

## **'OUT OF GRACE': INEQUITY IN POST-EXONERATION REMEDIES FOR WRONGFUL CONVICTION**

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### **I INTRODUCTION**

On 26 June 1990, Kelvin Condren was exonerated for the wilful murder of his live-in partner, Patricia Rose Carlton, after having served seven years in prison for a crime he did not commit.<sup>1</sup> The main evidence against him was the confession he gave when under police custody for drunk and disorderly behaviour. Condren's conviction was ultimately quashed after the Attorney-General of Queensland had the Queensland Court of Criminal Appeal consider fresh evidence in the case suggesting that the victim was seen alive while Condren was in police custody.<sup>2</sup> On 6 February 1995, the Queensland government offered him A\$400 000 as an ex gratia or 'out of grace' payment as compensation for his wrongful conviction.<sup>3</sup> One year after Condren's exoneration, on 10 August 1991 in Western Australia, Jeanie Angel was exonerated for the wilful murder of her neighbour after having served two years in prison for a crime that she did not commit.<sup>4</sup> Angel allegedly made a confession to police; however, she claimed that during the interrogation she was hit over the

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1 For a summary of the case, see Bernie Matthews, 'Australian Miscarriages of Justice' (2004) 10(1) *National Legal Eagle* 14.

2 Ibid 16.

3 See Greta Bird, Gary Martin and Jennifer Nielson, *Majah: Indigenous Peoples and the Law* (Federation Press, 1996).

4 See Tony Barrass, 'Policeman Gave Women Lift After Murder', *The Australian* (Sydney), 7 December 2007, 2.

head with a bottle before signing the written confession.<sup>5</sup> Her conviction was quashed as unsafe and unsatisfactory after two other women who had been drinking with the deceased admitted that they hit her several times over the head with a stick and later hid the body in the bushes.<sup>6</sup> In contrast to Kelvin Condren's case, Jeanie Angel did not receive compensation for her wrongful conviction; instead the Attorney-General of Western Australia rejected her request for an ex gratia payment saying that '[a]n act of grace [ex gratia] payment is made only in the most exceptional circumstances, and this is not such a case.'<sup>7</sup>

These examples raise questions about the application and adequacy of ex gratia payments as a means of compensating for the loss, harm or injury that wrongfully convicted persons endure due to their convictions and subsequent imprisonment.<sup>8</sup> These payments are not awarded to all who have been pardoned or have had their convictions quashed, since there is no state or federal indemnity legislation in place that explicitly address the needs of those wrongfully convicted in Australia.<sup>9</sup> In the absence of indemnity legislation for wrongful conviction, exonerees may seek recourse through specialised bills to compensate individuals, civil litigation against liable parties, or ex gratia 'out of grace' payments.<sup>10</sup> Due to the difficulty and rarity of pursuing compensation through parliament and the courts,<sup>11</sup> ex gratia is the most commonly utilised and viable option for individuals who seek redress for wrongful conviction and incarceration.<sup>12</sup>

Over the past century, legal scholars have argued for the establishment of compensation statutes for wrongful conviction in common law countries around

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5 Ibid.

6 See Tony Barrass, 'No Cash for Aboriginal Woman Jeanie Angel Wrongly Jailed', *The Australian* (online), 3 June 2008 <<http://www.theaustralian.com.au/news/nation/no-cash-for-woman-wrongly-jailed/story-e6frg6pf-111116520126>>.

7 Duncan Graham, 'Jailed Woman Deserves Pay-Out: Tickner', *Sydney Morning Herald*, 15 July 1993, 3.

8 See Christine E Sheehy, 'Compensation for Wrongful Conviction in New Zealand' (1999) 8 *Auckland University Law Review* 977, 983–4.

9 With the exception of the ACT, discussed in Part II below. See Adrian Hoel, 'Compensation for Wrongful Conviction' (Trends and Issues in Crime and Criminal Justice Research Paper No 356, Australian Institute of Criminology, May 2008).

10 See *ibid*; Rachel Dioso-Villa, 'Without Legal Obligation: Compensating the Wrongfully Convicted in Australia' (2012) 75 *Albany Law Review* 1329, 1334–8.

11 See Part II below.

12 See Dioso-Villa, above n 10 (analysing successful and unsuccessful ex gratia petitions for wrongful conviction in Australia and identifying salient factors that can influence the decision-making process and the allocation of payments).

the world with some success;<sup>13</sup> however, there are limited studies that argue for such laws within the Australian context or that have evaluated the adequacy of existing remedies to aid exonerees in their successful reintegration into society.<sup>14</sup> This article attempts to fill this gap by examining the application of ex gratia payments as compensation for wrongful conviction and asking the questions: (1) Are ex gratia payments a suitable remedy for exonerees? (2) Does the state have an obligation to exonerees to provide redress for the injury or loss they experience from their imprisonment? (3) If ex gratia is not an adequate measure, why might this be the case? (4) What may Australia do to address the needs of the wrongfully convicted post-exoneration? Because the definition of a 'wrongful conviction' may encompass many situations, it is used in this article to refer to cases where individuals have been sentenced to a term of imprisonment and have had their sentences quashed on appeal; were acquitted at retrial; had their verdicts considered unsafe and their convictions vacated; or have received a pardon.

The article begins by outlining compensation remedies available to exonerees in Australia with a focus on ex gratia payments. I draw on my earlier work that examined the circumstances in which ex gratia payments were awarded and denied for wrongful conviction<sup>15</sup> and provide a summary of these findings to identify key criticisms about the existing structure and application of ex gratia payments as a principal remedy for wrongful conviction in Australia.<sup>16</sup> I then consider the role of the state in providing compensation for errors of justice as a moral and legal duty and question whether discretionary acts create unintended equity issues for exonerees who seek compensation. The article concludes with recommendations to improve the situation for the wrongfully convicted in Australia who wish to seek redress, namely the creation of comprehensive compensation legislation for wrongful conviction, extended post-appeal review, and the establishment of a review commission to investigate potential wrongful conviction cases.

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13 See Edwin M Borchard, 'European Systems of State Indemnity for Errors of Criminal Justice' (1913) 3 *Journal of the American Institute of Criminal Law and Criminology* 684; Edwin M Borchard, 'State Indemnity for Errors of Criminal Justice' (1941) 21 *Boston University Law Review* 201; Adele Bernhard, 'When Justice Fails: Indemnification for Unjust Conviction' (1999) 6 *University of Chicago Law School Roundtable* 73; Jennifer L Chunias and Yael D Aufgang, 'Beyond Monetary Compensation: The Need for Comprehensive Services for the Wrongfully Convicted' (2008) 28 *Boston College Third World Law Journal* 105; Jessica R Lonergan, 'Protecting the Innocent: A Model for Comprehensive, Individualized Compensation of the Exonerated' (2008) 11 *Legislation and Public Policy* 405; Shawn Armbrust, 'When Money Isn't Enough: The Case for Holistic Compensation of the Wrongfully Convicted' (2004) 41 *American Criminal Law Review* 157.

14 But see Hoel, 'Compensation for Wrongful Conviction', above n 9; Dioso-Villa, above n 10.

15 Dioso-Villa, above n 10, 1369–71. Table 1, below, lists individuals in Australia exonerated between 1956 and 2011.

16 Despite the fact that ex gratia payments are discretionary by nature, in this article, I elect to frame ex gratia payments as a 'remedy' for wrongful conviction and imprisonment, consistent with research discussing the options available to exonerees to seek redress for harm or loss experienced as a result of the wrongful conviction: see Sheehy, above n 8; Lonergan, above n 13.

## II COMPENSATION FOR WRONGFUL CONVICTION IN AUSTRALIA

Currently, wrongfully convicted individuals do not automatically receive compensation in Australia. In most Australian jurisdictions other than the Australian Capital Territory,<sup>17</sup> these individuals do not have a common law or statutory right to compensation for their wrongful conviction or imprisonment.<sup>18</sup> Australia is a signatory to the *ICCPR*<sup>19</sup> that outlines compensation for the wrongfully convicted. However, Australia has yet to incorporate this as a right into domestic law<sup>20</sup> and maintains the position that this provision gives rise to administrative procedures, rather than legal provisions.<sup>21</sup> Article 14(6) of the *ICCPR* states:

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has 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.<sup>22</sup>

This compensation scheme has had varying degrees of success in its application.<sup>23</sup> One criticism is that ‘miscarriage of justice’ in this context has been narrowly interpreted to include only those who have been exonerated as factually innocent, rather than innocent individuals who have had their convictions quashed because the verdict was considered unsafe on appeal.<sup>24</sup> By limiting applicants’ eligibility to the factually innocent, this understanding of a miscarriage of justice may miss its intended purpose, which is to provide a legislated entitlement to compensation for individuals who have been convicted

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17 The ACT has incorporated the *International Covenant on Civil and Political Rights* (‘*ICCPR*’) art 14(6) in the *Human Rights Act 2004* (ACT) s 23. The section for compensation for wrongful conviction applies if:

(a) anyone is convicted by a final decision of a criminal offense; 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. ... If this section applies, the person has the right to be compensated according to law [unless] it is proved that the nondisclosure of the unknown fact in time is completely or partly the person’s own doing.

18 See Hoel, ‘Compensation for Wrongful Conviction’, above n 9, 2–3.

19 Opened for signature 16 December 1966, 999 UNTS 1057 (entered into force 23 March 1976).

20 Dioso-Villa, above n 10, 1336.

21 See Hoel, ‘Compensation for Wrongful Conviction’, above n 9, 2.

22 *ICCPR* art 14(6).

23 See Hannah Quirk and Marny Requa, ‘The Supreme Court on Compensation for Miscarriages of Justice: Is It Better That Ten Innocents Are Denied Compensation Than One Guilty Person Receives It?’ (2012) 75 *Modern Law Review* 387. They demonstrate that in the United Kingdom, there has been a decline in the number of applications received and approved for compensation for miscarriages after the abolition of the ex gratia scheme in 2006 and the increased subsequent reliance on the *Criminal Justice Act 1988* (UK) c 33, s 133, that is based on the *ICCPR* art 14(6).

24 See Stephanie Roberts, ‘“Unsafe” Convictions: Defining and Compensating Miscarriages of Justice’ (2003) 66 *Modern Law Review* 441; Quirk and Requa, above n 23.

and imprisoned for crimes they did not commit.<sup>25</sup> Therefore, those innocent individuals who have received pardons or who have had their convictions quashed, reversed, vacated or dismissed, must seek alternative avenues of redress such as seeking compensation through ex gratia schemes.

In the absence of federal, state or territory compensation legislation, a state may award 'out of grace' payments as ex gratia compensation without explanation and without setting precedent.<sup>26</sup> These payments are generally made and calculated according to the actual damage or loss incurred from the act(s) or event(s) in question.<sup>27</sup> States have awarded ex gratia payments in the past to classes of victims such as wrongfully convicted individuals as well as victims of natural disasters,<sup>28</sup> although each case is considered independently on its own merit.<sup>29</sup> The state has no legal obligation to award payments and the decision is highly discretionary<sup>30</sup> and often rests in the hands of an executive power, such as an attorney-general, who may or may not reach a decision in consultation with others.<sup>31</sup>

Currently, there are no guidelines to assist governors or attorneys-general in making decisions to award or deny ex gratia payments for wrongful conviction.<sup>32</sup> There are, in some jurisdictions, principles that these executives may consider when administering ex gratia payments to persons who have 'suffered a financial loss or other detriment directly as a result of the workings of [g]overnment',<sup>33</sup> which would encompass those who seek compensation for wrongful conviction. Two such principles are to have applicants provide evidence of a clear and verifiable loss and provide evidence of fault or error by a state actor that is

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25 See Quirk and Requa, above n 23, 390. As they discuss, another equally valid intended purpose of the legislation is not to compensate individuals who have been imprisoned for crimes they did commit. The difficulty with including quashed sentences as a miscarriage of justice is that a quashed sentence does not necessarily mean that the person did not commit the crime.

26 See Hoel, 'Compensation for Wrongful Conviction', above n 9, 2–3.

27 See Sheehy, above n 8, 979.

28 The Australian Government Disaster Recovery Payment Program was available to individuals adversely affected by the Queensland flooding from November 2010 to January 2011. Ex gratia payments were also available for New Zealanders affected by the flooding: Australian Government Disaster Assist, *Queensland Floods (November 2010 - February 2011): Australian Government Expenditure for Queensland Floods* (4 September 2013) <[http://www.disasterassist.gov.au/Currentdisasters/Pages/QLD/Queenslandfloods\(November2010February2011\).aspx#gratia](http://www.disasterassist.gov.au/Currentdisasters/Pages/QLD/Queenslandfloods(November2010February2011).aspx#gratia)>.

29 Each application is considered on its merits and decisions do not create precedents: see Department of Finance and Deregulation, 'Review of Government Compensation Payments' (Submission No 92 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, 11 June 2010) 5.

30 See Sheehy, above n 8, 979.

31 See John McMillan, 'Executive Schemes' (Report No 12 of 2009, Commonwealth Ombudsman, August 2009) 7.

32 See Hoel, 'Compensation for Wrongful Conviction', above n 9, 3 (discussing guidelines as they may apply to ex gratia payments in Australia). See also Adrian Hoel, 'The Imperfect Crime: Dealing with Wrongful Conviction' (2008) 33 *Alternative Law Journal* 252.

33 Justice Legal, *Ex Gratia Payments* (19 August 2012) New South Wales Lawlink <[http://www.lsb.lawlink.nsw.gov.au/lsb/legal\\_services\\_appl\\_costs/legal\\_services\\_exgratia\\_pay.html](http://www.lsb.lawlink.nsw.gov.au/lsb/legal_services_appl_costs/legal_services_exgratia_pay.html)>.

directly responsible for the loss.<sup>34</sup> However, these principles are not formal, nor mandatory criteria to receive payments, since each case is considered on its own merits and payments are not guaranteed even when the applicant addresses all principles.<sup>35</sup>

Another option for exonerees is to raise a civil suit against state actors who were instrumental in the wrongful conviction during the investigation or at trial.<sup>36</sup> In cases with evidence of gross state misconduct, such as a coerced confession elicited during a police interrogation, fraudulent forensic evidence, or prosecutorial misfeasance, an exoneree may pursue civil litigation against individual police officers, a laboratory, or the prosecutors responsible for their false imprisonment. Successful tortious claims are rare,<sup>37</sup> given the difficulty in demonstrating that the public officer acted with malice against the exoneree and that this resulted in his or her wrongful conviction and subsequent suffering.<sup>38</sup> This is especially the case when a person may be wrongfully convicted without malice or ill intent.<sup>39</sup> Moreover, not all exonerees have the legal and financial resources required to pursue tortious action and the time required to build the case to its final outcome may be too lengthy given the already acute losses experienced while imprisoned.<sup>40</sup>

Exonerees may also seek compensation by drafting an individualised bill to pass through state legislature for direct compensation for injuries or loss experienced as a result of the wrongful conviction.<sup>41</sup> This is the least pursued remedy since it requires legal support to draft the bill and political support to marshal a politician to lobby the bill in parliament.<sup>42</sup> Success of such private bills may depend on the political climate of parliament at the time the bill is proposed and the clout or authority of the politician presenting the bill, rather than the merits of the bill itself.<sup>43</sup> Given the legal, political, and financial requirements required to carry this out, it is unlikely that this is a viable option for most exonerees. There is also no guarantee that the bill will pass and the time it would take to secure funding may extend far beyond the point at which it is needed.<sup>44</sup>

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34 Ibid.

35 Ibid.

36 See Sheehy, above n 8, 978–83 (discussing traditional remedies for wrongfully convicted individuals). See also Dioso-Villa, above n 10, 1334–8 (discussing compensation remedies for the wrongfully convicted in Australia).

37 Dioso-Villa, above n 10, 1372 (see Figure 1, which shows the compensation outcomes for exonerees in Australia). See also Sheehy, above n 8, 980–1 (outlining what is needed to file a civil litigation suit for wrongful conviction and stating its rarity due to the stringency of the requirements).

38 See Sheehy, above n 8, 981 (discussing the difficulty in demonstrating malicious prosecution in wrongful conviction cases).

39 Ibid.

40 Ibid (discussing tortious remedies for wrongful convictions).

41 Ibid 982; Dioso-Villa, above n 10, 1338.

42 See Bernhard, ‘When Justice Fails’, above n 13, 94.

43 Ibid; Michael Leo Owens and Elizabeth Griffiths, ‘Uneven Reparations for Wrongful Convictions: Examining the State Politics of Statutory Compensation Legislation’ (2012) 75 *Albany Law Review* 1283, 1296–7; Armbrust, above n 13, 166.

44 See Sheehy, above n 8, 982.

### III EX GRATIA PAYMENTS FOR WRONGFUL CONVICTION IN AUSTRALIA

In an earlier work, I compiled a dataset of 57 known cases of wrongful convictions<sup>45</sup> in Australia based on secondary sources including academic articles, legal databases, newspaper articles and wrongful conviction websites.<sup>46</sup> Because there is no centralised resource that compiles this information, these cases are a sample of wrongful convictions in Australia rather than an exhaustive list of all cases.<sup>47</sup> The cases ranged from 1922 to 2008 and corresponding exonerations from 1956 to 2011. The sentences ranged from one year to life imprisonment, while time served in prison ranged from two and a half months to 15 years, with an average of four and a half years spent in prison before release and exoneration.<sup>48</sup> Over half of the sample (58 per cent) sought some form of compensation in the form of requesting an ex gratia payment, lodging a specialised bill in parliament or pursuing a civil lawsuit for loss and damages for the wrongful conviction and imprisonment (see Table 1).<sup>49</sup> Nearly half of the exonerees in the sample petitioned for compensation through ex gratia applications to the state (47 per cent).<sup>50</sup> Of these, almost two-thirds (63 per cent) were successful in receiving some form of compensation through ex gratia payments made by the state. Seven out of the 57 exonerees filed a civil suit, of which three were successful. In other words, five per cent of the total sample of known wrongful convictions in Australia received some form of compensation for wrongful conviction and imprisonment via civil litigation. Only one exoneree had a specialised bill drafted and lodged in parliament regarding compensation.<sup>51</sup> Since few exonerees in the sample filed civil suits and only one individual pursued compensation through an individualised bill, filing ex gratia applications is by far the most sought after post-exoneration remedy in Australia.

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45 'Wrongful convictions' were identified as (1) individuals who have had their sentences quashed at appeal; (2) individuals who were acquitted at retrial; (3) cases where the verdict was considered unsafe and the conviction was vacated; and (4) individuals who received a pardon.

46 For a description of the dataset and the methodology employed to create it, see Dioso-Villa, above n 10, 1338–41.

47 For a listing of cases compiled, see *ibid* 1369–71.

48 *Ibid*.

49 For the remaining 24 cases (48 per cent), I could not locate evidence that indicated that they had applied for compensation, however, this does not necessarily account for civil suits settled out of court that were not made public or disclosed to media sources, or those who sought redress after the point of data collection.

50 Specifically, 27 out of 57 of the sample pool of exonerees filed an ex gratia claim before 2011.

51 Douglas Harry Rendell had a specialised Bill lodged on his behalf to the NSW Parliament petitioning that a judge, rather than a political executive, assess the compensation payment due to his dissatisfaction with the amount offered by the Attorney-General. However, it must be noted that he later accepted the amount originally offered by the Attorney-General. The Bill passed with the Crimes Legislation (Review of Convictions) Amendment Bill 1993.

Table 1: Compensation Outcomes for Known Exonerations in Australia from 1956 to 2011

	Awarded/ Successful	Denied/ Failed	Decision Pending	Total
Ex Gratia	17	8	2	27
Civil Lawsuits	3	4	0	7
Specialised Bill	1*	0	0	1
Unknown	--	--	--	24

\* Note: The specialised bill in this case was submitted to Parliament to address the fairness in determining the appropriate amount of compensation, such that a judge, rather than a political officer should make the determination.

In response to the absence of specific guidelines for issuing *ex gratia* payment for wrongful conviction, each case and its corresponding compensation outcome was reviewed to identify any common case characteristics or factors common to *ex gratia* awards.<sup>52</sup> *Ex gratia* payments were often found to be awarded in cases with new evidence discovered after conviction;<sup>53</sup> gross misconduct by state officials; high profile cases; where the applicant was able to solicit political support for their application; or where they were themselves a political figure (See Table 2).<sup>54</sup> So, although each petition for *ex gratia* payment was considered on its own merit and that there were no formal or mandatory criteria to receive an award, the analysis showed that the presence of these factors appeared to increase the likelihood of the applicant's success.

Table 2: Salient Factors Identified in Cases Successfully Awarded Ex Gratia Payments for Wrongful Conviction

Salient Factor*	Description	Examples	Frequency among Awards
New Evidence**	New evidence discovered post-conviction that became instrumental in exoneration	Forensic error, perjured testimony, unsolicited confessions by true perpetrator	16/17
Political Support	Political involvement and support in the reinvestigation of the case	Politicians to petition parliament for special inquiries on the defendant's behalf, when the defendant is a political figure	13/17

52 Dioso-Villa, above n 10.

53 'New evidence' in this context includes fresh evidence not available at the time of the trial and evidence available at the time of the trial, but not presented in court: see Lynne Weathered, 'Pardon Me: Current Avenues for the Correction of Wrongful Conviction in Australia' (2005) 17 *Current Issues in Criminal Justice* 203, 210–11.

54 See also Dioso-Villa, above n 10, 1342–53 (discussing case examples for each salient factor).



High Profile/Media Attention	Media attention on the case	News coverage of the crime, investigation, trial or defendant or journalist-led reinvestigation of the case	11/17
Gross State Misconduct	Misconduct by police, state officials, or prosecutors that occurred at investigation or trial	Coerced confessions, gross negligence, fraud, prosecutorial misfeasance, police malfeasance	8/17
<p>* Note: Salient factors are not mutually exclusive. For example, an act of gross state misconduct may have occurred during the investigation or at trial, but was only discovered after conviction and became instrumental to the person's exoneration as new evidence.</p> <p>** Note: The term 'new evidence' includes fresh evidence discovered after trial that was unavailable at the time of the trial and new evidence available at the time of the trial, but not presented at trial.</p>			

The study also examined the rationales that state officials gave to justify their decisions taken from official press releases, interviews with journalists about the award or denial, and statements made to the media during the coverage of the case.<sup>55</sup> State officials justified *ex gratia* awards for wrongful conviction using similar sentiments and themes as those found to be salient factors among award recipients. This included offering compensation as a gift to ease their transition back into society,<sup>56</sup> to correct specific misconduct by the police or prosecution that may have led to the wrongful conviction.<sup>57</sup> Alternatively, they simply stated that they made the decisions in deference (see Table 3).<sup>58</sup> These explanations highlight that *ex gratia* payments may serve as something more than solely compensation for the monetary loss experienced as a result of the wrongful conviction.<sup>59</sup> The attorneys-general and governors offered that they may also serve to provide reparation to the exoneree to assist them with their successful re-entry to society. In contrast, they rationalised the denial of *ex gratia* petitions based on how deserving or blameworthy the applicant was for the conviction; if they felt the case lacked exceptional circumstances, such as evidence of state

55 Ibid, 1354–8 (discussing rationales given for *ex gratia* awards).

56 Eg, the Attorney-General of NSW stated that the A\$100 000 payment to Douglas Harry Rendell was 'to assist his rehabilitation back into society': New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 May 1993, 2440 (John Mills).

57 Eg, the Attorney-General of WA stated that the *ex gratia* payment in the Mickelbergs case 'has been made in consideration of the ... magnitude of the admitted perjury and the perversion of the course of justice by [a] former detective': ABC News, *Mickelbergs to Receive \$1 Million Ex Gratia Payment* (16 January 2008) <<http://www.abc.net.au/news/2008-01-16/mickelbergs-to-receive-1-million-ex-gratia-payment/1013980>>.

58 Eg, the Attorney-General of NSW received advice from the Solicitor-General in deciding compensation for Douglas Harry Rendell: New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 May 1993, 2440 (John Mills).

59 But see Hoel, 'The Imperfect Crime', above n 32, 258 (discussing a narrative where *ex gratia* payments are meant to strictly compensate for the wrongfully convicted person's financial loss as a result of the term of imprisonment).

misconduct; or they simply highlighted that the process was lawful, though unfortunate for the applicant convicted and incarcerated (see Table 3).

Table 3: Explanations Given by State Officials to Justify Awards and Denials of Ex Gratia Payments for Wrongful Conviction for Australian Exonerees

<b>Rationales for Awards:</b>	<b>Case Examples:</b>
Without Explanation or as a Referral	Lindy Chamberlain Harry Rendell
Gift to Ease Transition	Andrew Mallard Harry Rendell
To Express Regret	Darryl Beamish
To Correct Mistakes of the State	Peter and Ray Mickelberg
Awarded, but under No Legal Obligation	Farah Jama
Awarded, but Not to Set Precedent	John Button Vincent Narkle
<b>Rationales for Denials:</b>	<b>Case Examples:</b>
Exoneree as Blameworthy or Undeserving	Salvatore Fazzari Jose Martinez Carols Pereiras
Lack of State Misconduct	Kevin Ibbs
Non-exceptional Circumstances	Jeanie Angel
Not Unlawful	David Ettridge Pauline Hanson

#### IV HOW DOES EX GRATIA STACK UP?

Moving this research forward, this article asks the next question of whether ex gratia sufficiently addresses compensation and reparation for wrongful conviction in Australia. This section raises issues with the adequacy of ex gratia as a means to remedy the consequences of wrongful conviction as an act of grace in Australia, rather than to satisfy any legal obligation to the victim. First, based on ex-offenders' experiences upon release,<sup>60</sup> and exonerees' additional 'burden of innocence',<sup>61</sup> ex gratia, as monetary compensation, cannot address the

60 See generally Sandra D Westervelt and Kimberly J Cook, *Life After Death Row: Exonerees' Search for Community and Identity* (Rutgers University Press, 2012) (discussing the consequences of wrongful conviction after exonerees are released from prison).

61 Kathryn Campbell and Myriam Denov, 'The Burden of Innocence: Coping with a Wrongful Imprisonment' (2004) 46(2) *Canadian Journal of Criminology and Criminal Justice* 139, 152 (discussing findings from in-depth interviews with Canadian exonerees about their experiences while in prison).

incalculable loss that these individuals experience when released from prison. Second, not all exonerees who apply for ex gratia payments are successful. Third, the onus to apply for ex gratia payments rests with the applicant, which may limit its use and accessibility to all exonerees. Fourth, given the absence of guidelines and its discretionary nature, there is a lack of transparency in the decision-making process. Lastly, the fact that the outcomes of the petitions are non-reviewable raises issues with the fairness and equity of the distribution of these awards.

### A Consequences of Wrongful Conviction

As a consequence of incarceration, exonerees experience the same challenges as ex-offenders in finding housing, employment, and medical attention, which is exacerbated by the lack of financial assistance when released.<sup>62</sup> The after-effects of long-term incarceration mean that exonerees and ex-offenders may experience psychological distress from imprisonment in the form of depression, alcohol and substance dependence, feelings of hopelessness or estrangement, and sometimes paranoia and aggression.<sup>63</sup> They may also experience difficulties reuniting with their family, who may resent or reject them, and must cope with the loss of time as they may have missed important life events while in prison, such as the death of a parent or the birth of a child.<sup>64</sup>

Individuals wrongfully convicted and imprisoned are said to have an added dimension of loss and pain experienced while in prison that has been described as a 'burden of innocence'.<sup>65</sup> For example, wrongfully convicted individuals tend to serve longer sentences than other offenders who may receive early release, by refusing to participate in rehabilitative programs in prison that require them to admit their guilt and take accountability for their crimes.<sup>66</sup> Or, while in prison they may solicit legal and administrative assistance to file appeals or request the reinvestigation of their cases, which is time consuming and costly.<sup>67</sup> Upon release, they are often ineligible for parole services to assist with housing and

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62 See Sandra D Westervelt and Kimberly J Cook, 'Coping With Innocence After Death Row' (2008) 7(4) *Contexts* 32, 36.

63 See Adrian Grounds, 'Psychological Consequences of Wrongful Conviction and Imprisonment' (2004) 46(2) *Canadian Journal of Criminology and Criminal Justice* 165, 168–9 (discussing potential personality changes experienced after incarceration); Westervelt and Cook, 'Coping with Innocence', above n 62, 36; Myriam Denov and Kathryn Campbell, 'Criminal Injustice: Understanding the Causes, Effects, and Responses to Wrongful Conviction in Canada' (2005) 21 *Journal of Contemporary Criminal Justice* 224, 234–6.

64 See Westervelt and Cook, *Life after Death Row*, above n 60; Sandra D Westervelt and Kimberly J Cook, 'Framing Innocents: The Wrongfully Convicted as Victims of State Harm' (2010) 53 *Crime, Law and Social Change* 259, 268–70.

65 Campbell and Denov, above n 61, 152.

66 See Gabe Tan, 'Structuration Theory and Wrongful Imprisonment: From "Victimhood" to "Survivorship"?' (2010) 19 *Critical Criminology* 175, 177–8.

67 Campbell and Denov, above n 61, 152.

employment,<sup>68</sup> and they are released with little notification or preparation.<sup>69</sup> Additional burdens that are unique to exonerees include expunging their criminal record,<sup>70</sup> since this is not automatic and may require legal assistance, and coping with stigma and apprehension from the community if their cases received considerable media attention.<sup>71</sup> This unwanted notoriety can lead to ostracism and hostility by community members that can hamper an exoneree's transition from prison to the community.<sup>72</sup>

Taken together, the consequences of imprisonment for exonerees extend beyond the loss of income or costs incurred due to errors of justice.<sup>73</sup> Rather, the literature suggests that the experience of imprisonment for victims of wrongful conviction is unique and can produce psychological, physical, and social injuries; *ex gratia* as a financial award inherently cannot compensate for these injuries. *Ex gratia* payments and the way in which applications are evaluated and awards are calculated attempt to pare down the injury, harm or loss experienced by the applicant to a quantifiable measure, such as the expected loss of income due to wrongful imprisonment.<sup>74</sup> However, as discussed above in Table 3, state officials are open to award *ex gratia* payments as gifts to ease an exonerees transition back into the community or as a means of expressing regret for the wrongful conviction. What this suggests is that although the award is strictly monetary, it can aim to achieve restorative goals that address the immediate and long term needs of the exoneree and any barriers to their successful entry into society.<sup>75</sup>

## B No Guarantee of Payment

*Ex gratia* payments are made under a wide array of circumstances as a means of providing financial aid to victims, including groups that may have suffered shared negative experiences.<sup>76</sup> For example, the Queensland government issued

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68 See Westervelt and Cook, 'Coping With Innocence', above n 62, 37; Chunias and Aufgang, above n 13, 111, 118–19.

69 See Chunias and Aufgang, above n 13, 115.

70 See Lonergan, above n 13, 438.

71 See Grounds, above n 63, 170, 172; Chunias and Aufgang, above n 13, 115.

72 See Westervelt and Cook, 'Framing Innocents', above n 64, 270–1; Denov and Campbell, above n 63.

73 See Tan, above n 66, 177–9 (discussing the additional burden of legal fees incurred as a consequence of wrongful conviction).

74 See Hoel, 'The Imperfect Crime', above n 32 (discussing, eg, *ex gratia* calculations that subtract the cost for lodging and food while imprisoned, from the applicants' expected income to determine the final amount of the award).

75 See Karin D Martin, 'A Model State Policy for the Treatment of the Wrongfully Convicted' (Research Paper, University of California, Berkeley, 2006) 11–13 (discussing the purposes of restorative compensation, which extends beyond an exclusive monetary form of compensation to address the aftermath of wrongful conviction). See also Lonergan, above n 13, 420–8 (discussing how financial compensation can be structured in a way that can achieve restorative means for exonerees, such as making additional payments for reintegration expenses incurred between their release from prison and their receipt of the award or altering the structure and delivery of the compensation such that it is dispensed in instalments over several years to ensure a steady income for the exoneree).

76 'The Government can call upon the *ex gratia* power to deliver financial relief quickly at short notice. For this reason, it is the most appropriate response for groups of people affected by a common set of circumstances and for unexpected events.' Department of Finance and Deregulation, above n 29.

ex gratia payments to the victims of the 2011 flood,<sup>77</sup> a disaster that killed 35 people, affected over 200 000 others across the state and incurred A\$2.38 billion in damages.<sup>78</sup> It is not contested that victims of natural disasters and victims of social atrocities<sup>79</sup> may experience forms of psychological and physical injury or loss as a consequence of the events in question. If ex gratia is the primary means by which these individuals seek reparation, one might hope that any individual who meets the eligibility criteria and applies for compensation will receive an award. However, as was seen in my earlier work,<sup>80</sup> of those exonerees who filed ex gratia petitions, over one third had their applications (37 per cent) rejected and did not receive any compensation for their wrongful conviction and imprisonment (see Table 1).

As discussed in Table 2, ex gratia payments were awarded to exonerees who had specific factors common to their cases. The more factors present in a case, the greater the likelihood of success, as over half of these successful cases had three or more factors present.<sup>81</sup> For example, it is not hard to imagine that a high profile case that attracted media attention may have also attracted an avid politician to marshal a post-conviction inquiry. To take this further, a post-conviction inquiry, such as a Royal Commission,<sup>82</sup> will have additional resources and accessibility to material not readily available in the initial investigation, which has the potential to lead to the discovery of new evidence that could

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77 Eg, the Australian Government Disaster Recovery Payment included A\$1000 per eligible adult, the Essential Household Contents Grant included up to A\$1705 per eligible adult whose essential household contents were lost or damaged in the disaster and a Structural Assistance Grant that was available to property owners whose homes had been damaged by the disaster up to A\$10 500 per individual: see Skinner Hamilton, *Government Assistance for Queensland Flood Victims* <<http://www.skinnerhamilton.com.au/files/docs/government%20assistance%20for%20queensland%20flood%20victims.pdf>> (including a resource list and description of grant schemes for Queensland flood victims).

78 Delana Carbone and Jenna Hanson, *Floods: 10 of the Deadliest in Australian History* (March 8 2012) Australian Geographic <<http://www.australiangeographic.com.au/topics/history-culture/2012/03/floods-10-of-the-deadliest-in-australian-history/>>.

79 Eg, some individuals of the Stolen Generation who were forcibly removed from their families and put under state care, and abused children who were in institutional care or were wards of the state sought ex gratia payments as redress for their injuries. See Stephen Winter, 'Australia's *Ex Gratia* Redress' (2009) 13 *Australian Indigenous Law Review* 49; Andrea Durbach, "'The Cost of a Wounded Society': Reparations and the Illusion of Reconciliation' (2008) 12 *Australian Indigenous Law Review* 22; Antonio Buti, 'Reparations, Justice Theories and Stolen Generations' (2008) 34 *University of Western Australia Law Review* 168; Dylan Lino, 'Monetary Compensation and the Stolen Generations: A Critique of the Federal Labor Government's Position' (2010) 14 *Australian Indigenous Law Review* 18.

80 Dioso-Villa, above n 10.

81 Specifically, 10 successful cases had more than three salient factors present in their case.

82 Eg, Edward Splatt and Lindy Chamberlain had Royal Commission Inquiries into their cases: see South Australia, Royal Commission of Inquiry in Respect to the Case of Edward Charles Splatt, *Royal Commission Report Concerning the Conviction of Edward Charles Splatt* (1984); *Re Conviction of Chamberlain* (1988) 93 FLR 239; Commonwealth, Royal Commission of Inquiry into Chamberlain Convictions, *Report* (1987).

expose state or police misconduct. However, this is not to say that the presence of any or all of these factors will automatically result in an ex gratia award.<sup>83</sup>

### C Onus on Applicant

The onus of applying for an ex gratia payment rests with the wrongfully convicted individual. Unlike parolees or inmates who are aware of their release date and can prepare for their dismissal, exonerees are often released abruptly as soon as a judgment is made in their favour.<sup>84</sup> Moreover, at the time when they are most in need of financial assistance to re-enter society due to loss of income while in prison, they are unlikely to have the resources to devote to drafting and filing an ex gratia application while they attempt to secure employment and suitable housing.<sup>85</sup> They also may not have the necessary skills to navigate their options for compensation, such as the resources, time, or legal knowledge to file an application on their own.<sup>86</sup>

This additional burden placed upon exonerees to apply for compensation will inevitably deter some from applying altogether because they may be too embarrassed to request help.<sup>87</sup> Or, since the process of applying for ex gratia calls for written explanations<sup>88</sup> of the person's harm, injury and loss experienced as a result of the false conviction, the exoneree may be unwilling to recount the experience to demonstrate their worthiness for compensation. This may especially be the case, as exonerees tend to focus on the state's responsibility for their victimisation and view themselves as victims of state harm.<sup>89</sup> The onus of receiving ex gratia payments lies with the applicant and creates a certain unjust irony that they must request reparation for state harms experienced as a result of the wrongful conviction from the parties responsible for their victimisation.<sup>90</sup>

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83 Eg, Kelvin Condren received ex gratia compensation although he only had one of the four relevant factors. New evidence that the victim was still alive when Condren was in police custody supported his appeal, however, there was no evidence of gross state misconduct, much media attention on the case or any political support for his exoneration: see Dioso-Villa, above n 10.

84 See Chunias and Aufgang, above n 13, 115.

85 Ibid 114–20.

86 Ibid 111–12 (discussing the issue that exonerees may not have the skills necessary to seek out services upon release). See also Westervelt and Cook, 'Framing Innocents', above n 64, 263 (discussing the fact that applying for compensation may be costly and time consuming).

87 See Chunias and Aufgang, above n 13, 111–12.

88 See Department of Finance and Deregulation, above n 29, 11.

89 See Westervelt and Cook, 'Framing Innocents', above n 64, 271.

90 Ibid 263 (discussing an exoneree's frustration with having to apply to the state to expunge his record for an error they committed that had him wrongfully convicted).

## D Non-transparency in Decision-Making

Ex gratia payments are inherently non-transparent,<sup>91</sup> since the decision to award or deny an application and the allocation amount of the award lies exclusively at the discretion of a single executive. This makes it increasingly difficult for an exoneree to determine the likelihood of an award or the amount<sup>92</sup> since governors, attorneys-general, and other state executives with such prerogative powers are under no legal obligation to grant an award or to provide an explanation for their decisions.<sup>93</sup> This requires an exoneree to invest time and resources in an avenue of redress that has no guarantee of success and no means to predict future outcomes.

Since ex gratia payments are discretionary, the executives are able to selectively justify these awards (see Table 3). In the sample, state officials offered ex gratia payments as tokens or gifts to assist with the exoneree's transition back into the community,<sup>94</sup> without necessarily offering them as reparation for the harms or injuries incurred for the wrongful conviction.<sup>95</sup> Or they acknowledged the occurrence of the wrongful conviction, and in some cases expressed the state's regret over the unfortunate circumstances that led to the event,<sup>96</sup> without acknowledging their contribution to the errors that may have led to the wrongful conviction.

State executives maintained this lack of transparency in the decision-making process in several ways. They underscored the fact that ex gratia payments meant that they were under no legal obligation to provide compensation for wrongful conviction.<sup>97</sup> When they did provide an explanation for the ex gratia payment, it was construed as a moral act as the 'right thing to do.'<sup>98</sup> They also reiterated that

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91 See Nick Taylor, 'Compensating The Wrongfully Convicted' (2003) 67 *Journal of Criminal Law* 220, 220–2, 224 (discussing the lack of transparency in ex gratia decisions in the absence of official guidelines). Even in instances where guidelines are in place, they explicitly state that an award is still not guaranteed and that the decision is discretionary. Eg, NSW frames them as principles for state officials to consider in the decision-making process: Justice Legal, above n 33.

92 See, eg, Dioso-Villa, above n 10, 1341–2. The analysis of the successful ex gratia cases revealed that there is little consistency and predictability in the amount of payments allocated to exonerees. The length of time an individual spent in prison did not correspond with the amount of compensation they received through ex gratia payments. Those who spent longer periods in prison did not necessarily receive greater amounts than their counterparts who spent less time in prison.

93 See Hoel, 'Compensation for Wrongful Conviction', above n 9; Dioso-Villa, above n 10.

94 See Dioso-Villa, above n 10, 1355.

95 Eg, the Attorney-General of WA awarded Darryl Beamish A\$425 000 in ex gratia compensation and explained that the payment was not to compensate him for the loss he experienced for the wrongful incarceration, but 'to express the state's sincere regret for what occurred': Hans Sherrer, *Darryl Beamish Awarded \$451,000 Compensation 50 Years After Wrongful Murder Conviction* (6 June 2011) Justice Denied <<http://justicedenied.org/wordpress/archives/1209>>.

96 Ibid.

97 See Dioso-Villa, above n 10, 1357–8.

98 Eg, the Attorney-General of Victoria, when awarding Farah Jama an ex gratia payment for a wrongful conviction due to contaminated DNA samples, stated that 'the government had no legal obligation to compensate Mr Jama but believed it was the right thing to do': Reid Sexton, 'Man Paid \$525 000 for Wrong Conviction', *The Age* (Melbourne), 30 June 2010, 3.

any payment awarded would not set the precedent for future decisions,<sup>99</sup> which further obscures the transparency in the decision-making process and makes it difficult to predict the outcomes of future applications. Some state executives reinforced the rarity of receiving compensation through ex gratia petitions stating that any award would require sufficient justification.<sup>100</sup> According to these explanations for ex gratia awards, wrongful conviction and incarceration alone would not suffice to justify payment.<sup>101</sup>

### E Non-reviewable Outcome

One of the difficulties with ex gratia payments as the chief form of redress for wrongful conviction is that the decisions are non-reviewable.<sup>102</sup> If an exoneree applies for ex gratia compensation and the petition is denied, there is no further recourse to appeal the decision. Without requiring governors or attorneys-general to explain or justify their decisions, there is little ground for an exoneree to contest the outcome of the petition whether in regards to the amount of the award or its rejection.<sup>103</sup> From the sample, state executives tended to tout the legality of their actions in denying the payment and stressed that the process, in a given case, was not unlawful and would therefore not warrant any state awarded compensation.<sup>104</sup> In other words, the exoneree had the benefit of due process and any errors that may have occurred despite the failsafe mechanisms within the system were deemed unfortunate, but not sufficient reason to justify compensation.<sup>105</sup> Rather, these executives stressed that ex gratia would be granted in cases of exceptional circumstances,<sup>106</sup> such as evidence of state misconduct that was pivotal to the wrongful conviction.<sup>107</sup>

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99 Eg, the Attorney-General in WA presented Button's payment as a special case that will not set a precedent for other compensation payouts for wrongful convictions: 'Button Payout Is a Precedent', *The West Australian* (Perth), 14 April 2003.

100 See '\$163 000 for 18 Months Jail', *The Sunday Times* (Perth), 3 July 2007 (discussing statements made by the Attorney-General of WA regarding Vincent Narkle's payment).

101 There are parallels between ex gratia awards granted for wrongful conviction and individuals from the Stolen Generations who were forcibly removed from their homes and put into state care. Tasmania established a reparation scheme for members of the Stolen Generations and their descendants and Queensland and WA established reparation schemes to children abused while in state care. In Tasmania's determination of awards, the 'treatment of removed children was irrelevant to the amount awarded' and assessors were given complete discretion to determine how to apply the ex gratia scheme: see Chiara Lawry, 'Moving Beyond the Apology: Achieving Full and Effective Reparations for the Stolen Generations' (2010) 14 *Australian Indigenous Law Review* 83, 89–90. In Queensland and WA, payments were awarded based on the severity and impact of the abuse suffered that could be corroborated and wrongful removal was not a sufficient basis for payment: at 90–1.

102 See Dioso-Villa, above n 10; Hoel, 'Compensation for Wrongful Conviction', above n 9.

103 See Hoel, 'The Imperfect Crime', above n 32, 259 (discussing an applicant's dissatisfaction with the amount of the ex gratia award for wrongful conviction).

104 Dioso-Villa, above n 10, 1361 (discussing Pauline Hanson and David Ettridge's ex gratia applications).

105 Ibid 1360 (discussing Kevin Ibbs' ex gratia application).

106 See Graham, above n 7 (discussing Jeannie Angel's ex gratia application).

107 Similarly, Queensland and WA have awarded ex gratia payments to children who were forcibly removed and placed in state care and who could demonstrate severe abuse with serious impacts. Wrongful removal was not sufficient evidence to award payments: see Lawry, above n 101, 90–1.



This raises the question of whether all exonerees are equally deserving of compensation. The *ICCPR*'s article 14(6) and some compensation statutes in other parts of the world do not recognise this as a blanket right and exclude anyone who in any way contributed to their wrongful conviction.<sup>108</sup> In the sample, state executives focused on the need for exonerees to demonstrate their worthiness of compensation beyond the wrongful conviction and deemed the exoneree unworthy of payments based on their prior actions.<sup>109</sup> For example, having falsely confessed to the crime may be construed as misleading the investigation and contributing to the wrongful conviction regardless of the interrogation conditions or the duress under which the statements were made.<sup>110</sup> Alternatively, having had a previous altercation with the victim may also deem the exoneree unworthy of compensation.<sup>111</sup> For the executives to focus on the individual's blameworthiness for their circumstances when deciding to award or deny payments also disadvantages exonerees who have criminal records and who suffer from substance and alcohol dependence.<sup>112</sup> One might argue that the time spent in prison and the aftermath of wrongful incarceration outweighs past behaviours or actions that may have hindered the investigation or contributed to the wrongful conviction, making these individuals also worthy recipients of state assistance alongside their factually innocent counterparts.<sup>113</sup>

## V ROLE OF THE STATE TO CORRECT ERRORS OF JUSTICE

If the limitations of *ex gratia* in theory and application do not appear to meet exonerees' needs, the next question to ask is: what role should the state play to redress wrongful conviction? A century ago, Edwin Borchard argued that the state should compensate the wrongfully convicted and analysed indemnity laws

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108 See Martin, above n 75. See also, Innocence Project, 'Making Up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation' (Report, Benjamin N Cardozo School of Law, Yeshiva University, 2 December 2009) 27–31 (discussing the wording of eligibility criteria for compensation legislation in various states in the United States ('US')).

109 Dioso-Villa, above n 10, 1359.

110 Under some state legislation in the US, guilty pleas or false confessions automatically bar exonerees from applying for compensation as a condition of eligibility: Lonergan, above n 13, 416–17.

111 Ibid 418–19 (discussing the impact of prior criminal history on eligibility for compensation in the US).

See Dioso-Villa, above n 10, 1359–60 (discussing Salvatore Fazzari, Carlos Pereiras and Jose Martinez's applications for *ex gratia*).

112 See Adele Bernhard, 'Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated' (2004) 52 *Drake Law Review* 703, 721–2 (discussing compensation for wrongful conviction in light of the exoneree's criminal history); Westervelt and Cook, 'Framing Innocents' above n 64, 262 (discussing how victims of state crime are blamed for their suffering).

113 See Adam I Kaplan, 'The Case for Comparative Fault in Compensating the Wrongfully Convicted' (2009) 56 *UCLA Law Review* 227, 256 (discussing exonerees' contributions to convictions as a basis for exclusion in compensation statutes for wrongful conviction).

for miscarriages of justice in Europe and the US.<sup>114</sup> His analysis examined whether the state should compensate for wrongful conviction as an act of grace or out of a legal duty to correct errors of justice and provide reparations to exonerees.<sup>115</sup> If the state is not responsible for the errors that led to the wrongful conviction and it does not directly benefit from depriving individuals of their liberty, any compensation, whether it is through discretionary acts, like *ex gratia*, are acts over and above the state's role and responsibility to the individual.<sup>116</sup> The justification for these payments is the moral value of aiding those who have experienced injustice and are in need of assistance.<sup>117</sup> Like a charitable donation, the state may provide *ex gratia* to exonerees without claiming any liability for their actions, or responsibility for the errors that led to the wrongful conviction.<sup>118</sup>

Although the state does not appear to benefit from imprisoning an innocent person, the arrangement preserves the public's view that the justice system operates efficiently and legitimately in the absence of errors.<sup>119</sup> When the public perceives that errors of justice are non-existent or rare occurrences, they are more likely to have confidence in the operation and legitimacy of the system.<sup>120</sup> When the public perceives otherwise, individuals may seek other avenues of achieving justice outside of the law.<sup>121</sup> In this way, the individual's liberty is treated like private property that the state has taken for public use<sup>122</sup> to preserve peace and order.<sup>123</sup> Accordingly, the state has a moral and legal obligation to provide compensation for harm, loss or injury that the individual has incurred as a result of the wrongful conviction.<sup>124</sup>

Another way to frame the state's legal obligation to compensate victims of errors of justice is to treat it as a matter of worker's compensation, where errors

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114 See Borchard, 'European Systems of State Indemnity', above n 13 (discussing the state of wrongful compensation statutes in Europe in the early 1900s); Borchard, 'State Indemnity for Errors', above n 13 (discussing the state of wrongful compensation statutes in the US in the early 1900s).

115 See Borchard, 'European Systems of State Indemnity', above n 13, 694.

116 *Ibid* (discussing reasons for and unwillingness of countries to adopt indemnity legislation for wrongful conviction and imprisonment).

117 See Winter, above n 79, 49.

118 *Ibid*.

119 See Borchard, 'State Indemnity for Errors', above n 13, 207.

120 See Brian Forst, *Errors of Justice: Nature, Sources and Remedies* (Cambridge University Press, 2005) 212–19 (discussing the importance of the criminal justice system that maintains its legitimacy when errors occur).

121 *Ibid* 212.

122 That is, if the state claimed property for public use (eg, land taken to build a public road or building), then they would award the landowner with a payment for the exchange. See Borchard, 'State Indemnity for Errors', above n 13, 207–8 (discussing arguments to support indemnity legislation for wrongful conviction and imprisonment).

123 See Winter, above n 79, 53 (discussing the state's use of *ex gratia* as an effort to keep the peace).

124 See Borchard, 'State Indemnity for Errors', above n 13, 207. Borchard explains:

Thus, when his property is taken for a public use ... compensation is made. ... Yet when the liberty of an individual is taken for the public use – and the preservation of the public peace through the administration of the criminal law is a public purpose at least equally vital to social welfare as the erection of public buildings – the right to compensation is apparently overlooked.

are likened to accidents in a workplace.<sup>125</sup> In this vein, the criminal justice system is considered a large and complex system or organisation that processes thousands of convictions annually; miscarriages of justice, such as failures to bring offenders to justice and the conviction of innocent people, are inevitable.<sup>126</sup> These errors may occur despite the numerous safeguards and regulations in place.<sup>127</sup> Accordingly, the state may provide compensation to victims who have experienced loss and injury due to unforeseen, yet inevitable, accidents in the system.<sup>128</sup>

As members of society, we submit to the law and in turn expect the state to protect us from crime and wrongful conviction.<sup>129</sup> If the state has a duty to protect these rights, then, as an extension of the welfare provision, any failures that occur can be perceived as a breach of the social contract and would justify compensation.<sup>130</sup> If the state is responsible for the errors that led to the wrongful conviction, compensation, in accordance with theories of corrective justice, holds that wrongfully caused harms should be repaired and that those who are responsible for the loss or harms are required to provide the reparation.<sup>131</sup> This corrective act is not voluntary, but a condition to provide complete redress:

if, in spite of these practical precautions against error, an innocent man is convicted of a crime, and it is later established that he had no connection with it, the least that the State can do to vindicate itself and make restitution to the innocent victim is to grant him an indemnity, not as a matter of grace and favor, but as a matter of right.<sup>132</sup>

If the state treated the compensation for wrongful conviction as a legal duty, rather than an act of grace, then this would acknowledge state errors and the probability of future errors, however rare the occurrence. It would also recognise that wrongful conviction and imprisonment causes harm and injury to individuals and that the state has a responsibility to redress the situation.

Perhaps part of the reason as to why there is no legal right for compensation for wrongful convictions is because, given what we know about their causes and

125 Ibid 208.

126 See generally Forst, above n 120 (discussing the management of errors within the criminal justice system).

127 See generally *ibid* (discussing each stage of the criminal justice system where errors can occur despite existing safeguards).

128 See Borchard, 'State Indemnity for Errors', above n 13, 208. Borchard states: 'where the facts show that that the conviction has resulted through no demerit of his own, certainly the State owes the victim compensation for the grievous wrong he has been compelled to suffer.'

129 See Borchard, 'European Systems of State Indemnity', above n 13, 691 (discussing Jeremy Bentham's view on the state's duty to compensate for wrongful conviction). See generally Kenneth J Arrow, 'A Difficulty in the Concept of Social Welfare' (1950) 58 *Journal of Political Economy* 328 (discussing the concept of social welfare).

130 See Sheehy, above n 8, 985.

131 See Buti, above n 79, 171–7 (discussing theories of reparation and the use of *ex gratia* for compensation for the Stolen Generation). See also Winter, above n 79, 51–3 (discussing *ex gratia* in terms of corrective justice).

132 Edwin M Borchard, *Convicting the Innocent: Errors of Criminal Justice* (Yale University Press, 1932) xxiv.

correlations, they often arise from multiple errors that occur independently or may conspire together at different levels of the justice system.<sup>133</sup> For example, the 2010 judicial report into the Farah Jama case by former justice of the Supreme Court, the Hon Frank Vincent, revealed a range of errors that contributed to his wrongful conviction including contaminated DNA evidence; limited communication between the police, forensic scientists, the Crown and defence; and the decision to proceed with the prosecution and conviction in the absence of circumstantial evidence.<sup>134</sup> In these cases, state actors have contributed to some of the factors that led to the wrongful conviction, but not to all. Is it reasonable to hold the state responsible for repairing the harm caused by this cumulative effect of circumstances? On moral grounds, the state may take responsibility for a flawed system that was unable to detect or correct for errors that led to the conviction, but the state would not necessarily be legally at fault.

Another potential perceived danger of having a legal duty to compensate for wrongful convictions is that payments may be made to undeserving individuals such as those who committed the crimes, but whose convictions were quashed as unsafe. One could narrow the eligibility criteria to compensate only the factually innocent to diminish this threat; however, doing so would exclude innocent individuals from receiving payments who have had their convictions quashed, but have yet to be acquitted for these original convictions. The question then becomes whether it is more desirable that innocent individuals are denied compensation for their hardships, than that a guilty person receives it.<sup>135</sup>

If the answer is that it is better to compensate a person who may have committed the crime, but was found wrongfully convicted based on a defective trial or other gross miscarriage of justice, then regardless of whether the remedies are by favour or obligation, it is worth considering that reparations for wrongful conviction benefit the recipient, the government, and society.<sup>136</sup> Compensation provides monetary support to assist exonerees with finding adequate housing and to compensate for lost income as they transition into the workforce. The government benefits from compensation by restoring public confidence in the fairness of the justice system, since errors are recognised and addressed; in turn, the public gains from this, by the restoration of its confidence in the fairness and adequacy of the justice system.

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133 See Brandon L Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (Harvard University Press, 2011); Barry Scheck, Peter Neufeld and Jim Dwyer, *Actual Innocence: When Justice Goes Wrong and How to Make It Right* (New American Library, 2003); James M Doyle, 'Learning from Error in American Criminal Justice' (2010) 100 *Journal of Criminal Law and Criminology* 109.

134 Farah Jama was wrongfully convicted by a jury and imprisoned for sexual assault based on DNA evidence and in the absence of corroborating evidence. It was later discovered that the DNA evidence had been contaminated and the rape had not occurred. The Vincent Report investigated the factors that led to his conviction: Victoria, *Inquiry into the Circumstances That Led to the Conviction of Mr Farah Abdulkadir Jama, Report* (2010).

135 See Quirk and Requa, above n 23.

136 See Owens and Griffiths, above n 43, 1301 (discussing three beneficiaries of state compensation for wrongful conviction).

## VI DISCRETIONARY ACTS AND ISSUES OF EQUITY

Ex gratia payments as the chief compensation remedy for individuals wrongfully convicted and imprisoned in Australia have inherent challenges. As discussed in the sections above, there are limitations arising from the fact that ex gratia is discretionary, the decision-making process lacks transparency, and the outcomes are non-reviewable. Because of its monetary nature, it does not include provisions that allow for access to services that can assist the individual with finding housing, employment or seeking medical attention for psychological or physical injuries due to the wrongful incarceration.<sup>137</sup>

From the analysis of successful and unsuccessful ex gratia applications for compensation for wrongful conviction, it appears that ex gratia continues to disadvantage those who begin with limited financial resources, no access to legal assistance, or who may lack any political influence to assist with their applications and cases.<sup>138</sup> They are among the least socially powerful members of society,<sup>139</sup> are disproportionately represented by minorities,<sup>140</sup> and many have criminal records.<sup>141</sup> It has been suggested that the state has overlooked compensation for wrongful conviction because of the power differentials in society that have historically favoured the protection of property rights over individual liberty.<sup>142</sup> Property owners are likely to have the financial and legal resources and the social capital to marshal political support for their causes or they may be themselves political figures who can influence legislative changes.<sup>143</sup> In contrast, exonerees tend to belong to a 'weak social group'<sup>144</sup> in society whose voices and opinions tend to go unheard. This raises issues of equity as to whether such an advantage is fair and whether it is adequate that Australian exonerees must rely on ex gratia payments as their main means to seek redress for wrongful conviction.

To further compound this problem, there are enormous difficulties in securing exoneration in Australian jurisdictions. For one, the avenues to appeal are limited to one appeal to a state appellate court. After this avenue is exhausted, or in cases where fresh evidence is discovered after appeal that demonstrates innocence, a case cannot be raised with the High Court of Australia, because it is

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137 But see ex gratia payments made to individuals and descendants of the Stolen Generations in Tasmania and children abused under state care in Queensland and WA. These payments included intra-program assistance including legal counselling as part of their redress scheme: Winter, above n 79, 52 'Figure 1'.

138 See Westervelt and Cook, 'Framing Innocents', above n 64, 261–2; Kaplan, above n 113, 246.

139 See Westervelt and Cook, 'Framing Innocents', above n 64, 261–2.

140 See Kaplan, above n 113, 246.

141 See John H Blume, 'The Dilemma of the Criminal Defendant with a Prior Record – Lessons from the Wrongfully Convicted' (2008) 5 *Journal of Empirical Legal Studies* 477 (discussing the effect of an exoneree's criminal record on the likelihood of testifying at trial).

142 See Borchard, 'European Systems of State Indemnity', above n 13, 696.

143 See Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 *Law and Society Review* 95.

144 Borchard, 'European Systems of State Indemnity', above n 13, 696.

unable to hear fresh evidence discovered post-appeal.<sup>145</sup> The remaining avenue is to petition the attorney-general to refer the case to the court of appeal.<sup>146</sup> The attorney-general has the discretion to make this decision and his or her decision is non-reviewable by the courts. This means that where the original conviction may have been quashed after petitions and appellate review, but the individual has not been acquitted at retrial, the wrongfully convicted person may not be eligible for ex gratia compensation when a miscarriage of justice is narrowly defined as factual innocence.<sup>147</sup>

As it stands, ex gratia is a discretionary, non-obligatory act that rests in the hands of the state, typically in the hands of a single executive. The power to grant ex gratia payments is analogous to other discretionary powers given to state executives such as clemency and the power to pardon and reduce sentences, as they all operate in the space of ‘lawful lawlessness’.<sup>148</sup> These prerogative powers that extend to members of the executive arm of the government are written into the law, but operate outside of the law as fail-safe mechanisms intended to catch and correct errors that occur in the justice system.<sup>149</sup> Ex gratia is considered an act of grace to provide assistance to an exoneree, while clemency is considered an act of mercy to reduce or pardon an individual’s sentence. Both are said to operate on moral, rather than legal grounds. This exposes an area absent of accountability or regulation within the law that is subject to personal bias and political influence.<sup>150</sup> As a form of unchecked discretion, clemency decisions have been found to be prone to racial discrimination, favouritism, cronyism, and other extra-legal factors particular to the executive.<sup>151</sup>

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145 The High Court cannot accept fresh evidence in an appeal as expressed in the opening judgment in *Mickelberg v The Queen* (1989) 167 CLR 259, 264 (Mason CJ); *Australian Constitution* ss 73–6. See also Bibi Sangha and Robert Moles, ‘Mercy or Right? Post-appeal Petitions in Australia’ (2012) 14 *Flinders Law Journal* 293; Bibi Sangha and Robert Moles, ‘Post-appeal Review Rights: Australia, Britain and Canada’ (2012) 36 *Criminal Law Journal* 300.

146 See Weathered, above n 53, 212; Sangha and Moles, ‘Post-appeal Petitions in Australia’, above n 145; Sangha and Moles, ‘Post-appeal Review Rights’, above n 145. See also *Crimes Act 1900* (ACT) pt 20 div 20.2; *Crimes (Appeal and Review) Act 2001* (NSW) pt 7; *Criminal Code Act* (NT) s 431; *Criminal Code Act 1899* (Qld) ss 18, 672A; *Criminal Law Consolidation Act 1935* (SA) s 369; *Criminal Code Act 1924* (Tas) s 419; *Criminal Procedure Act 2009* (Vic) s 327; *Sentencing Act 1991* (Vic) s 106; *Sentencing Act 1995* (WA) s 140.

147 Article 14 of the ICCPR has been interpreted this way: see above Part II.

148 Austin Sarat, ‘On Lawful Lawlessness: George Ryan, Executive Clemency, and the Rhetoric of Sparing Life’ (2004) 56 *Stanford Law Review* 1307.

149 See Robert Weisberg, ‘Apology, Legislation, and Mercy’ (2004) 82 *North Carolina Law Review* 1415; Stephen P Garvey, ‘Is It Wrong to Commute Death Row? Retribution, Atonement, and Mercy’ (2004) 82 *North Carolina Law Review* 1319; Cathleen Burnett, ‘The Failed Failsafe: The Politics of Executive Clemency’ (2003) 8 *Texas Journal on Civil Liberties and Civil Rights* 191.

150 See Austin Sarat, *Mercy on Trial: What It Means to Stop an Execution* (Princeton University Press, 2005); Adam M Gershowitz, ‘Essay: The Diffusion of Responsibility in Capital Clemency’ (2001) 17 *Journal of Law and Politics* 669; Burnett, above n 149.

151 See Rachel E Barkow, ‘The Ascent of the Administrative State and the Demise of Mercy’ (2008) 121 *Harvard Law Review* 1332; Talia Roitberg Harmon, James R Acker and Craig Rivera, ‘The Power to Be Lenient: Examining New York Governors’ Capital Case Clemency Decisions’ (2010) 27 *Justice Quarterly* 742; Talia Roitberg Harmon and William S Lofquist, ‘Too Late for Luck: A Comparison of Post-Furman Exonerations and Executions of the Innocent’ (2005) 51 *Crime and Delinquency* 498.

Because clemency has been rarely used in recent years,<sup>152</sup> it has been criticised as the state's empty gesture<sup>153</sup> or 'meaningless ritual'<sup>154</sup> that provides the public with the solace that safety mechanisms exist to override any injustice created, or missed, by the legal system. This creates the appearance that no stone has been left unturned and that the system is operating smoothly and fairly, maintaining the status quo. If we are to understand *ex gratia* in these terms, this too serves to maintain the status quo, since only the cases that appear to pose the largest threat to the perceived fairness of our justice system are awarded *ex gratia* payments, such as those that can prove gross state misconduct or have received considerable media attention.<sup>155</sup> That is, compensation payments appear as charity or acts of state generosity,<sup>156</sup> rather than as compensation for the state's inflicted harm and injury to the exoneree.<sup>157</sup> This exposes the state's actions as operating for self-serving ends, such as to manage public dissent and as damage control to maintain their perceived legitimacy, rather than for the purposes of assistance or moral obligation to the victims of state error.

## VII WHAT CAN BE DONE?

Given the limitations of the existing remedies to redress the aftermath of wrongful conviction and the issues of equity and availability of compensation for exonerees, Australia can take steps toward improving the situation for the wrongfully convicted by: (1) creating appropriate compensation legislation that addresses economic and non-economic loss as a result of the wrongful conviction; (2) increasing opportunities for exoneration by revising the appellate review process to accommodate situations where fresh evidence is discovered post-appeal; and (3) establishing an independent review commission that has the investigative power and resources to identify wrongful convictions and conduct post-exoneration reviews of cases. This nuanced approach would have the potential to identify new cases, address equity issues regarding access to post-exoneration services, and handle the varied needs of the wrongfully convicted as they attempt to reintegrate into society.

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152 See Carolyn Strange, 'Discretionary Justice: Political Culture and the Death Penalty in New South Wales and Ontario, 1890–1920' in Carolyn Strange (ed), *Qualities of Mercy: Justice, Punishment and Discretion* (University of British Columbia Press, 1996) 130; Austin Sarat, 'Memorializing Miscarriages of Justice: Clemency Petitions in the Killing State' (2008) 42 *Law and Society Review* 183.

153 See Sarat, *Mercy on Trial*, above n 150.

154 Alyson Dinsmore, 'Clemency in Capital Cases: The Need to Ensure Meaningful Review' (2002) 49 *UCLA Law Review* 49 1825, 1852, quoting *Woodard v Ohio Adult Parole Authority*, F 3d 1178, 1188 (6<sup>th</sup> Cir, 1997).

155 See Dioso-Villa, above n 10.

156 See Winter, above n 79, 49 (discussing *ex gratia* payments as charity, rather than redress or reparation for members of the Stolen Generations).

157 See Sheehy, above n 8, 86 (discussing the state's responsibility to account for errors in the justice system and to maintain the system's integrity); Owens and Griffiths, above n 43, 1301 (discussing the government as a beneficiary of reparation to the wrongfully convicted individual).

## A Model Compensation Legislation

Rather than look to discretionary acts as the principal means by which an individual can seek recompense, Australia may be in the position to formulate indemnity legislation that creates a right to compensation.<sup>158</sup> Statutory compensation treats reparation as a right of the wrongfully convicted person, rather than a state act of grace or favour, which would remedy issues of inequity in its delivery and distribution of resources.<sup>159</sup> Compensation statutes vary across countries<sup>160</sup> regarding the conditions of eligibility<sup>161</sup> and the allocation of funds;<sup>162</sup> however, the majority of statutes remain solely monetary and do not incorporate provisions that address non-economic injuries or loss. As some have suggested, a comprehensive model can include monetary payments made either in a lump sum, or distributed over time, that would assist with any loss of income experienced while in prison and would provide financial support for exonerees and their families as they transition back to society and seek employment.<sup>163</sup> Such legislation can also attempt to address non-monetary injury and loss by giving exonerees full access to services available to parolees (eg, work placements, vocational training, assistance and access to affordable housing).<sup>164</sup>

Australia is currently in a good position to provide an integrated model of compensation with its problem-solving courts for family violence, drug offences, and offenders with mental health issues.<sup>165</sup> The compensation legislation could take advantage of this existing infrastructure that mobilises government and community organisations to incorporate a specialised delivery of social services that are tailored to the individual's needs within his or her community.<sup>166</sup> This would ensure that resources are effectively allocated to meet the specific needs of each exoneree and could address the needs of specific groups, such as Indigenous exonerees, by matching them with services within their communities. With few identified exonerees in Australia, having an individualised model of compensation and re-entry would not necessarily burden the existing services and resources

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158 See Kaplan, above n 113, 244–6 (discussing equal treatment among states within a US context).

159 If Australia were to adopt state and territory legislation, coordination would be needed to ensure systematic recompense, rather than having each jurisdiction operate independently with potentially very different models of compensation. See Owens and Griffiths, above n 43 (discussing the disparate allocation of compensation across states in the US).

160 See Martin, above n 75 (discussing variations among common law countries).

161 Eg, some statutes restrict compensation to only those exonerated through DNA: Innocence Project, above n 108, 29 (discussing Missouri and Montana's compensation statutes).

162 There is no standard formula to calculate the amount of compensation; some statutes base it on the number of years in prison, while others provide minimum and maximum amounts: *ibid.*

163 *Ibid.* (discussing proposed federal legislation to compensate wrongful conviction in the US). See also Armbrust, above n 13 (discussing a holistic model for wrongful conviction); Lonergan, above n 13 (discussing an individualised delivery system for compensation); Dioso-Villa, above n 10 (proposing a comprehensive compensation model for Australia).

164 See Armbrust, above n 13, 176.

165 See Arie Freiberg, 'Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism' (2002) 20(2) *Law in Context* 6 (discussing an overview of the emergence of specialized courts in Australia).

166 See Lonergan, above n 13.



available to ex-offenders and parolees;<sup>167</sup> rather, it would ensure that state services are distributed and used effectively and would offer the best chance of the exoneree's successful re-entry into society.

## B Post-appeal Review

Once a person has been convicted at trial and his or her conviction is upheld on appeal, that person has exhausted the legal right to further appeal, even if it is based on fresh evidence such as DNA evidence. The Australian appeal process has been criticised for the limited opportunities for the wrongfully convicted to appeal their cases, since the only avenue remaining is for individuals to petition the attorney-general of their state to refer the case back to the appellate court for rehearing; however, granting petitions is at the relevant attorney-general's discretion and is not guaranteed.<sup>168</sup> Critics contend that these limited avenues of appellate review are human rights violations that breach an individual's right to a fair trial as outlined in the *ICCPR*.<sup>169</sup> In support of this notion, the Australian Human Rights Commission submitted to the Legislative Review Committee of South Australia that the current appeals process does not adequately account for situations where a person has been wrongfully convicted and a gross miscarriage of justice has occurred, as it may not meet the obligations of the *ICCPR* regarding the right to a fair trial.<sup>170</sup>

In South Australia, in response to these criticisms, the government recently enacted the *Statutes Amendment (Appeals) Act 2013* that implemented a new right of appeal. That is, a person is entitled to a second or subsequent appeal in cases where there is 'fresh and compelling' evidence of a wrongful conviction in the interest of justice.<sup>171</sup> This is a vast improvement to the existing appeals system and further investigation is needed to determine whether the implementation of this *Act* will adequately address the needs of the wrongfully convicted in seeking exoneration. If the statute is found to be adequate, other states and territories across Australia may consider adopting similar reforms. This will have a carryover effect

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167 See Armbrust, above n 13, 177.

168 Sangha and Moles, 'Post-appeal Petitions in Australia', above n 145; Sangha and Moles, 'Post-appeal Review Rights', above n 145; Bibi Sangha, Kent Roach and Robert Moles (eds) *Forensic Investigations and Miscarriages of Justice: The Rhetoric Meets the Reality* (Irwin Law, 2010). In all states, there is a statutory provision that allows for petitions to the executive to exercise the power to grant a pardon: *Crimes (Appeal and Review) Act 2001* (NSW) ss 76–82; *Criminal Code Act* (NT) sch 1 s 431; *Criminal Code 1899* (Qld) s 672A; *Criminal Law Consolidation Act 1935* (SA) s 369; *Criminal Code Act 1924* (Tas) s 419; *Criminal Procedure Act 2009* (Vic) s 327; *Sentencing Act 1995* (WA) ss 137–40. As Sangha, Roach and Moles note in reference to the exercise of mercy, 'what appears initially as an application for mercy, the exercise of a prerogative power, is, in effect, a statutory power to be exercised by the Attorney-General': Bibi Sangha, Kent Roach and Robert Moles, *Forensic Investigations and Miscarriages of Justice: The Rhetoric Meets the Reality* (Irwin Law, 2010) 142.

169 See Sangha and Moles, 'Post-appeal Petitions in Australia', above n 145; Sangha and Moles, 'Post-appeal Review Rights', above n 145; Sangha, Roach and Moles, *Forensic Investigations and Miscarriages of Justice*, above n 168.

170 Australian Human Rights Commission, Submission to the Legislative Review Committee of South Australia, *Inquiry into the Criminal Cases Review Commission Bill 2010*, 25 November 2011.

171 *Statute Amendment (Appeals) Act 2013* (SA) s 43A.

for those exonerees who wish to seek compensation for wrongful conviction, as once acquitted and exonerated from their crimes on subsequent appeal, they will be eligible for compensation in the form of ex gratia payments and under any compensation legislation created thereafter.

### C Criminal Cases Review Commission of Australia

The United Kingdom established an independent statutory body, the Criminal Cases Review Commission ('CCRC'), with powers to investigate cases that have exhausted all legal avenues of review and the power to refer cases back to the Court of Appeal.<sup>172</sup> The CCRC operates independent of the executive arm of government, but has the power to demand documents from government bodies, such as the prosecution and police, and has the resources to carry out in-depth investigations.<sup>173</sup> Rather than restrict its purview to cases that prove actual innocence, where a person did not commit the crime, the CCRC also investigates cases where individuals have been wrongfully convicted based on procedural miscarriages of justice, with a broader goal to ensure the integrity of the criminal justice system.<sup>174</sup>

Such a system has been advocated for Australia, which would complement the work of existing innocence projects<sup>175</sup> through its wider review of potential wrongful convictions and miscarriages of justice. South Australia recently considered a bill to establish a CCRC that was endorsed by the Australian Human Rights Commission, the Law Society of South Australia, the Law Council of Australia, the Australian Lawyers Alliance, former justice of the High Court, the Hon Michael Kirby, and numerous legal scholars.<sup>176</sup> Such a commission would have similar powers to that of the United Kingdom's CCRC at a state level. In the end, the South Australian government opted not to establish such a commission and instead implemented the new right to appeal, discussed above. This improves the situation for wrongfully convicted individuals seeking legal recourse, however, the establishment of state, territory or a national CCRC would only work to further complement this step forward. More cases of miscarriages of justice would be identified through its extensive investigative powers making it easier for wrongfully convicted individuals to be acquitted and exonerated, and in turn become candidates for compensation. There would also be the opportunity to conduct post-exoneration examinations<sup>177</sup> to better understand the causes and

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172 See Sangha, Roach and Moles, *Forensic Investigations and Miscarriages of Justice*, above n 168.

173 See Stephanie Roberts and Lynne Weathered, 'Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Projects and the Criminal Cases Review Commission' (2009) 29 *Oxford Journal of Legal Studies* 43.

174 See John Weedon, 'The Criminal Cases Review Commission (CCRC) of England, Wales, and Northern Ireland' (2012) 80 *University of Cincinnati Law Review* 1415, 1421.

175 See Roberts and Weathered, above n 173.

176 Robert Moles, 'Australia Needs a National Response to Miscarriages of Justice', *Tasmanian Times* (online), 2 December 2013 <<http://tasmaniantimes.com/index.php/?weblog/article/australia-needs-a-national-response-to-miscarriages-of-justice/>>.

177 See Lynne Weathered, 'Does Australia Need a Specific Institution to Correct Wrongful Convictions?' (2007) 40 *Australian and New Zealand Journal of Criminology* 179, 193–4.

correlates of wrongful conviction in Australia and the needs of exonerees post-exoneration, in order to prevent future miscarriages of justice and effectively respond to their aftermath.

## VIII CONCLUSION

The purpose of this article was to evaluate the adequacy of the post-exoneration remedies in place in Australia to assist individuals to cope with the aftermath of wrongful conviction and to successfully reintegrate them back into society after imprisonment. Ex gratia payments as the chief form of reparation for exonerees are limited and pose challenges due to the fact that they are monetary awards, highly discretionary, non-transparent, non-reviewable, and not automatically allocated to those who apply. This creates an uneven distribution of awards that tend to advantage individuals with social, political, and monetary resources who are more likely to receive payments than those with limited resources.

To treat compensation as the state's act of grace, rather than its legal duty to provide reparations for errors in the justice system, is perhaps a greater comment on how the state handles errors that may pose a threat to public confidence in its legitimacy and the perceived fairness and effectiveness of the justice system. By awarding payments in cases that pose the greatest threat to jeopardising the public's view of the efficiency and fairness of the system, ex gratia payments can be interpreted as the state's attempt at damage control, rather than meaningful reparation. Ex gratia compensation gives the appearance that errors of justice are rare and therefore do not require indemnity legislation.

Australia should endeavour to adopt comprehensive indemnity legislation for wrongful convictions where the state acknowledges its role in contributing to the convictions and fulfils its moral obligation to address the aftermath. Since compensation legislation alone cannot fully address issues of equity and given the extreme difficulties in securing an exoneration in Australian jurisdictions, it is recommended that a nuanced approach that reforms the post-appeal review process at the state and territory level be established across the country, and serious consideration be paid to the establishment of a CCRC or similar agency. In this way, more cases of miscarriages of justice may be identified and the wrongfully convicted will receive systematic and meaningful post-exoneration redress.