

Compensation for wrongful conviction

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This paper examines the causes of wrongful imprisonment, the nature of losses and the applicability of international approaches and conventions. Definitions of wrongful conviction vary internationally, as do the circumstances and amount of compensation. Australian states and territories can make discretionary ex gratia payments, although determination of compensation amounts is unclear. Compensation levels for wrongful conviction in Australia are not as generous as tortious claims. The current system of ex gratia payments that exists in all Australian jurisdictions (other than the Australian Capital Territory) is arbitrary. The introduction of dedicated legislation or specific guidelines for wrongful conviction would help bring these Australian jurisdictions into line with international human rights best practice. This paper considers the scope of claims made in Australia through some key case studies. However, there is currently no reliable national data on the prevalence of wrongful convictions in Australia; overseas research suggests wrongful convictions may be less rare than we assume.

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Wrongfully convicted people commonly feel emotions ranging from anger and loss to paranoia and betrayal. The long-term effects have been likened to that of war veterans; many wrongfully convicted people experience ongoing psychiatric dysfunction and have long-term difficulties reintegrating into society (Grounds 2004).

Currently, most Australian jurisdictions are not generous, nor are they transparent, in awarding compensation. Many wrongfully convicted people in Australia do not get any compensation, do not get their legal fees paid for, and the reasons for decisions as to whether or how much to compensate them are never disclosed.

This paper considers the mechanisms used for compensating wrongfully convicted people in Australian jurisdictions as well as the causes of wrongful imprisonment, the nature of the loss suffered by wrongfully imprisoned people and the prevalence of wrongful conviction. It also discusses the international conventions in this area and the approaches of other national jurisdictions. The question of whether Australian jurisdictions need specific institutions to review cases to detect wrongful convictions is beyond the scope of this paper (see Gould 2004 regarding such bodies in the United States; Weathered 2007).

Defining wrongful conviction

The term 'wrongful conviction' could encompass situations where people are:

- arrested and detained but released without being charged
- detained and charged but whose charges are dropped prior to trial

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- tried and acquitted but who have been remanded and denied bail
- convicted but whose conviction has been quashed on appeal (this can also be divided into people who have, or have not, been granted bail prior to trial and/or after being convicted and the conviction being overturned)
- convicted and have been sentenced to a non-custodial sanction that has been served/enforced prior to the appeal being heard (but whose conviction has been quashed on appeal)
- tried and convicted, have exhausted all appeals but who later have their convictions quashed in an extraordinary appeal and no retrial ordered, or are found not guilty at such a retrial or have been pardoned (Huff 2002a; New Zealand Law Reform Commission 1998).

Arguably, all these categories of people deserve some form of restitution. For this paper, wrongful conviction will be limited to the last category outlined above. This definition of wrongful conviction most closely approximates that adopted in the International Covenant on Civil and Political Rights (ICCPR) (see below) and the approach of most signatories to it.

The ICCPR and wrongful conviction

Article 14(6) of the ICCPR provides:

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 (see Note 1).

Of the 160 States Parties that have ratified the ICCPR, nine countries made reservations to article 14(6). Trinidad and Tobago, Malta, Guyana, Belize and Bangladesh have expressly recognised the right to compensation but have stated that they are too impoverished to implement such a system. Ireland has since withdrawn its reservation. This leaves the United States, New Zealand and Australia (Costa 2005).

Australia has maintained the following reservation to the ICCPR:

[T]he provision of compensation for miscarriage of justice in the circumstances contemplated in paragraph 6 of article 14 may be by administrative procedures rather than pursuant to specific legal provision (see Note 2).

States Parties to the ICCPR meet their obligations under article 14(6) in one or more of the following ways: incorporation of the article (or a rewording of the article) directly into domestic legislation to create a statutory right to compensation; conferring a dedicated discretion on an administrative or judicial body to determine whether awards of compensation should be paid; and utilising the general power of domestic governments to make ex gratia payments.

The United Kingdom has directly incorporated article 14(6) into its domestic legislation under the Criminal Justice Act 1988 (UK), s 133. A wrongfully convicted person must make an application to the Secretary of State who determines applications for compensation on the criteria set out in s 133. If the criteria are met, the claim is sent to an assessor who determines how much compensation to pay using principles analogous to normal civil damages. The incorporation into the UK legislation of a right to compensation has not caused a spike in payouts to wrongfully convicted people or 'opened the floodgates' since its implementation nearly 20 years ago (Costa 2005; Taylor 2003).

New Zealand has adopted a guided discretionary system of compensation under the Compensation and Ex Gratia

Payments for Persons Wrongly Convicted and Imprisoned in Criminal Cases (POL Min (01) 34/5, 12 December 2001). Compensation is still ex gratia payments, so there is no actual right to compensation. However, discretion as to whether, and how much, compensation should be paid is structured by guidelines, which are publicly available. The Minister of Justice will refer matters to a Queen's Counsel who will first determine whether compensation should be paid and, if so, recommend to the Minister how much should be paid. The applicant must prove on the balance of probabilities that they are innocent, after which a determination of damages will follow. The applicant may also make submissions on quantum. The guidelines set out criteria for determining pecuniary and non-pecuniary loss and set a starting point of NZ\$100,000 of pecuniary loss for each year served in jail. They also specifically state that, as a matter of policy, compensation should be akin to that payable for the tort of false imprisonment (Patterson 2004).

Most US jurisdictions make use of ex gratia payments to compensate wrongfully convicted people.

Compensating wrongful conviction in Australia

Individuals wrongfully convicted and imprisoned do not have a common law or statutory right to compensation in any Australian jurisdictions other than the Australian Capital Territory (ACT). However, a state or territory government may choose to make an ex gratia payment either on its own accord or as a result of a request by a party for such a payment.

An ex gratia payment is a '[p]ayment of money made or given as a concession, without legal compulsion' (Butterworth 2004). The term literally means 'out of grace' rather than as a debt of justice. State and territory governments are not obliged to make ex gratia payments in respect of wrongful convictions and a decision to refuse to make a payment is not reviewable in any way (Butterworth 2007). Ex gratia payments are made in

a wide range of situations other than to compensate for wrongful convictions, including as a means of implementing financial aid packages to individuals after natural disasters. In some Australian jurisdictions, the relevant Attorney-General's office may publish general guidelines detailing the factors normally assessed in awarding ex gratia payments. Sometimes, specific guidelines may be promulgated to deal with particular types of payments. There are currently no publicly available guidelines in any Australian jurisdiction specifically dealing with ex gratia payments for wrongful conviction. Beyond that a conviction was wrongful, it is difficult to identify the factors that need to be present for a wrongfully convicted person to be compensated, nor how such compensation will be quantified. A high public profile seems to be a good start in terms of background circumstances, although even this does not guarantee success (Percy 2007).

Occasionally, facts surrounding a wrongful conviction may also support tortious claims, such as a false imprisonment, malicious prosecution or misfeasance (New Zealand Law Reform Commission 1998; Percy 2007). These tortious causes of action are very difficult to prove. Even very compelling cases of wrongful conviction will generally not give rise to a successful claim in tort. They require specific additional facts to be present beyond simply that a conviction was wrongful. As such, the protections offered in tort law to wrongfully convicted people are more of theoretical rather than practical utility.

The other type of award that needs to be distinguished from compensation is legal costs. Normally a successful criminal defendant will not be awarded the legal costs expended in defending criminal charges. However, where there have been malfunctions in the criminal process, courts in some Australian jurisdictions may award legal costs to a defendant (Fox 2005: 78, 307–308). Such awards relate to legal costs expended, not compensation.

The ACT approach

The Australian Capital Territory has incorporated a slightly reworded version of article 14(6) within ACT legislation. Under s 23 of the *Human Rights Act 2004* (ACT), an individual who is wrongfully convicted of a criminal offence may seek compensation. The individual must have:

- been convicted of a criminal offence by a final decision of a court
- suffered punishment because of the conviction
- had the conviction reversed (or been pardoned) on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice.

Section 23(2) provides that the individual will have a right to be compensated 'according to law'.

It appears that the convicted person does not need to have been imprisoned – a lesser sanction, such as a fine or even the recording of a conviction alone, may amount to punishment on the wording of the section. However, s 23(3) provides that the right to compensation is contingent upon the conviction being reversed or the person being pardoned as a result of a new fact showing conclusively that there has been a miscarriage of justice. It is unclear how broadly this will be construed – in the United Kingdom, which has similarly worded legislation, it has been established that the discovery that a law under which a person has been convicted is ultra vires (going beyond the legal power of an authority) will not amount to 'discovery of new fact' (Taylor 2003, *UK R v Secretary of State for the Home Department, ex parte Howse* [1993] COD 494).

It is also not clear how compensation will be quantified in respect of a wrongful conviction, nor is it clear whether compensation will be available for convictions for both indictable and summary offences. The Act does not define the phrase 'according to law' or 'criminal offence', nor do the Explanatory Statement and Second Reading Speech

to the Bill in which the Act was legislated. There have been no cases determined under s 23 to date, but it is probable that compensation would be paid in accordance with accepted heads of tortious damages (i.e. with a view to compensate the individual so as to put them back in the position they would have been in, but for the wrongful conviction). The severity and/or nature of the conviction and sanction would be relevant to determining what level of compensation would be appropriate.

It is not clear from the legislation who or what body will be empowered to determine if, and how much, compensation should be paid. It is also not clear whether reasons will be given for such a decision and whether such a decision will be reviewable. The ACT government can still make use of ex gratia payments in respect of cases falling outside the provisions of the *Human Rights Act 2004* (ACT).

There are other issues that also remain uncertain about the right under s 23. Criminal suspects are routinely extradited between Australian jurisdictions and overseas. The right created under s 23 is not limited by reference to the individual's nationality and domicile, nor the court's location. Where the Australian Capital Territory extradites a person interstate or overseas, it could be theoretically liable if the receiving jurisdiction wrongfully convicts the person. It is also unclear if the right to compensation survives the death of a wrongfully convicted person and can be pursued by the person's family.

Despite these uncertainties, the ex gratia payments currently used in other Australian jurisdictions provide even less guidance as to whether or how much compensation should be paid.

Causes of wrongful conviction

Causes of wrongful conviction are generally either specific to individuals or systemic in nature. Causes relevant to the individual include factors such as mental problems that may lead an individual to make a false confession (such as John

Mark Kerr who publicly confessed to murdering beauty queen JonBenet Ramsey but was later cleared by DNA evidence – see *The Age* 2006). Common systemic causes are incorrect/false eyewitness identification, flawed scientific/forensic evidence, fault/incorrect/self-serving informer evidence, police or prosecutor misconduct or overzealousness to secure a conviction, false confessions, faulty legal representation, tunnel vision and, perhaps, the effects of the media tainting a jury (Weathered 2007). Eyewitness error is said to be the most common cause of wrongful convictions (Campbell & Denov 2004 citing Huff, Rattner & Sagarin 1986). In many cases a confluence of these circumstances contribute to wrongful conviction – for example, an overzealous prosecution combined with faulty legal representation (Huff 2002a; MacFarlane 2005). While there have been a number of wrongful convictions brought about as a result of false/faulty forensic evidence, paradoxically, many wrongful convictions are discovered by the utilisation and/or re-evaluation of such evidence (Matthews 2004; *The Age* 2007).

Effects of wrongful convictions

Wrongfully convicted people may experience psychiatric and emotional effects from the conviction and subsequent imprisonment. They undergo enduring personality changes similar to that experienced by people suffering a catastrophic experience. They often exhibit serious psychiatric morbidity and display symptoms of disorders including post-traumatic stress disorder (Grounds 2004).

Wrongfully convicted people may also suffer ongoing emotional effects from the conviction and the disengagement from society that it brings. Fear of physical and/or sexual assault may cause some people to develop physically aggressive/intimidating character traits as a coping mechanism. They often exhibit feelings of bitterness, loss, threat, paranoia and hopelessness. Ironically, the accelerated pace of release that the discovery of a wrongful conviction will normally herald can have adverse effects. The graded

release mechanisms (i.e. programs to facilitate gradual reintegration into the community) used in most jurisdictions can cause a greater upheaval to the person (Grounds 2004).

Prisoners may lose simple technical proficiencies, as well as basic emotional coping skills, making it very difficult for them to adapt to normal life and maintain relationships with family and friends. One study found that a majority of wrongfully convicted males could not live with previous partners even where the partner supported them throughout the ordeal of the wrongful conviction (Grounds 2004). Despite their convictions being quashed, wrongfully convicted offenders may also continue to be stigmatised by sections of the public, including victims of the crimes for which they were convicted.

The process of being inducted into ‘total institutions’ such as a prison involves stripping away the prisoner’s former identity. A new identity is forced upon them by the institution and/or other prisoners. This new identity may simply be ‘a prisoner’ or ‘an offender’ but also may extend to specific identities such as ‘a rapist’ or ‘a murderer’ (Campbell & Denov 2004; Goffman 1961). The acceptance *and* rejection of these labels by wrongfully convicted people involve considerable costs in both assimilating to the prison environment as well as qualifying for privileges (Campbell & Denov 2004; Goffman 1961). Maintaining what Campbell and Denov refer to as the ‘burden of innocence’ may be seen by prison authorities to evidence a lack of rehabilitation, therefore raising a prisoner’s risk of recidivism. This may considerably impair a prisoner’s chances of parole or other privileges. Within prison society, some offenders enjoy or suffer greater or lesser degrees of respect by reference to the crime for which they were convicted: sex offenders tend to be treated with disdain by prisoners and prison administrators, while murderers may be accorded a measure of respect, at least among fellow prisoners. In such an institution, respect may be a valuable asset in surviving. Given that wrongful

convictions often go undetected, protesting innocence may not be in one’s best interests (Huff 2002b).

Aside from these direct effects of accepting or rejecting their wrongful conviction, the possibility, however unlikely, of their innocence being discovered also means that prisoners lack certainty of a release date as a yardstick upon which to measure the effluxion of time (Campbell & Denov 2004). Wrongfully convicted people also suffer the physical effects of a confined environment, and may suffer physical and sexual assault whilst incarcerated (Grounds 2004).

Prevalence of wrongful conviction

The nature and causes of wrongful conviction make it very difficult for reliable data to be obtained as to its prevalence. In jurisdictions that have functioning, independent judiciaries, the general view is that these convictions are very unusual. There is some evidence that wrongful convictions may be less rare than they are commonly thought to be. It has been estimated that in the United States between 0.5 and five percent of all offenders in prison have been wrongfully convicted (Weathered 2007: 180 citing Huff, Rattner & Sagarin 1996: 53–67). At least 23 innocent people have been executed in the United States (Huff 2002a citing Bedau & Radelet 1987 and Radelet, Bedau & Putnam 1992). Liebman et al. (2000) found serious appealable errors in nearly seven out of 10 potentially capital cases. While the wrongful conviction cases involving capital punishment are the most visible, emotive and sensational, the great majority of wrongful conviction cases in the United States and abroad involve non-capital offences. These people serve unwarranted sanctions and are left with shattered lives as a result of the physical and emotional damage suffered (Huff 2002a).

In the United Kingdom, it has been informally estimated that the wrongful conviction rate may be as high as 0.1 percent of all criminal cases (Huff 2002a

citing Criminal Cases Review Commission 2001). In the United States, indirect methods have been used to estimate the rate of wrongful conviction – a study found that 25 percent of prime suspects were excluded prior to trial where DNA testing was used. Most trials do not make use of DNA testing which means that an even larger number of defendants may get convicted based on other evidence (Scheck, Neufeld & Dwyer 2000).

Qualifying for and determining the quantum of compensation

Compensation levels for wrongful conviction in Australia and overseas are generally not as generous as those for normal tortious claims such as negligence, or even for claims such as false imprisonment (Percy 2007; Taylor 2003). False imprisonment cases are quite uncommon, so it is difficult to arrive at a clear tariff for the tort, but the following cases give an idea of the level of damages ordered:

- A protestor in Queensland who was refused entry into a sitting of Parliament and wrongfully removed and imprisoned by police for a matter of hours was awarded \$20,000 plus interest. The judge found that the plaintiff had suffered little or no shame, indignity and mental suffering but nevertheless had had his rights violated (*Coleman v Watson* [2007] QSC 343, BC200709939).
- A NSW man who was wrongfully arrested and imprisoned by police for 56 days pursuant to an ultra vires order of a magistrate (for failing to pay costs of an earlier unsuccessful prosecution) was awarded \$75,000 plus interest (*Spautz v Butterworth* (1996) 41 NSWLR 1).
- A NSW man attended a police station for an interview and was arrested, charged and detained for three hours in relation to a number of separate matters. It later transpired there were no reasonable grounds for the arrest. The man was awarded \$25,000 plus interest (*Zaravinos v NSW* (2005) 214 ALR 234).

Where ex gratia compensation payments are made in Australian jurisdictions, they would seem to encompass both pecuniary and non-pecuniary loss to the person (that is, loss that is easily quantifiable, such as loss of income) and loss that is not readily calculable (such as pain and suffering or the loss of the expectations of life).

Taylor (2003: 232) estimates compensation in the United Kingdom to be on average, including both pecuniary and non-pecuniary loss, £13,000–£14,000 for each year the person has been imprisoned. Taylor cites the case of a soldier wrongfully convicted and imprisoned for 25 years who was awarded £350,000, which translates to about £14,000 a year.

Ex gratia compensation payments in Australia have been described as ‘somewhat arbitrary’ and generally ‘very modest’, making it difficult to establish any formal or informal tariff of damages payable (Percy 2007). The broad discretion in awarding and lack of transparency surrounding these payments makes it difficult to determine what types of situations will result in an ex gratia payment at all, regardless of its size.

In the Chamberlain case, Lindy Chamberlain received an ex gratia payment of \$1.3m, as well as \$396,000 for legal costs and \$19,000 for the family car which had been effectively destroyed as a result of forensic investigations. She was imprisoned for approximately four years before her sentence was remitted and an inquiry convened into the matter (Victorian Bar 2005; see also *Re Conviction of Chamberlain* (1988) 93 FLR 239).

Percy (2007) discusses a number of other awards. In 1979, Tim Anderson, Ross Dunn and Paul Alister were convicted in New South Wales of conspiracy to murder and sentenced to 16 years in prison. After serving seven years imprisonment, they were unconditionally pardoned and were each awarded a \$100,000 ex gratia payment. In 1980, Douglas Rendell was convicted

of murdering his wife in New South Wales and after serving eight years in jail, was awarded a \$100,000 ex gratia payment. In 2003, a WA man, John Button, was cleared of a 1962 murder and awarded a \$400,000 ex gratia payment. Lastly, in 2006, a Perth man, Andrew Mallard (*Mallard v R* [2005] HCA 68, BC200509688), was cleared of a murder for which he served 12 years of imprisonment. Mallard’s application for an ex gratia payment is still under review, but he has already been granted an interim ex gratia payment of \$200,000.

Percy (2007) notes that while a small number of people who are wrongfully convicted are successful in getting an ex gratia payment, many get no compensation whatsoever.

Factors such as long duration of imprisonment and the presence of negligence or malice of government officials would generally seem to increase both the likelihood and the size of an ex gratia payment, although these factors are not rigidly adhered to (Zdenkowski 1993).

Factors that may lower the chances and/or size of an ex gratia payment are the presence of either prior criminality generally, or lesser criminal culpability in relation to the conduct surrounding wrongful conviction (Taylor 2005; Young 2007). Superior UK courts have ruled in favour of allowing deductions commonly made in tort matters to the pecuniary portion of compensation awards to reflect living costs such as food and lodgings that the wrongfully imprisoned individual did not have to pay whilst imprisoned. In one case, a 25 percent deduction to the loss of earnings portion of the award was confirmed on appeal. Academics, lawyers and the press have criticised this rather mean approach to such awards (Taylor 2005), but Australian jurisdictions would take a similar approach.

Conclusion

So long as Australia maintains its reservation to article 14(6) of the ICCPR, the system of ex gratia payments used in most Australian jurisdictions will not

breach Australia's international obligations. However, these ex gratia payments lack transparency and are somewhat arbitrary in terms of when compensation will be offered and how it will be quantified (Walsh 1994). While governments should be able to properly balance the surrounding circumstances of a case against the wrongful conviction itself, they should also foster a process for determining such claims fairly and appropriately, if not generously.

It would be appropriate for compensation for wrongful conviction to be calculated in a similar manner to damages for false imprisonment. It would also be desirable for the criteria upon which these decisions are based to be publicly available, and that reasons be given for any such decision.

It would be preferable for each Australian state and territory to either implement legislation akin to the *Human Rights Act 2004* (ACT) or draft specific guidelines for the award of compensation to wrongfully convicted people (akin to those used in New Zealand). Victoria recently introduced its own human rights legislation, which did not include such a provision, but there are a number of other Australian jurisdictions currently considering the feasibility of human rights legislation.

Notes

1. International Covenant on Civil and Political Rights, Australia Reservation, deposited 13 August 1980, 1197 UNTS 411. <http://www2.ohchr.org/english/law/ccpr.htm>

2. International fora such as the International Criminal Court make use of such compensation mechanisms; see Beresford (2002).

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All URLs correct at 14 April 2008

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