspapers.com.au/crimeandjustice/cnj28.php>.

¹²⁶ See *supra* notes 77–85 and accompanying text.

¹²⁷ *Id.*

¹²⁸ Henry Landini in NSW and Robert Sloan in Victoria were both convicted of drug possession or drug trafficking. See Lamont, *supra* note 72; Silvester, *supra* note 72; McKenzie, *supra* note 72. Police officers planted evidence which ultimately led to their convictions and was exposed only post-conviction during investigations into potential police conduct in other cases. See Lamont, *supra* note 72; Silvester, *supra* note 72; McKenzie, *supra*

causes of wrongful convictions.¹²⁹

In WA, police intimidated and abused Peter and Ray Mickelberg to obtain confessions to the theft of AUD 653,000 worth of gold.¹³⁰ At trial, the lead and supporting investigators testified that the brothers willingly confessed to the theft, which led to their convictions.¹³¹ Peter and Ray Mickelberg served six and eight years in prison, respectively, during which time the lead investigator became head of the Perth Criminal Investigations Bureau.¹³² After the death of the lead investigator, the supporting investigator admitted to fabricating the trial evidence and admitted that the confessions were false.¹³³ The Mickelberg brothers were each awarded AUD 500,000 for their wrongful conviction and incarceration.¹³⁴

In Vincent Narkle's case in WA, several errors occurred during the police investigation that led to his false conviction for sexual assault and the unlawful deprivation of liberty.¹³⁵ After an unsuccessful appeal, he filed a complaint with the Internal Affairs Unit of the Western Australia Police Services ("IAU-WAPS") for having the police coerce him to sign a confessional statement.¹³⁶ In the course of their investigation, the IAU-WAPS discovered a police journal that exposed that the investigators had shown the victim pictures of Narkle prior to her formal identification a month later.¹³⁷ This information was not disclosed to the defense and the defense did not have the opportunity to cross-examine the witness at trial.¹³⁸ After serving 19 months in prison, Narkle was exonerated by the Supreme Court of Western Australia based on the IAU-

note 72; see also *N.S.W. v Landini* [2010] NSWCA 157, ¶¶ 2–4 (Austl.).

¹²⁹ See BRANDON L. GARRETT, *CONVICING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 167–70 (2011) (discussing prosecutorial and police misconduct); JIM DWYER, PETER NEUFELD & BARRY SCHECK, *ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT* 318 (2001) (describing statistics on misconduct by police and prosecutors by type).

¹³⁰ See Neil Mercer, *The Knots in the Mickelberg Stitch*, *THE AGE* (Austl.), June 12, 2002, <http://www.theage.com.au/articles/2002/06/11/1022982845389.html>.

¹³¹ See *id.*

¹³² See *id.*

¹³³ See *id.*

¹³⁴ See *Mickelbergs to Receive \$1 Million Ex Gratia Payment*, *ABC NEWS* (Austl.), Jan. 16, 2008, <http://www.abc.net.au/news/2008-01-16/mickelbergs-to-receive-1-million-ex-gratia-payment/1013980>.

¹³⁵ See *\$163,000 for 18 Months Jail*, *SUNDAY TIMES* (Austl.), July, 3, 2007, <http://www.perthnow.com.au/news/western-australia/for-18-months-jail/story-e6frg13u-1111113883716>.

¹³⁶ *Narkle v W. Austl.* [2006] WASCA 113, ¶¶ 2, 6.

¹³⁷ *Id.* ¶ 8.

¹³⁸ See *id.* ¶ 10.

WAPS's findings¹³⁹ and was subsequently awarded AUD 163,000 by the Attorney General.¹⁴⁰

Likewise, Harry Rendell in NSW served eight and one half years in prison for the murder of his wife¹⁴¹ based on ballistic evidence and testimony that his rifle was incapable of accidentally discharging.¹⁴² He petitioned for a post-conviction inquiry on the basis that the same forensic examiner that testified in Lindy Chamberlain's case—whose conviction had been overturned—was also involved in his case.¹⁴³ During the investigation, they found that the Crown counsel had expert evidence that Rendell's rifle could accidentally discharge and that the police officer knowingly testified to the contrary at trial.¹⁴⁴ The NSW Parliament passed a special bill to quash Rendell's conviction and to have the compensation payment assessed by a judge, rather than through political pressure, and he received AUD 100,000 *ex gratia*.¹⁴⁵

Of the reviewed cases, there was only one instance where gross misconduct was involved in an unsuccessful *ex gratia* application. Even so, in this one case, the exoneree could not substantiate her allegations of police abuse during the interrogation.¹⁴⁶ From this analysis, the occurrence of state misconduct may be a pivotal factor in the determination and allocation of compensation payments.

4. High Profile Cases

In eleven of seventeen successful *ex gratia* cases, there was considerable media attention for the type of crime committed and the events that took place over the course of the investigation. For example, the case of the "Perth Mint Swindle" captured the media in Australia for its sophisticated design, flawless execution, and the theft of gold bars worth AUD 653,000.¹⁴⁷ During the investigation, the lead investigator coerced the Mickelberg brothers to confess to

¹³⁹ *\$163,000 for 18 Months Jail*, *supra* note 135.

¹⁴⁰ *Id.*

¹⁴¹ Malcolm Brown, *Doubt on \$100,000 Payout*, SYDNEY MORNING HERALD, Nov. 21 1992, at 11.

¹⁴² CHESTER PORTER, *THE CONVICTION OF THE INNOCENT: HOW THE LAW CAN LET US DOWN* 69 (2007).

¹⁴³ See NSW, Parliamentary Debates, Legislative Assembly, 20 Nov. 1993 (Mr. John Mills) (Austl.), available at <http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LA19930520005>.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ See *infra* Part IV.C (describing Jeannie Angel's case).

¹⁴⁷ See Mercer, *supra* note 130.

the crime, which was exposed after their convictions.¹⁴⁸ The story was featured in a television movie and four books that exposed issues of police misconduct during the investigation.¹⁴⁹ In another highly publicized case, Diane Fingleton, the former Chief Magistrate of Queensland, was convicted for threatening one of her subordinates.¹⁵⁰ After serving her six month sentence, she received AUD 475,000 as an ex gratia payment and intends to sue her defense team for twenty million dollars, since she should never have been charged in the first place for her actions.¹⁵¹ Her political status and high visibility in the public made her the subject of extensive news coverage.¹⁵² After her exoneration, she wrote the book, *Nothing to Do With Justice*, an account of the wrongful conviction and her time spent in prison.¹⁵³ Legal and feminist scholars also featured her case in academic articles, focusing on the injustice and gender-based attack on Fingleton throughout the trial and before her exoneration.¹⁵⁴

Journalists have also taken a special interest in certain cases and have revisited the evidence, collected court reports and trial transcripts, and conducted independent investigations, sometimes interviewing witnesses or seeking new expert opinions.¹⁵⁵ In some cases, they are responsible for exposing the principal evidence that

¹⁴⁸ See *id.* (explaining that Don Hancock fabricated statements and used physical violence to coerce confessions from the Mickelberg brothers).

¹⁴⁹ Television movie, *The Great Gold Swindle*, was released two years after the Mickelbergs' convictions in 1984. THE GREAT GOLD SWINDLE (Indian Pacific Films 1987). Author, Avon Lovell, wrote a book about the case, *The Mickelberg Stitch* in 1985, a second book, *Split Image: International Mystery of the Mickelberg Affair* in 1990, and has released his third book on this case, *Litany of Lies*, in 2011. AVON LOVELL, THE MICKELBERG STITCH (1985); AVON LOVELL, SPLIT IMAGE: INTERNATIONAL MYSTERY OF THE MICKELBERG AFFAIR (1990); AVON LOVELL, LITANY OF LIES (2011). Author, Antonio Buti also published a book on the case in 2011 entitled *Brothers: Justice, Corruption and the Mickelbergs*. ANTONIO BUTI, BROTHERS: JUSTICE, CORRUPTION AND THE MICKELBERGS (2011).

¹⁵⁰ See generally *Fingleton v The Queen* (2005) 227 CLR 166 (Austl.) (outlining the conviction of Diane Fingleton).

¹⁵¹ Michael McKenna, *Fingleton Suing Her Lawyers for \$20M*, THE AUSTRALIAN, Sept. 20, 2008, at 3.

¹⁵² In the year of her conviction in December 2002, there were approximately seventy-six news articles in the media on the charges laid against her (according to a Factiva search conducted January 6, 2012). In 2003, after her conviction, 643 news articles featured her case (according to a Factiva search conducted January 6, 2012).

¹⁵³ DIANE FINGLETON, NOTHING TO DO WITH JUSTICE: THE DI FINGLETON STORY (2010).

¹⁵⁴ See generally Margaret Thornton, 'Otherness' on the Bench: How Merit is Gendered, 29 SYDNEY L. REV. 391, 399-401 (2007) (explaining how Fingleton was treated unfairly despite her impressive traits as Queensland's Chief Magistrate); Rosemary Hunter, *Fear and Loathing in the Sunshine State*, 19 AUSTRALIAN FEMINIST STUD. 145, 152-53 (2004) (citing the numerous personal and professional attacks on Di Fingleton).

¹⁵⁵ See, e.g., David Gramm, *Trial by Fire: Did Texas Execute an Innocent Man?*, NEW YORKER, Sept. 7, 2009, http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_gramm.

leads to exoneration. For example, Edward Splatt from South Australia (“SA”) was convicted for the murder of an elderly woman after the prosecution presented evidence that paint particles found at the victim’s home originated from Splatt’s shoes.¹⁵⁶ Stewart Cockburn, a journalist for the *Adelaide Advertiser*, took an interest in Splatt’s case, obtained and reviewed trial transcripts, interviewed jurors, and revisited the expert evidence on paint particles, which was key to his exoneration.¹⁵⁷ Cockburn wrote a series of articles that outlined and exposed the injustices that lead to what he believed to be a wrongful conviction.¹⁵⁸ Cockburn’s continuous coverage brought unwanted media attention to the case and forced the Royal Commission to initiate a post-conviction investigation.¹⁵⁹ The Commission found that the paint particles from the victim’s home came from a paint spray from workers down the road and Splatt was pardoned and awarded AUD 270,000 as an *ex gratia* payment.¹⁶⁰

Political journalist Colleen Egan, for *The Australian*, took a special interest in Andrew Mallard’s case after she received a call from his mother requesting that she investigate the case to find fresh evidence.¹⁶¹ Mallard spent nearly twelve years in prison for murder and lost his appeal and petition for clemency.¹⁶² Egan investigated the case for four years, unable to gain access to all the evidentiary documents.¹⁶³ She approached WA shadow Attorney General John Quigley, whom she knew personally as a former court reporter.¹⁶⁴ Serving his first term in Parliament, he brought Mallard’s case to the Attorney General who instructed the Department of Public Prosecutions to hand over Mallard’s complete case file for post-conviction examination.¹⁶⁵ They discovered that

¹⁵⁶ See Ben Hills, *Trial and Error*, SYDNEY MORNING HERALD, June 15, 1996, at 1.

¹⁵⁷ See Matthews, *supra* note 121, at 15; see also *Old-School Journalist for Justice Stewart Cockburn Dies at 87*, THE AUSTRALIAN, July 7, 2009, <http://www.theaustralian.com.au/old-school-journalist-for-justice-stewart-cockburn-dies-at-87/story-fna7dq6e-1225746654302> [hereinafter *Old-School Journalist*].

¹⁵⁸ *Old-School Journalist*, *supra* note 157.

¹⁵⁹ Matthews, *supra* note 121, at 15.

¹⁶⁰ *Miscarriages of Justice*, JUSTICE ACTION, http://www.justiceaction.org.au/index.php?option=com_content&task=view&id=74&Itemid=148 (last visited Feb. 17, 2012).

¹⁶¹ *The Wronged Man Part One* (ABC Australian Story broadcast Sept. 27, 2010) (transcript available at <http://www.abc.net.au/austory/content/2007/s3023243.htm>).

¹⁶² See generally *Mallard v The Queen* (2005) 224 CLR 125 (Austl.) (discussing the conviction of Andrew Mallard and subsequent quashing of said conviction).

¹⁶³ *The Wronged Man Part Two* (ABC Australian Story broadcast Oct. 4, 2010) (transcript available at <http://www.abc.net.au/austory/content/2007/s3029194.htm>).

¹⁶⁴ See *id.*

¹⁶⁵ *Id.*

the prosecutor did not disclose to the defense an expert report that disputed the prosecution's theory of the case that Mallard had used a wrench to inflict fatal injuries to the victim.¹⁶⁶ They also discovered inconsistent witness statements that the police failed to disclose to the prosecution.¹⁶⁷ Mallard was exonerated and received AUD 3.25 million plus AUD 332,000 for legal and interim expenses.¹⁶⁸

Exonerees who received compensation, but did not attract much media attention involved some form of new evidence (for example, the victim was seen alive,¹⁶⁹ witness testimony was found to be false,¹⁷⁰ or new information was discovered post-conviction).¹⁷¹ This suggests that in these cases, new evidence had more impact on the decision rather than did media coverage.¹⁷²

News coverage alone was not a sufficient reason to grant ex gratia payments, as is illustrated in the six instances where exonerees had high profile cases, but did not receive compensation. The news coverage in these cases appeared to follow the exoneree, a key player on the exoneration team, or the crime itself. For example, Pauline Hanson, a Queensland politician, was convicted and exonerated of election fraud.¹⁷³ Her political position and campaign attracted media attention prior to the conviction, which flared again after her arrest and conviction.¹⁷⁴ Esteemed Queen's Council and Melbourne barrister, Philip Priest, undertook a post-conviction murder case pro bono, which attracted media and resulted in the exoneration of Salvatore Fazzari, Carlos Pereiras, and Jose

¹⁶⁶ See *id.*; see also *Mallard v The Queen* (2005) 224 CLR 125, 133 (Austl.).

¹⁶⁷ See *The Wronged Man Part Two*, *supra* note 163.

¹⁶⁸ See Aja Styles & Chris Thomson, *Andrew Mallard Gets \$3.25M for Wrongful Imprisonment*, THE AGE (Austl.), May 5, 2009, <http://www.theage.com.au/national/andrew-mallard-gets-325m-for-wrongful-imprisonment-20090505-at11.html>.

¹⁶⁹ Bernie Matthews, *Hanson and Ettridge Got Off Lightly from the Scars of Qld 'Justice'*, ON LINE OPINION (Austl.), Nov. 21, 2003, <http://www.onlineopinion.com.au/view.asp?article=877&page=2>.

¹⁷⁰ *Ananda Marga Trio*, VICTIMS OF THE STATE, <http://www.victimsofthestate.org/ANZ/AMT.html> (last visited Feb. 17, 2012).

¹⁷¹ *Vincent Narkle*, THE INNOCENCE PROJECT WA, http://www.innocenceprojectwa.org.au/vincent_narkle.html (last visited Feb. 17, 2012).

¹⁷² See *infra* Table 1. All three indigenous exonerees in the sample did not receive much media coverage post-conviction or post-exoneration, although two received ex gratia payments and the other did not. See *infra* Table 1.

¹⁷³ See *'No Compensation' for Hanson and Ettridge*, SYDNEY MORNING HERALD, Nov. 7, 2003, <http://www.smh.com.au/articles/2003/11/07/1068013385142.html>.

¹⁷⁴ Serena Nicholls, *'Aussie Battler' Pauline Hanson Exonerated Of Fraud*, JUST. DENIED, Winter 2006, at 18, available at http://justicedenied.org/issue/issue_31/jd_issue_31.pdf. A Factiva database search, conducted January 9, 2012, of the news media coverage on Hanson and Ettridge's conviction returned 774 articles in the year 2003—the year of their convictions.

Martinez.¹⁷⁵ Kevin Ibbs was convicted and exonerated for rape.¹⁷⁶ He received the title, “the 30-second rapist” for not desisting with sexual intercourse when the victim withdrew her consent.¹⁷⁷ Much of the media coverage of his case involved the perceived trivial nature of the crime rather than his innocence.¹⁷⁸

Media coverage is a salient factor among the exonerees who applied for ex gratia payments, but is not necessarily a pivotal factor in deciding whether to grant or deny compensation payments. By the same token, media attention does not appear to jeopardize ex gratia applications. Rather, it can be a means of bolstering political and public support for exonerees pursuing compensation and exposing errors in the justice system, so long as the content and function of the coverage is not solely based on an individual’s fame or notoriety.

5. Political Support

In thirteen of the seventeen cases that were successfully compensated, exonerees attracted political involvement in the re-investigation of their cases.¹⁷⁹ Political involvement can lead to political pressures to undertake Royal Commissions for third party inquires that can be more persuasive than a direct appeal from the exoneree. With extensive resources and police and prosecutorial cooperation, special inquires are able to uncover new evidence that might otherwise be missed. For example, Andrew Mallard and Alexander McLeod-Lindsay had specific politicians take an interest in their cases and petition Parliament for special inquiries on their behalf.¹⁸⁰ The journalist investigating Mallard’s case enlisted a politician she knew personally to petition the request.¹⁸¹ The chief donor and advocate of a community organization that sought to exonerate McLeod-Lindsay was married to the Chief Justice who petitioned the Attorney General for an independent inquiry on

¹⁷⁵ See *Their Day in Court* (ABC Australian Story broadcast July 16, 2007) (transcript available at <http://www.abc.net.au/austory/specials/theirdayincourt/default.htm>).

¹⁷⁶ John Townsend, *30-Second Rapist: Women Charged*, W. AUSTRALIAN, Nov. 6, 1996.

¹⁷⁷ See *id.*

¹⁷⁸ See Roy Gibson, *Trial That Made Legal History*, W. AUSTRALIAN, Nov. 21, 1996; *Man Wrongly Jailed on Bizarre Rape Charges Fails to Get Compensation*, AGENCE FRANCE-PRESSE, July 9, 2001; Mark Russell, *Set Up to Be a Rapist*, DAILY TELEGRAPH (Austl.), Nov. 22, 1996, at 22.

¹⁷⁹ See *infra* Table 1; *infra* Figure 1.

¹⁸⁰ See Brown, *supra* note 107; *The Wronged Man Part One*, *supra* note 161.

¹⁸¹ See *The Wronged Man Part One*, *supra* note 161; *The Wronged Man Part Two*, *supra* note 163.

McLeod-Lindsay's behalf.¹⁸²

High profile cases and extensive media coverage may incite political action to petition for special inquiries. For example, after a series of articles exposing forensic errors in Edward Splatt's case, the Attorney General elected to hold a Royal Commission investigation, which ultimately led to his exoneration.¹⁸³ Before issuing an ex gratia payment to Farah Jama for his wrongful conviction, the Attorney General requested a DNA inquiry based on the lab errors exposed in the case that the media highly publicized.¹⁸⁴

When the wrongfully convicted individual is a politician, the facts surrounding the case appear to be more influential in granting ex gratia than the individual's status. Diane Fingleton, Chief Magistrate of Queensland, received compensation for her false conviction and was reinstated to her position after exoneration.¹⁸⁵ The charges brought against her were interpreted as politically motivated to undermine her authority as Chief Magistrate.¹⁸⁶ In contrast, Queensland politician, Pauline Hanson, and the co-founder of her political party, David Ettridge, were convicted and exonerated of election fraud and did not receive ex gratia compensation.¹⁸⁷ The Court of Appeals that quashed their convictions emphasized that the wrongful convictions were the result of her inexperienced legal counsel that could not disprove the evidence of fraud.¹⁸⁸ In these cases, the exoneree's political influence may not have weighed in as strongly as other factors.

In the five cases where exonerees were not compensated, but had some form of political involvement, the cases either involved a politician as the exoneree¹⁸⁹ or involved a high profile and political figure as part of the post-conviction legal team.¹⁹⁰ In comparison, for their successful counterparts that received political assistance, the political involvement incited state-led third-party inquiries that uncovered new evidence, which were instrumental in their

¹⁸² See Brown, *supra* note 107.

¹⁸³ See Matthews, *supra* note 121, at 15.

¹⁸⁴ See Hunt, *supra* note 99.

¹⁸⁵ See Peter Wilmoth, *A Life at Law Turned Inside Out*, THE AGE (Austl.), Sept. 25, 2005, <http://www.theage.com.au/news/national/life-at-law-turned-inside-out/2005/09/24/1126982262902.html>.

¹⁸⁶ See Hunter, *supra* note 154, at 153.

¹⁸⁷ See *No Compensation for Hanson and Ettridge*, *supra* note 173.

¹⁸⁸ See Nicholls, *supra* note 174, at 19.

¹⁸⁹ See *No Compensation for Hanson and Ettridge*, *supra* note 173.

¹⁹⁰ See *Their Day in Court*, *supra* note 175.

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exonerations. This suggests that it is not simply the captivated interest or profile of a politician that influences *ex gratia* decisions, but how their political power may be used to mobilize resources to aid in exoneration.

6. The Presence of Multiple Factors

When a high profile case attracts an influential political figure who successfully marshals a post-conviction inquiry, which leads to the discovery of new evidence that exposes flawed evidence, police misconduct or legal malfeasance, there is an increased chance of receiving an *ex gratia* payment. Over half of successful *ex gratia* applications had multiple salient factors present in their cases (ten cases had three or more factors).¹⁹¹ Certainly, the exonerees who received the highest amounts of *ex gratia* compensation in total and per year had multiple factors present in their cases. For example, Andrew Mallard's case had elements of new evidence, gross misconduct, extensive media coverage, and political interest and he received AUD 3.25 million plus AUD 132,000 for legal expenses; Lindy Chamberlain's case had extensive media coverage, political interest, new evidence and gross misconduct and received AUD 1.3 million plus AUD 415,000 in additional expenses; and Farah Jama had gross misconduct, new evidence, and extensive media coverage and received AUD 525,000 after spending fifteen months in prison.¹⁹² Although there is a lack of transparency in how these decisions are reached, perhaps high profile cases that bring to light new evidence, expose gross misconduct by state officials, and have political support for exoneration are more persuasive applications for *ex gratia* compensation than those that have none or only a few factors. Bear in mind, however, that multiple factors are no guarantee of compensation following exoneration;¹⁹³ the point is only that the presence of multiple factors may strengthen an *ex gratia* application rather than weaken it.

¹⁹¹ See discussion *supra* Parts IV.A.1–5.

¹⁹² See Mackinolty & Brown, *supra* note 92; Sexton, *supra* note 93; Styles & Thomson, *supra* note 168.

¹⁹³ Two cases (four exonerees) had three or more factors in their cases, but were denied compensation. See 'No Compensation' for Hanson and Ettridge, *supra* note 173; 4 Denied Compensation for Prison Time, UNITED PRESS INT'L, Mar. 23, 2008, http://www.upi.com/Top_News/2008/03/23/4-denied-compensation-for-prison-time/UPI-76871206323416.

V. RATIONALE FOR AWARDING EX GRATIA PAYMENT

In reviewing documents and statements made by state officials regarding ex gratia decisions, we can infer their rationales and possibly predict the outcome of future applications. In the absence of ex gratia guidelines, and no requirement for state officials to comment, justify, or disclose the reasons for their decisions, only case materials were analyzed in order to identify common factors present in ex gratia outcomes. In a few instances a rationale was given in a court ruling, comments made on the passage of a Parliament bill, or a formal and informal statement was issued or made to the media.

The reasons state officials provided to award ex gratia payments fall into the following categories: (1) award without explanation; (2) award as gift to ease transition; (3) award to express regret; and (4) award to rectify injustice or correct mistakes of the state or state misconduct.¹⁹⁴ In these explanations, state officials reinforce the fact that ex gratia payments are not awarded to set precedent and are not automatically awarded for state misconduct.¹⁹⁵

A. Award Without Explanation

Ex gratia payments may be awarded without explanation,¹⁹⁶ with state officials having the option to explain that the award was made in deference to the recommendations of an inquiry.¹⁹⁷ For example, the NT Attorney General asked the judge who oversaw the Royal Commission inquiry into the Chamberlain case to also assess the amount of appropriate compensation and awarded it accordingly.¹⁹⁸ Harry Rendell also received an ex gratia payment by the Attorney General of NSW on the advice of the Solicitor General.¹⁹⁹ In both cases, the recommendations were cited as the only basis for the ex gratia payments. By doing so, this gives the impression that the decisions were reached in consultation with experienced officials

¹⁹⁴ See discussion *infra* Parts V.A–D.

¹⁹⁵ See discussion *infra* Part V.E.

¹⁹⁶ Edward Splatt, Ziggy Pohl, and Alexander McLeod-Lindsay received ex gratia payments without published explanation. See *Miscarriages of Justice*, *supra* note 160.

¹⁹⁷ See NSW, Parliamentary Debates, Legislative Assembly, 18 Nov. 1993 (Mr. Stephen O'Doherty, Mr. Malcolm Kerr, and Mr. John Mills) (Austl.), available at <http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LA19931118008>.

¹⁹⁸ See *id.* (containing a comment on the Chamberlain's award).

¹⁹⁹ See NSW, Parliamentary Debates, Legislative Assembly, 20 Nov. 1993 (Mr. John Mills) (Austl.), available at <http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LA19930520005>.

and negates any perceived personal bias in considering the case. Deferring judgments to higher ranked or more experienced authorities also introduces a certain sense of finality in the decision. Rather than allow an appeal, the state makes it clear that the decision has been vetted and is sound.

B. Award as Gift to Ease Transition

Ex gratia payments may serve as a token or “gift” to assist the exoneree’s transition from prison back into the community, without providing compensation for the harms and injury incurred as a result of the wrongful conviction. For example, in reference to Harry Rendell’s award, the Attorney General relayed this sentiment by stating that the AUD 100,000 ex gratia payment for the eight years he served in prison was “to assist his rehabilitation back to society.”²⁰⁰ Andrew Mallard received an interim compensation payment of AUD 200,000 “to give him a helping hand to start afresh”²⁰¹ and was later offered AUD 3.25 million ex gratia payment to which the Deputy Premier said could be considered a “[gift] without any strings attached.”²⁰² In these instances, the state acknowledges that there are detrimental consequences to incarceration and wrongful conviction and that an award of compensation is needed. Both Rendell and Mallard spoke openly with the media about the challenges they faced in prison and after release.²⁰³ Rendell was homeless within three years after his release and Mallard suffered from post traumatic stress disorder brought on by the wrongful conviction and eventually left Australia because of the stigma and notoriety that persisted after his exoneration.²⁰⁴

²⁰⁰ See *id.* (quoting Mr. John Mills).

²⁰¹ See Ministerial Media Statement, Gov’t of W. Austl., Andrew Mallard Granted Interim Ex Gratia Payment (Nov. 22, 2006), available at <http://www.mediastatements.wa.gov.au/Pages/default.aspx?ItemId=124308&page=75>.

²⁰² See *Andrew Mallard Accepts \$3.25M for Wrongful Jailings*, THE AUSTRALIAN, May 25, 2009, <http://www.theaustralian.com.au/news/breaking-news/andrew-mallard-accepts-325m-for-wrongful-jailing/story-fn3dxity-1225715815671>.

²⁰³ See, e.g., Chris Thomson, *Mallard Sentenced to Life Without Love*, WA TODAY (Austl.), Oct. 20, 2008, <http://www.watoday.com.au/wa-news/mallard-sentenced-to-life-without-love-20081018-53le.html> (discussing Mallard’s difficulties in sustaining meaningful relationships after his wrongful conviction); see also *Andrew Mallard Still Abused Over Murder of Pamela Lawrence*, PERTH NOW (Austl.), Sept. 27, 2010, <http://www.perthnow.com.au/news/western-australia/andrew-mallard-still-abused-over-murder-of-pamela-lawrence/story-e6frg143-1225930071492> (featuring an interview with Mallard describing the challenges he faces due to his wrongful conviction).

²⁰⁴ See Malcolm Brown, *NSW Considers Compensation Plan for Victims of Legal System*,

C. Award to Express Regret

The idea that ex gratia payments cannot account for the loss and injury experienced for wrongful conviction and incarceration is another sentiment expressed in public statements by state officials to justify ex gratia awards. Darryl Beamish spent fifteen years wrongfully imprisoned and received AUD 420,000 in ex gratia compensation.²⁰⁵ The WA Attorney General explained that the payment was not intended to fully compensate Beamish for the loss he suffered while incarcerated, “but that this payment is intended to express the state’s sincere regret for what occurred and provide him with a measure of comfort and financial security in his retirement.”²⁰⁶ Here, the ex gratia compensation acknowledges the wrongful conviction, without the state having to take responsibility for its role in the matter or without compensating for injury or loss suffered due to the conviction.

D. Award to Correct Mistakes of the State

Perhaps the most often cited justification for compensation is to correct the state’s wrongdoings. In the rejection of a compensation claim filed by Jonathan Manley, acquitted of murder by the Court of Criminal Appeal, the NSW Attorney General stated, “[i]f it is found that the evidence was fabricated or if the prosecution misconducts itself, then [ex gratia] compensation would be paid.”²⁰⁷ Here, a precedent is set that if there is evidence of state misconduct, then an exoneree could expect an ex gratia payment for his claim.

As the WA Attorney General stated in the Mickelbergs’ case, the ex gratia payment of AUD 500,000 each “has been made in consideration of the magnitude of the admitted perjury and the perversion of the course of justice by [a] former detective.”²⁰⁸ Here, the gravity and extent of the state’s misconduct is a determining

SYDNEY MORNING HERALD, June 22, 1994, <http://www.miscarriages.com.au/miscarriages-articles/1994/6/21/nsw-considers-compensation-plan-for-victims-of-legal-system/>; *The Wronged Man Part One*, *supra* note 161; *The Wronged Man Part Two*, *supra* note 163.

²⁰⁵ See *Innocent Man Surprised by Compo Payout*, ABC MID W. & WHEATBELT (Austl.), July 21, 2011, [http://www.abc.net.au/news/stories/2011/06/02/3233676.htm?site=wheatbelt;](http://www.abc.net.au/news/stories/2011/06/02/3233676.htm?site=wheatbelt; Ex Gratia Payment for Wrongly Jailed Man) *Ex Gratia Payment for Wrongly Jailed Man*, *supra* note 119.

²⁰⁶ See Hans Sherrer, *Darryl Beamish Awarded \$451,000 Compensation 50 Years After Wrongful Murder Conviction*, JUST. DENIED (June 6, 2011), <http://justicedenied.org/wordpress/archives/1209>.

²⁰⁷ See Tim Anderson, *Background on Compensation for NSW Victims*, NETWORKED KNOWLEDGE, <http://netk.net.au/Tort/Compo41.asp> (last visited Feb. 17, 2011).

²⁰⁸ See *Mickelbergs to Receive \$1 Million Ex Gratia Payment*, *supra* note 134.

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factor in its ex gratia decision. The occurrence of misconduct itself may not be sufficient to justify compensation or the gravity and extent of the misconduct is considered in determining the amount of compensation. Perhaps, had the perjury or the detective's action been less offensive, the award amount would have been less. Regardless, both Attorney Generals acknowledged the state's role in the wrongful conviction and attempt to rectify the injustice through compensation.

E. Not to Set Precedent and No Legal Obligation

In contrast, after the contamination of DNA samples in Farah Jama's case, Victoria's Attorney General stated, "[t]he government had no legal obligation to compensate Mr[.] Jama, but believed that it was the right thing to do."²⁰⁹ Despite the errors that occurred in the laboratory due to a lack of protocols and the analyst's negligence that directly contributed to Jama's conviction, the Attorney General underscores that ex gratia payments are not compulsory or automatic, rather, they are moral and voluntary decisions.²¹⁰

In awarding John Button's ex gratia payment, the Western Australia Attorney General "argued that the payment will not set a precedent for other compensation pay-outs," as it is likely that other wrongful convictions will be tested.²¹¹ In this interpretation, ex gratia payments should not be seen as setting a precedent and the lack of specific criteria or guidelines makes this possible. In Vincent Narkle's case, the same WA Attorney General stated,

"[e]x-gratia payments are rare and are generally only made when a miscarriage of justice has occurred as the result of the actions of a public officer In this case there is sufficient information available to conclude that the identification of Mr[.] Narkle as an offender was sufficiently flawed and ex-gratia compensation is justified."²¹²

In this way, he first declares that simply awarding an ex gratia payment should not be taken as setting precedent to future cases, and second, he underscores that ex gratia payments are rare and require justification. This suggests that wrongful conviction in itself is not a sufficient reason for compensation and cases must be

²⁰⁹ See Sexton, *supra* note 93.

²¹⁰ See Armbrust, *supra* note 22, at 168; see also Westervelt & Cook, *supra* note 17, at 271–73 (discussing the state's responsibility for victimization for wrongful conviction).

²¹¹ See *Button Payout is A Precedent*, W. AUSTRALIAN, Apr. 14, 2003.

²¹² See *\$63,000 for 18 Months Jail*, *supra* note 135.

considered on an individual basis. He then further qualifies this statement in his explanation of Narkle's award as justified by stating that the police process during the investigation "was sufficiently flawed."²¹³ Again, it is the sentiment that some form of state misconduct is required for compensation and that the magnitude of this misconduct ultimately determines the decision whether or not to award.

F. Rationale for Awards and Salient Factors

Without guidelines for ex gratia payments or a compensation statute in place in Australia, there is the potential for considerable disparity and unpredictability in receiving compensation for wrongful conviction. The rationales provided by state officials to justify ex gratia awards are not guidelines nor do they set a precedent.²¹⁴ When awarded, state officials underscored the voluntary nature and rarity of ex gratia payments and offered them as "gifts" to assist exonerees with rehabilitation and transition into the community.²¹⁵ Payments were also made as expressions of the state's regret for an unfortunate situation, rather than as an apology or reparation for the harm and injury they caused through the wrongful conviction. Even when there is evidence of state misconduct, state officials make it clear that ex gratia payments are not awarded as a legal obligation to compensate for damage or injury caused by the wrongful conviction, but rather as a moral response to a hapless situation.²¹⁶

The patterns found in compensation cases compliment this rationale and help us to better understand the basis on which ex gratia payments are granted. State officials reinforce the importance of new evidence and state misconduct by including these factors as part of their justification statements. However, they did not acknowledge any political or media influence that may have affected their decisions, nor did they appear to scale the size of the award to the term of imprisonment.

²¹³ *See id.*

²¹⁴ Hoel, *supra* note 2, at 2 ("State and territory governments are not obliged to make ex gratia payments in respect of wrongful convictions.").

²¹⁵ *See id.* ("The term [ex gratia] literally means 'out of grace' rather than as a debt of justice.").

²¹⁶ *See id.* (underscoring the voluntary nature of providing ex gratia payments in the event of a wrongful conviction).

VI. RATIONALE FOR DENYING EX GRATIA PAYMENT

In contrast to the reasons state officials provided in successful ex gratia claims, there was little state acknowledgment of the harms caused by wrongful conviction or the state's moral obligation to aid in the exoneree's reentry into the community when ex gratia payments are denied. Rather, rationales that explain denials are focused on: (1) the exoneree's culpability and their worthiness of compensation; (2) the absence of demonstrable state misconduct; (3) the state's lack of legal obligation to redress wrongful conviction through ex gratia payments; and (4) adherence to the lawful process.

A. *Exoneree as Blameworthy or Undeserving*

Whether the exonerees participated in the crime or were in some way culpable is a salient factor identified in the majority of unsuccessful ex gratia applications (five of the eight unsuccessful cases).²¹⁷ State officials use this point to justify their refusal of payment. For example, in Western Australia, Salvatore Fazzari, Carlos Pereiras, and Jose Martinez, were each convicted of murder and sentenced to life imprisonment.²¹⁸ They confessed to assaulting the victim without provocation prior to the victim's death and were not in the vicinity when the victim was seen falling from the footbridge.²¹⁹ Given the inconsistencies of the timing of the events and the lack of evidence as to the cause of the victim's death, the WA Supreme Court found the verdict unsafe and quashed the convictions after each defendant served three years in prison.²²⁰

In their application for ex gratia compensation, the Attorney General rejected their request on the following basis: "their behaviour in misleading police during their investigations, the vicious assault on Phillip Walsham [the victim], and the fact that there was no wrongdoing by any public officers in the way in which the matter was investigated or prosecuted means there is no basis for an ex-gratia payment."²²¹ This reasoning negates the exonerees'

²¹⁷ The five exonerees were: Jeannie Angel, Kevin Ibbs, Salvatore Fazzari, Carlos Pereiras, and Jose Martinez.

²¹⁸ See *Martinez v W. Austl.* [2007] WASCA 143, ¶¶ 1–2 (Austl.).

²¹⁹ *Id.* ¶¶ 7, 83, 89. At trial, the prosecution offered the theory that the defendants left the scene then later returned to throw the victim off the footbridge. See *id.* ¶ 340.

²²⁰ See *id.* ¶¶ 364, 402.

²²¹ *No Compensation for Walsham Four*, SYDNEY MORNING HERALD, Mar. 23, 2008, <http://news.smh.com.au/national/no-compensation-for-walsham-four-20080323-212o.html>.

worthiness for compensation because of their unfavorable actions, regardless of whether the actions themselves resulted in the crime for which they were ultimately exonerated.

B. Lack of State Misconduct

In Kevin Ibbs' case, after his conviction the victim retracted her allegations and confessed that they were contrived in an attempt to remove Ibbs from her home.²²² The WA Attorney General who denied compensation payment stated that "there is no evidence that any state authority or officer acted improperly or did not carry out their duties when initiating this criminal prosecution."²²³ This statement highlights the absence of state misconduct as a reason to deny compensation. In contrast to the successful *ex gratia* applications, here, the wrongful conviction in itself is not considered worthy of compensation. The state absolves its responsibility to redress the consequences of wrongful conviction by requiring demonstrable evidence of its role in the matter for *ex gratia* payment.

C. Non-Exceptional Circumstances

Even when there is an occurrence of police misconduct, there is no guarantee of an *ex gratia* compensation award. For example, Jeanie Angel in WA was convicted of murder and sentenced to life imprisonment.²²⁴ She became the police's primary suspect because she had an altercation with the victim on the day of murder.²²⁵ Although the police had witness affidavits naming other women in the community who were seen with the victim after Angel's altercation, the investigators did not pursue those leads.²²⁶ Angel made allegations that police hit her over the head with a bottle during her interrogation before she signed a written confession.²²⁷ She served two and one half years in prison before one of the named women in the witness affidavit confessed to the murder, which

²²² See Townsend, *supra* note 176; Russell, *supra* note 178, at 22.

²²³ Roger Martin, *Innocent Jailed, but No Payout*, THE AUSTRALIAN, July, 10, 2001, at 6.

²²⁴ See Tony Barrass, *Policeman Gave Women Lift After Murder*, THE AUSTRALIAN, Dec. 7, 2007, <http://www.theaustralian.com.au/news/nation/policeman-gave-women-lift-after-murder/story-e6frg6pf-1111115053163>.

²²⁵ Tony Barrass, *No Cash for Aboriginal Woman Jeanie Angel Wrongly Jailed*, THE AUSTRALIAN, June 3, 2008, <http://www.theaustralian.com.au/news/nation/no-cash-for-woman-wrongly-jailed/story-e6frg6pf-1111116520126>.

²²⁶ See Barrass, *supra* note 224.

²²⁷ See *id.*

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ultimately led to Angel's release and the quashing of her sentence on appeal.²²⁸ In considering Angel's request for compensation, a representative from the WA Attorney General's office clarified that, "[a]n act of grace payment is made only in the most exceptional of circumstances."²²⁹ The alleged police abuse during the interrogation and the police's tunnel vision²³⁰ over the course of the investigation did not justify ex gratia compensation payment nor did it make Angel's circumstances exceptional.

D. Not Unlawful

In Queensland, in denying Pauline Hanson and David Ettridge's ex gratia application for their wrongful convictions of fraud, the Attorney General stated:

[i]t should be understood that [the] result [of quashing Hanson's and Ettridge's convictions] will not mean the process has to this point been unlawful. While the appellants' experience will in that event have been insupportably painful, they will have endured the consequence of adjudication through due process in accordance with what is compendiously termed the rule of law.²³¹

Again, the lack of state misconduct is stressed as a reason to justify denying compensation. Although the state admits that there are harmful consequences of wrongful conviction that are "insupportably painful," it nonetheless argues that it is not the state's role to provide reintegration assistance or reparation to exonerees.²³² With the "out of grace" nature of ex gratia, the state is not obliged to provide compensation to any or all wrongfully convicted individuals, so long as the process of investigation and adjudication was lawful.²³³

E. Comparing Awards and Denials of Ex Gratia Payment

In successful cases, state officials stress the moral obligation to

²²⁸ See Barrass, *supra* note 225.

²²⁹ See Duncan Graham, *Jailed Woman Deserves Pay-Out: Tickner*, SYDNEY MORNING HERALD, July 15, 1993.

²³⁰ See generally DWYER, NEUFELD & SCHECK, *supra* note 129, at *passim* (discussing the causes of wrongful convictions).

²³¹ *R v Hanson* [2003] QCA 488, ¶ 39 (Austl.).

²³² See *id.*; Nicholls, *supra* note 174, at 19.

²³³ See Martin, *supra* note 223.

assist the exonerees to “get back on their feet,” but do not provide compensation to address injuries or damages caused by the wrongful convictions. When applicants are rejected, state officials stress the adherence to lawful processes and that wrongful conviction in itself is not sufficient grounds to grant ex gratia payments.²³⁴ Successful cases often involved the discovery or release of new evidence, or state misconduct that led to the exonerees’ convictions and political or media advocates who campaigned for their innocence. Rejected applications lacked the same extent of political involvement or media attention in their exonerations. Despite the fact that their cases may have had occurrences of state misconduct or new evidence, the majority of the rejected applicants were involved in incidents that led to the crimes. What is clear is that ex gratia payment is the most viable form of compensation for exonerees, although not guaranteed, and results in unpredictable outcomes that may or may not have explicit state justification. There is a need in Australia for a compensation statute, in order to provide transparency and uniformity in the dispensation of payment to wrongfully convicted individuals.

VII. MODEL COMPENSATION LEGISLATION FOR AUSTRALIA

Compensation statutes allow exonerees to file a claim to the state for financial compensation for their wrongful convictions. While these statutes may differ across countries and jurisdictions,²³⁵ they are meant to provide uniform treatment of similarly situated individuals and to do so reliably and swiftly.²³⁶ Not all exonerees are eligible to file a claim; some statutes restrict compensation to only those exonerated through DNA testing²³⁷ or exclude claims if the wrongfully convicted person in some way contributed to his conviction.²³⁸ Therefore, people who falsely confess or plead guilty are often prevented from receiving compensation.²³⁹

²³⁴ See MARTIN, *supra* note 35, at 19.

²³⁵ See *id.* at 14 (discussing common law variations); INNOCENCE PROJECT, *supra* note 35, at 13–16, 21–24 (charting compensation for wrongful convictions worldwide).

²³⁶ See Lonergan, *supra* note 26, at 410 (recommending uniform treatment of the wrongfully incarcerated).

²³⁷ See INNOCENCE PROJECT, *supra* note 35, at 29 (describing the Missouri and Montana compensation statutes).

²³⁸ See *id.* at 27, 31 (highlighting California and Wisconsin as states only compensating the wrongfully incarcerated if they did not contribute to their conviction).

²³⁹ See Lonergan, *supra* note 26, at 416–17 (discussing the response of model statutes to state laws that bar the wrongfully incarcerated from receiving compensation when they plead guilty or confess).

By and large, the majority of compensation statutes provide monetary payments for wrongful conviction and incarceration.²⁴⁰ However, there is no standard formula to calculate this amount.²⁴¹ For example, in the United States, some states allocate compensation based on the number of years wrongfully incarcerated with either a minimum or maximum payment²⁴² or they may place a cap on the total payment available.²⁴³ Few compensation statutes include reimbursement or consideration of additional costs incurred while wrongfully incarcerated, such as lost wages, child support payments, or legal fees incurred by the exoneree over the course of the trial or during the pursuit of exoneration and compensation.²⁴⁴ Far fewer statutes incorporate non-economic consequences of wrongful conviction, such as support services for health care, skills training, education, or housing assistance.²⁴⁵

Australia currently has no existing compensation legislation at the state or federal level for the wrongfully convicted, with exception of the ACT. Building on what other countries have successfully implemented, Australia can create a federal statute that is uniform and uniquely geared to the Australian population and its resources. Based on the known consequences of wrongful conviction, a proposed compensation statute should not be limited to monetary compensation for economic loss; rather, it should attempt to also address non-economic repercussions that are both debilitating and devastating. Within the literature, researchers propose two types of comprehensive compensation models that address economic and non-economic loss which vary in their delivery and access: (1) monetary compensation model and (2) holistic and individualized compensation model.

²⁴⁰ *Id.* at 409.

²⁴¹ See INNOCENCE PROJECT, *supra* note 35, at 10; see also Lonergan, *supra* note 26, at 411 (discussing significant variations in state compensation for the wrongfully convicted).

²⁴² For example, Alabama has a minimum of \$50,000 per year, whereas California has a maximum of \$100 per day, and Missouri has a maximum of \$50 per day. INNOCENCE PROJECT, *supra* note 35, at 27, 29.

²⁴³ For example, Florida has a capped amount of \$2 million for compensation, whereas New Hampshire has a capped payment of \$20,000 for the entirety of the wrongful incarceration, regardless of the time served. *Id.* at 28–29.

²⁴⁴ See Lonergan, *supra* note 26, at 420–21 (recommending a statute that calculates the loss of wages, emotional distress, liberty deprivation, and other “incalculable” losses in compensation for wrongful incarceration statutes).

²⁴⁵ For example, in Vermont, the exoneree is eligible for a maximum of \$60,000 per year incarcerated, ten years of state healthcare, economic damages, reimbursement of legal fees, and other physical and mental health costs incurred after release from prison. INNOCENCE PROJECT, *supra* note 35, at 4, 31.

A. *Comprehensive Monetary Compensation Model*

The Innocence Project, a U.S. organization dedicated to the exoneration of the wrongfully convicted through the use of DNA,²⁴⁶ proposed a 2010 model legislation that addressed compensation claims made by exonerees.²⁴⁷ In general, it is an inclusive monetary compensation payment for wrongful conviction and incarceration.²⁴⁸ This includes: (1) a minimum payment of \$50,000 per year incarcerated adjusted for inflation and lost wages; (2) payment of all legal fees incurred due to a wrongful conviction from trial, appeal, or to file compensation claim; (3) physical and mental health coverage after release; (4) vocation training and tuition reimbursement; (5) child support incurred while incarcerated; and (6) any costs related to the exonerees immediate release and reintegration into the community (for example, housing and transportation costs).²⁴⁹ In addition, the statute stresses the need for the terms of the compensation in writing and that the state should expunge the exoneree's conviction automatically.²⁵⁰ Although the proposed model strictly delivers monetary compensation, it is more comprehensive and inclusive of support services than any existing compensation legislation²⁵¹ and addresses the majority of the known complex effects that afflict post-incarcerated individuals.²⁵²

B. *Holistic and Individualized Compensation Models*

Armbrust and Lonergan offer two alternative compensation statute models that both address the same consequences of wrongful conviction, but differ in their means of compensation delivery. Armbrust argues for a holistic approach to compensation that includes a monetary award for known and predicted losses, as

²⁴⁶ See Marvin Zalman, *An Integrated Justice Model of Wrongful Convictions*, 74 ALB. L. REV. 1465, 1499 (2010/2011); see also INNOCENCE PROJECT, *supra* note 35, at 3–5 (describing the Innocence Project's work).

²⁴⁷ Eligibility requires that a claim must be filed within three years of exoneration and that the exoneree will not have contributed to his own conviction, with the exception of pleading guilty or being coerced into a false confession that led to their wrongful conviction. INNOCENCE PROJECT, *supra* note 35, at app. B.

²⁴⁸ *Id.* at app. B 3–5; see also Lopez, *supra* note 41, at 711–16 (stating the model is strictly monetary with caps on non-economic damages, which requires giving money for medical care and counseling pro-actively as incorporated into final compensation payout).

²⁴⁹ See INNOCENCE PROJECT, *supra* note 35, at app. B at 3–5.

²⁵⁰ See *id.* at app. B at 10–11 (detailing the obstacle for exonerees without expungement).

²⁵¹ See *id.* at 27–31.

²⁵² See *id.* at 7–11.

well as full access to the services available to paroled offenders that are specifically designed to assist with their transition into society.²⁵³ For example, in this model, exonerees would be eligible to participate in employment placement or vocational training programs and services run by the state, reduced or free tuition at particular state colleges and universities, and access to medical and health services to address any psychological or emotional problems as a result of wrongful conviction and incarceration.²⁵⁴

Lonergan expands on Armbrust's holistic model of monetary compensation and the provision of social services, by including a personalized compensation delivery system and specialized services based on the exoneree's needs.²⁵⁵ For example, rather than paying compensation in a total lump sum, payment can be made in monthly installments with the advice of a financial consultant.²⁵⁶ Education assistance can take the form of tuition deductions and coverage as well as providing state assistance in completing high school diplomas to make exonerees eligible for college and university education.²⁵⁷ In determining what training and employment assistance is necessary, exonerees would be given access to the same services in the community that are available to parolees.²⁵⁸

In an individualized reentry plan model, services are tailored to the exoneree's needs based on the expertise of key service providers, legal players, and medical health providers, with input from the exoneree and a designated caseworker.²⁵⁹ Services are identified in the community in planning stages, as are the details of the start and end dates, expected frequency and duration of services, and specific goals, benchmarks and a proposed timeline of completion.²⁶⁰ The caseworker would review and reassess the reentry plan yearly, and reevaluate the exoneree for continuing eligibility, to ensure that the exoneree is progressing toward successful reintegration and receiving the necessary services.²⁶¹

²⁵³ See Armbrust, *supra* note 22, at 171.

²⁵⁴ See *id.* at 176–77, 179.

²⁵⁵ See Lonergan, *supra* note 26, at 452 (advocating that the government “has a profound moral obligation” to provide such compensation).

²⁵⁶ See *id.* at 426–28 (addressing the issue of exonerees spending the total compensation amount quickly and avoiding tax penalties on large amounts).

²⁵⁷ See *id.* at 432–33 (exemplifying education assistance).

²⁵⁸ See *id.* at 435–36 (exemplifying work assistance).

²⁵⁹ *Id.* at 440–46.

²⁶⁰ *Id.* at 444–45.

²⁶¹ *Id.* at 445–46.

Loneragan refocuses the issue past the notion of compensating the injustice of wrongful conviction and targets the exonerees needs post-exoneration that ultimately affect their successful transitions and quality of life.²⁶² The services outlined in Lonergan's model cannot account for all specific losses and future needs of each individual; however, it accommodates for long-term changes that occur post-exoneration and extends the state's obligation to make reparation to exonerees beyond the courtroom doors.

C. Proposed Australian Compensation Model

The proposed model relies on the mobilization and collaboration of government and community organizations within the exoneree's local community. Australia's criminal justice system currently has such an infrastructure in place with its problem-solving courts that integrate treatment services with judicial case processing for family violence, drug offences, and for offenders with mental health issues.²⁶³ For example, these drug courts vary the treatment and services based on the nature of client's needs and the availability of resources.²⁶⁴ Similar to Lonergan's individualized reentry plan, this is determined by a team of professionals that work with case officers to develop effective and monitored treatment plans.²⁶⁵ With these services and practices in place, Australia may be in the position to implement a compensation statute model that uses existing community and government agencies targeting the specific reentry needs of each exoneree.

With few known exonerees in Australia,²⁶⁶ compensation and individualized reentry plans would not necessarily burden the existing services available to ex-offenders and parolees.²⁶⁷ An individualized compensation model in Australia would also be able to address the needs of specialized groups, such as Indigenous exonerees, since it currently offers a tailored program for the reentry of Indigenous offenders with goals set out by the individuals and services within the community.²⁶⁸ The re-evaluation of the

²⁶² *Id.* at 452.

²⁶³ See generally Arie Freiberg, *Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism?*, 20 LAW CONTEXT 6, 6 (2002) (Austl.) (containing a history and overview of the emergence of specialized courts in Australia).

²⁶⁴ *Id.* at 14.

²⁶⁵ See *id.*

²⁶⁶ See *infra* Table 1.

²⁶⁷ See Armbrust, *supra* note 22, at 177.

²⁶⁸ Indigenous people represented twenty-six percent of the total full-time prison population in 2011 and two-percent of the total Australian population. See AUSTL. BUREAU

suitability of the re-entry plan continues a long-term relationship between the exoneree and the state, safeguarding that state services are being distributed and used effectively. Australia could also incorporate a process or service to automatically notify an exoneree of his or her eligibility for compensation immediately after exoneration and provide assistance with the claim process.²⁶⁹ Such a system would ensure equal opportunities for compensation for all exonerees, regardless of their financial resources or ability to secure legal services.

VIII. CONCLUSION

The consequences and lasting repercussions of wrongful conviction and incarceration are complex, individualized, and extensive, affecting various physical, psychological, and social aspects of life. Exonerated individuals need assistance once released from prison to reintegrate back into society successfully and may seek compensation to facilitate this transition or as restitution for the damages directly caused by their imprisonment. In Australia, there are few compensation remedies available to exonerees since Australia lacks a statute to guide the dispensation of compensation for wrongful conviction. Ex gratia payments are the most tenable option for Australian exonerees, however, given their voluntary nature and lack of transparency in the decision making process, the decisions are often criticized as arbitrary and

OF STAT., CORRECTIVE SERVICES 5–6 (2011), *available at* [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/E9DDB05C68AD2185CA257951000F74A4/\\$File/45120_sep%202011.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/E9DDB05C68AD2185CA257951000F74A4/$File/45120_sep%202011.pdf). They are fourteen times more likely than non-Indigenous people to be incarcerated and their imprisonment rate was 1,868 per 100,000 Indigenous adults, compared to 130 non-Indigenous prisoners per 100,000 non-Indigenous adults. *See* AUSTL. BUREAU OF STAT., PRISONERS IN AUSTRALIA 49 (2011), *available at* [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/7B05CD44A0E2FC8ACA25795F000DBD0F/\\$File/45170_2011.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/7B05CD44A0E2FC8ACA25795F000DBD0F/$File/45170_2011.pdf). In addition to the detrimental effects of incarceration experienced by the general prison population, Indigenous individuals are at increased risk of death during custody, are more likely to enter prison with a blood-borne virus such as Hepatitis C, and are more often convicted of offenses that link substance use with mental illness when compared to non-Indigenous prisoners. *See* AUSTL. BUREAU OF STAT., THE HEALTH AND WELFARE OF AUSTRALIA'S ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES, 2005 (2005), *available at* <http://www.abs.gov.au/ausstats/abs@.nsf/0/6910DD97E582D744CA25709900031B61?opendocument>. *See generally* Elena Marchetti & Kathleen Daly, *Indigenous Courts and Justice Practices in Australia*, TRENDS & ISSUES IN CRIME & CRIM. JUST. (Austl.), May 2004 (containing a discussion of Indigenous courts in Australia); Elena Marchetti & Kathleen Daly, *Indigenous Sentencing Courts: Toward a Theoretical and Jurisprudential Model*, 29 SYDNEY L. REV. 415 (2007) (discussing Indigenous sentencing courts and their function in the development of Australian jurisprudence).

²⁶⁹ *See, e.g.*, Armbrust, *supra* note 22, at 172.

disparate.

This article sought to elucidate potential salient factors that may impact whether an *ex gratia* payment is awarded or denied by reviewing the cases, their outcomes, and the rationales provided by state officials. Wrongful conviction itself and the length of time the innocent person spent in prison did not appear to have any bearing on the award or the size of the payment. The presence of multiple salient factors, such as the discovery of new evidence, state misconduct, political influence, and media coverage appeared to increase the likelihood of an award; however, if the exoneree contributed in some way to the crime or the events surrounding the crime, the odds of being granted an award are lowered.

The rationale state officials used to justify their decisions on *ex gratia* payments emphasized the voluntary nature of the award and the lack of legal obligation to provide any compensation for wrongful conviction. When granted, they awarded payments to assist with reintegration efforts; as expressions of regret for the occurrence of the wrongful conviction; or to correct the state's misconduct that directly led to the conviction. In the reasons given to those exonerees whose applications to *ex gratia* were rejected, state officials emphasized the culpability of the exoneree in the conviction or crime and the absence of state misconduct or exceptional circumstances to justify compensation. In these instances, the wrongful conviction was not sufficient reason to warrant payment, especially if the adjudication process was deemed lawful.

There is a pattern of awards and denials in the data that highlights specific salient features and some of these factors may be reinforced by the state's articulated reasons for *ex gratia* decisions. However, with the lack of guidelines, precedent, transparency, or required disclosure to explain how and why *ex gratia* payments are awarded, there is little exonerees can do to determine their chances of becoming a successful applicant and even less information available to them to predict the size of the award. As such, adopting a comprehensive compensation statute in Australia would not only provide some immediate assistance to these individuals as they undergo reintegration, but it would also help address issues that exonerees face in becoming successful and productive members of society. Finally, by Australia adopting a comprehensive statute, the exoneree would have the satisfaction of having the state acknowledge its role in contributing to the conviction and its willingness to uphold its moral responsibility to redress the consequences of wrongful conviction beyond its legal obligation.

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TABLE 1: INDIVIDUALS EXONERATED BETWEEN 1956 AND 2011 IN AUSTRALIA AND COMPENSATION STATUS

Name of Exoneree	State	Crime(s)	Year Convicted/ Exonerated	Sentence/ Time Spent in Prison	Form(s) of Compensation/ Compensation (AUD)
ALISTER, Paul	NSW	Conspiracy and attempted murder	1979/1985 (pardoned)	16 years/ 7 years	Ex-gratia/ 100,000
ANDERSON, Tim	NSW	Conspiracy and attempted murder	1979/1985 (pardoned)	16 years/ 7 years	Ex-gratia/ 100,000
ANGEL, Jeannie (Indigenous)	WA	Murder	1989/1991	Life imprisonment/ 2.5 years	Ex-gratia/ Denied
BEAMISH, Darryl	WA	Murder	1961/2005	Capital punishment/ 15 years	Ex-gratia/ 425,000
BUTTON, Frank	WA	Rape	2000/2001	7 years/ 10 months	Unknown/ N/A
BUTTON, John	WA	Manslaughter	1963/2002	10 years/ 5 years	Ex-gratia/ 460,000 (including legal expenses)
CATT, Roseanne	NSW	Malicious wounding and conspiracy to commit murder*	1991/2005	12 years and 3 months/ 10 years	Ongoing/ N/A
CARROLL, Raymond John	QLD	Murder	1985/ -	- / -	Unknown/ N/A
CHAMBERLAIN, Lindy	NT	Murder	1982/1988	Life imprisonment with hard labour/ 4 years	Ex-gratia/ 1.3 million (including 400,000 to spouse), 396,000 (legal costs), 19,000 (family car)
CHRISTIE, Rory Kirk	WA	Murder	2003/2005	10 years/ 3 years	Unknown/ N/A
CONDREN, Kelvin (Indigenous)	WA	Murder	1984/1990	Life imprisonment/ 7 years	Ex-gratia/ 400,000
D'ORTA-EKENAIKE, Ryan	NSW	Rape	1996/1997	3 years/ 7 months	Civil suit/ Denied
DUNN, Ross	NSW	Conspiracy and attempted murder	1979/1985 (pardoned)	16 years/ 7 years	Ex-gratia/ 100,000
EASTERDAY, Clark	WA	Fraud	1993/2003	3 years/ 1.5 years	Unknown/ N/A
ETTRIDGE, David	QLD	Election fraud	2003/2003	3 years/ 2.5 months	Ex-gratia/ Denied

* In Roseanne Catt's case, the NSW Court of Appeals upheld her convictions for assault and malicious wounding but quashed the other convictions.

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FINGLETON, Diane	QLD	Threatening behaviour	2003/2005	1 year/ 6 months	Ex-gratia and Civil suit/475,000 (ex-gratia), 300,000 (civil damages)
FOSTER, Steven	NSW	Arson	1990/ -	- / -	Unknown/ N/A
GEESENG, Raymond John	SA	Abduction and murder	1983/1985	Life imprisonment/ 15 years	Unknown/ N/A
HANSON, Pauline	QLD	Election Fraud	2003/2003	3 years/ 2.5 months	Ex-gratia/ Denied
HAYMAN, Suezanne	NSW	Conspiracy to import heroin	1987/1988	- / 3.5 years	Civil Suit/ Confidential
HOSER, Raymond	VIC	Assault, simple assault, and theft	1988/1990	Fine and 1 month and 14 days/ -	Unknown/ N/A
HYTCH, Robert	QLD	Murder	1999/2008	- / 9 years	Unknown/ N/A
IBBS, Kevin	WA	Rape	1987/2001	4 years/ 6 months	Ex-gratia/ Denied
IRELAND, Dean	WA	Fraud	1993/2003	3 years/ 1.5 years	Unknown/ N/A
IRELAND, Len	WA	Fraud	1993/2003	3 years/ 1.5 years	Unknown/ N/A
IRVING, Terry (Indigenous)	WA	Armed robbery	1993/1998	8 years/ 4.5 years	Ongoing/ N/A
JAMA, Farah Adulkadir	VIC	Rape	2006/2009	6 years/ 15 months	Ex-gratia/ 525,000
JENSON, Douglas	VIC	Murder	2004/2011	16 years/ 7 years	Unknown/ N/A
KINA, Robyn Bella (Indigenous)	QLD	Murder	1988/1993	Life Imprisonment with hard labour/5 years	Unknown/ N/A
KLAMO, Tomas	VIC	Manslaughter	2007/2008	5 years/ 1 year	Unknown/ N/A
LANDINI, Henry	NSW	Drug possession	1983/2001	15 years/ 5 years	Civil suit/ 5,000 (legal expenses), 35,000 (injury to person/ restriction of liberty), 3,000 (aggravated damages), 160,000 (exemplary damages)
MALLARD, Andrew	WA	Murder	1995/2006	Life imprisonment/ 11 years	Ex-gratia/3.25 million (ex-gratia), 200,000 (interim payment), 132,000 (legal expenses)
MANLEY, Jonathan	NSW	Murder	1993/1994	12.5 years/ 1 year	Ex-gratia/ Denied
MARTENS, Fredrick Arthur	QLD	Rape	2006/2009	5.5 years/ 2.75 years	Civil Suit/ Denied
MARTINEZ, Jose	WA	Murder	2006/2007	Life imprisonment/ 3 years	Ex-gratia/ Denied

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MCCLEOD-LINDSAY, Alexander	NSW	Attempted murder	1965/1990	18 years/ 9 years	Ex-gratia/ 700,000
MICKELBERG, Peter	WA	Theft	1982/2004	14 years/ 6 years	Ex-gratia/ 500,000
MICKELBERG, Ray	WA	Theft	1982/2004	20 years/ 8 years	Ex-gratia/ 500,000
MRAZ, Gigula	NSW	Murder and rape	1955/1956	- / -	Unknown/ N/A
NARKLE, Vincent (Indigenous)	WA	Deprivation of liberty and sexual assault	1993/2006	5 years/ 19 months	Ex-gratia/ 163,000
PEREIRAS, Carlos	WA	Murder	1993/2003	Life imprisonment/ 3 years	Ex-gratia/ Denied
PERRY, Emily	SA	Attempted murder	1981/1982	15 years/ 1 year	Unknown/ N/A
PODUSKA, Paul Jacob	VIC	Driving under the influence causing death	2007/2008	35 years/ 9 months (approx.)	Unknown/ N/A
RENDELL, Douglas Harry	NSW	Murder	1980/1989 (pardoned), 1997 (acquitted)	Life imprisonment/ 8 years	Ex-gratia Specialized Bill**/ 100,000
ROSS, Colin Campbell	VIC	Murder and rape	1922/2008	Executed/ 115 days	N/A/ N/A
SCHAFFER, Colleen	QLD	Murder	1987/ -	- / -	Unknown/ N/A
SIEGFRIED POHL, Johann Ernst	NSW	Murder	1973/1992	Life imprisonment/ 10 years	Ex-gratia/ 200,000
SLOAN, Robert	VIC	Drug trafficking	2001/2001	4 years and 4 months/ 5 months	Civil suit (settled out of court)/ 385,000
SPLATT, Edward	SA	Murder	1978/1984	Life imprisonment/ 6.5 years	Ex-gratia/ 270,000
STAFFORD, Graham	QLD	Murder	1992/2009	Life imprisonment/ 15 years	Unknown/ N/A
STEGMAN, Geoffrey Robert	QLD	Aggravated assault causing GBH	1993/1993	- / -	Unknown/ N/A
STEVENS, Laurie	QLD	Murder	2003/2006	- / 3 years (approx.)	Unknown/ N/A
SZITOVSKY, Leslie Christopher	VIC	Murder	2007/2009	18 years/ 2 years	Unknown/ N/A
TAHCHE, Robert	VIC	Rape	1991/1995	16 years/ 3 years	Civil suit/ Denied
THAIDAY, Patrick Dominic	QLD	Rape	2008/2009	8 years/ 5 months (approx.)	Unknown/ N/A
THOMAS, Joseph Terrence	VIC	Terrorism	2006/2008	5 years/10 months (approx.)	Unknown/ N/A

** Henry Rendell lodged a specialized bill to the Parliament of New South Wales petitioning that a judge, rather than a political state official such as the Attorney General, assess compensation payments.

FIGURE 1: BREAKDOWN OF AUSTRALIAN CASES REVIEWED IN SAMPLE AND COMPENSATION OUTCOMES

