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# The cruelty and injustice of a poorly funded legal aid system

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**Imagine being jailed for something you didn't do and help is denied.**

Read more: <http://www.smh.com.au/federal-politics/society-and-culture/the-cruelty-and-injustice-of-a-poorly-funded-legal-aid-system-20111221-1p5je.html#ixzz2j70k665u>

TERRY Irving found himself in the wrong place at the wrong time. In 1993, an armed robber held up a bank in Cairns and stole \$6230. Meanwhile, Irving was at the nearby pub playing pool. A relaxed and generous man, he lent his car to a couple of blokes for the afternoon. He did not think further of it until he heard the police reporting information about the robbery over the radio, including his car registration. Irving was arrested and charged, despite not matching the physical description.

Irving's problems became a nightmare when his barrister failed to show up and he met his new one on the morning of the trial. Despite the hearing being listed for three days, he was convicted that afternoon and sentenced to eight years in prison.

Irving was denied legal aid funding for an appeal. He went on to represent himself and, unsurprisingly, lost.

Fortunately, Irving met legal aid solicitor Michael O'Keeffe while in jail. Many inmates will tell you they are innocent, but O'Keeffe was good enough to listen.

Together, they decided to take Irving's case to the High Court, a task that has cost countless hours of their lives. They applied for legal aid to do so. This was again denied; the reason is still unclear. When the High Court learnt of this, the judges immediately adjourned the hearing and ordered Irving to get legally aided representation.

With legal aid finally granted, the result was breathtaking. The chief justice at the time, Sir Gerard Brennan, expressed "the gravest misgiving about the circumstances of this case ... [It is] a very disturbing situation. And in all of this, the accused has been denied legal aid for his appeal."

The conviction was quashed, unopposed by the Crown. A retrial was ordered, but Irving had to wait another year in limbo before the State of Queensland decided not to proceed with another prosecution.

Irving and O'Keeffe made a complaint to the UN Human Rights Committee, which found he was subject to a "manifest injustice". The UN was critical of the failure to grant legal aid,

saying it amounted to a breach of our international obligations, including to provide legal aid to persons facing serious criminal charges.

O'Keeffe then approached law firm Maurice Blackburn and successfully obtained pro bono representation for Irving in his claim for compensation.

This preventable tragedy cost Irving nearly five years of his life. This demonstrates the importance of access to the judicial system: everybody is entitled to a lawyer to guard against such miscarriages of justice. If we had a better-funded legal aid system that could take on more cases, it is less likely that someone like Irving would fall through the cracks of our justice system.

In 1997, the year Irving's conviction was quashed, legal aid suffered funding cuts under the Howard government. Legal aid is funded in partnership by the Commonwealth and states and territories. The Commonwealth's share of spending declined from 49 per cent in 1996-97 to 32 per cent in 2009-10. The states and territories have been unable to make up the shortfall.

The lion's share of this limited resource is spent on criminal and family law cases, many civil legal aid divisions were closed or drastically reduced after these cuts. Today, the means thresholds for civil cases tend to come in below the poverty line, meaning the number of legally aided civil cases (other than family law) is tiny.

Troublingly, the increased complexity of litigation has led to an increase in the cost of cases across all courts by 78 per cent in real terms from 1998 to 2008.

All this has had a devastating effect on access to justice. Everyday people are simply unable to obtain advice on housing, employment and consumer and debt matters. Such advice is desperately needed, particularly in these difficult economic times. Instead, the shortfall in legal services must be picked up by overworked community legal centres or pro bono practices in large firms. This is no substitute for a funded system. Many fall through the net or go unrepresented.

By global standards, we are lagging behind. The UK government spends £2 billion (\$3 billion) of taxpayers' money a year on publicly funded legal advice, per capita spending of \$68.36 compared with Australia, which spends just \$23.

The result is Australia has a grossly underfunded system that ends up proving costly. Modelling done on family law matters in Queensland found net efficiency benefits for cases where legal aid funding was available. It was estimated that for every dollar spent on legal aid, we save between \$1.64 and \$2.25 in fees, court time and other litigation expenses. In other words, this is a positive investment of public money because it saves money elsewhere.

Under the Labor government, we have seen the first increase in federal funding for legal aid since 1997. But there is still a long way to go.

And for Irving, proper funding may provide some comfort that his nightmare would be less likely to happen to anybody else.

**Elizabeth O'Shea and Nicole Papaleo are lawyers.**

## ATTACHMENT 2

### LIST OF AUSTRALIAN CASES OF WRONGFUL CONVICTION

Source: Wrongfully Convicted Database maintained by Forejustice and *Justice Denied* magazine, [http://forejustice.org/db/location/innocents\\_1.html](http://forejustice.org/db/location/innocents_1.html) .

Note that dates used refer to the date of **original** conviction, not the date of discovery of innocence, which can be a decade or more after conviction

<a href="#">Alister</a> , Paul	Australia	1979
<a href="#">Anderson</a> , Timothy	Australia	1979
<a href="#">Angel</a> , Jeanie	Australia	1989
<a href="#">B</a> , Unnamed Defendant	Australia	
<a href="#">Beamish</a> , Darryl	Australia	1961
<a href="#">Boekeman</a> , Janel Anne	Australia	
<a href="#">Bui</a> , Hong	Australia	2006
<a href="#">Burglary</a> , Man convicted of	Australia	
<a href="#">Busuttill</a> , John	Australia	2011
<a href="#">Butler</a> , Lawrence	Australia	
<a href="#">Button</a> , Frank Alan	Australia	2000
<a href="#">Button</a> , John	Australia	1963
<a href="#">Campbell</a> , Belinda Mary	Australia	2007
<a href="#">Campbell</a> , Don Gordon	Australia	
<a href="#">Campbell</a> , Garry	Australia	2007
<a href="#">Campbell</a> , Ian	Australia	2007
<a href="#">Campbell</a> , Vivian	Australia	2007
<a href="#">Carol</a> , Raymond	Australia	
<a href="#">Catt</a> , Roseanne	Australia	1991
<a href="#">Chamberlain</a> , Lindy	Australia	1982
<a href="#">Chamberlain</a> , Michael	Australia	1982
<a href="#">Chaytor</a> , Steven	Australia	
<a href="#">Chishimba</a> , Tyrone	Australia	2009
<a href="#">Condren</a> , Kevin	Australia	1984
<a href="#">Conor</a> , Colin	Australia	2006
<a href="#">Davy</a> , Raymond Paul	Australia	2006

<a href="#">De Simone</a> , Giuseppe	Australia	2007
<a href="#">Deutschburg</a> , Chris von	Australia	1983
<a href="#">Di Maria</a> , Joshua	Australia	2009
<a href="#">D'Orta-Ekenaike</a> , Ryan	Australia	1996
<a href="#">Dowling</a> , Tim	Australia	2007
<a href="#">Dunn</a> , Ross	Australia	1979
<a href="#">Easterday</a> , Clark	Australia	1993
<a href="#">Edwards</a> , Ben	Australia	2008
<a href="#">Ettridge</a> , David	Australia	2003
<a href="#">Father</a> , Queensland	Australia	2010
<a href="#">Fazzari</a> , Salvatore (Sam)	Australia	2006
<a href="#">Fingleton</a> , Di	Australia	2003
<a href="#">Frederick</a> , Michael	Australia	2004
<a href="#">Fysh</a> , Stuart	Australia	2012
<a href="#">Gardiner</a> , Stephen	Australia	2005
<a href="#">Geesing</a> , Raymond	Australia	1983
<a href="#">Goldie</a> , Adele	Australia	2007
<a href="#">Grandmother</a> , Unnamed	Australia	2006
<a href="#">Grant</a> , William Christopher	Australia	2006
<a href="#">Greensill</a> , Josephine Mary	Australia	2010
<a href="#">H</a> , PA	Australia	2008
<a href="#">Hanson</a> , Pauline	Australia	2003
<a href="#">Hayman</a> , Suezanne	Australia	1987
<a href="#">HAZ</a> , 58-year-old man	Australia	2010
<a href="#">Hoser</a> , Raymond	Australia	1988
<a href="#">Hutton</a> , Drew	Australia	2011
<a href="#">Ireland</a> , Dean	Australia	1993
<a href="#">Ireland</a> , Len	Australia	1993
<a href="#">Irving</a> , Terry	Australia	1993
<a href="#">J.</a> , A.	Australia	2009
<a href="#">Jama</a> , Farah	Australia	2008
<a href="#">John Sharpley</a> , Robert	Australia	2010
<a href="#">Keenan</a> , Francis Robert	Australia	2007
<a href="#">Kelly</a> , Desmond Patrick	Australia	2006

<a href="#">Keough</a> , Henry	Australia	1970
<a href="#">Klamo</a> , Tomas	Australia	2007
<a href="#">Lam</a> , Cuong	Australia	2006
<a href="#">Landini</a> , Henry	Australia	1983
<a href="#">Law</a> , Bryan	Australia	2007
<a href="#">Lodge</a> , Matthew James	Australia	2011
<a href="#">Lustig</a> , Peter	Australia	
<a href="#">Makasa</a> , Likumbo	Australia	2009
<a href="#">Mallard</a> , Andrew	Australia	1994
<a href="#">Manley</a> , Jonathan	Australia	1993
<a href="#">Martens</a> , Frederic Arthur	Australia	2006
<a href="#">Martinez</a> , Jose	Australia	2006
<a href="#">May</a> , Scott Alan	Australia	2008
<a href="#">Michael King</a> , Stefan	Australia	
<a href="#">Mickelberg - (2010 conviction)</a> , Ray	Australia	
<a href="#">Mickelberg</a> , Brian	Australia	1983
<a href="#">Mickelberg</a> , Peter	Australia	1983
<a href="#">Mickelberg</a> , Raymond	Australia	1983
<a href="#">Mraz</a> , (First name withheld	Australia	
<a href="#">Mulenga</a> , Mumbi Peter	Australia	2009
<a href="#">Mulhearn</a> , Donna	Australia	2007
<a href="#">Penza</a> , Franco Michael	Australia	2009
<a href="#">Pereiras</a> , Carlos	Australia	2006
<a href="#">Perry</a> , Emily	Australia	1981
<a href="#">Poduska</a> , Paul Jacob	Australia	2007
<a href="#">Pohl</a> , Johann (Ziggy)	Australia	1973
<a href="#">Potter</a> , Graham	Australia	
<a href="#">Raiskio</a> , Elsa	Australia	2011
<a href="#">Rotumah</a> , Brett	Australia	2007
<a href="#">Rotumah</a> , Steven	Australia	2007
<a href="#">Ryan</a> , Ronald	Australia	
<a href="#">S</a> , AL	Australia	2011
<a href="#">Sharpley</a> , Robert John	Australia	2010

<a href="#">Splatt</a> , Edward	Australia	1978
<a href="#">Spratt</a> , Kevin John	Australia	2009
<a href="#">Stafford</a> , Graham Stuart	Australia	1991
<a href="#">Stegman</a> , Geoffrey Robert	Australia	1993
<a href="#">Stevens</a> , Laurie	Australia	2003
<a href="#">Szitovszky</a> , Christopher Leslie	Australia	
<a href="#">Taufahema</a> , Motekiai	Australia	2002
<a href="#">Tauszik</a> , Anthony John	Australia	2005
<a href="#">Thaiday</a> , Patrick Dominic	Australia	2008
<a href="#">Thomas</a> , Joseph	Australia	2006
<a href="#">Thomas</a> , Joseph 'Jack' Terren	Australia	2006
<a href="#">Tran</a> , Hoang Quang	Australia	2006
<a href="#">Tran</a> , Long Thanh	Australia	2006
<a href="#">Van</a> , Hung	Australia	2006
<a href="#">X</a> , Mr.	Australia	
<a href="#">Zamudin</a> , Ardi Zam	Australia	
<a href="#">Zukanovic</a> , Mirza	Australia	2010

## ATTACHMENT 3

### LIST OF PARTIES WHO HAVE RATIFIED THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS ICCPR

Note: Not all parties are signatories to the ICCPR

- [Afghanistan](#)
- [Algeria](#)
- [Argentina](#)
- [Armenia](#)
- [Australia](#)
- [Austria](#)
- [Azerbaijan](#)
- [Bahamas](#)
- [Bahrain](#)
- [Bangladesh](#)
- [Barbados](#)
- [Belarus](#)
- [Belgium](#)
- [Belize](#)
- [Bolivia](#)
- [Bosnia and Herzegovina](#)
- [Botswana](#)
- [Bulgaria](#)
- [Cambodia](#)
- [Canada](#)
- [Chile](#)
- [China](#)
- [Colombia](#)
- [Congo](#)
- [Croatia](#)
- [Cuba](#)
- [Cyprus](#)
- [Czech Republic](#)
- [Democratic People's Republic of Korea](#)
- [Denmark](#)
- [Ecuador](#)
- [Egypt](#)
- [El Salvador](#)
- [Estonia](#)
- [Fiji](#)
- [Finland](#)
- [France](#)
- [Gambia](#)
- [Georgia](#)
- [Germany](#)
- [Ghana](#)
- [Greece](#)
- [Guatemala](#)
- [Guinea](#)
- [Guyana](#)
- [Hungary](#)
- [Iceland](#)
- [India](#)
- [Indonesia](#)
- [Iraq](#)

- [Ireland](#)
- [Israel](#)
- [Italy](#)
- [Jamaica](#)
- [Japan](#)
- [Kuwait](#)
- [Lao People's Democratic Republic](#)
- [Latvia](#)
- [Libyan Arab Jamahiriya](#)
- [Liechtenstein](#)
- [Luxembourg](#)
- [Maldives](#)
- [Malta](#)
- [Mauritania](#)
- [Mexico](#)
- [Monaco](#)
- [Mongolia](#)
- [Namibia](#)
- [Nepal](#)
- [Netherlands](#)
- [New Zealand](#)
- [Nicaragua](#)
- [Norway](#)
- [Pakistan](#)
- [Panama](#)
- [Paraguay](#)
- [Peru](#)
- [Philippines](#)
- [Poland](#)
- [Portugal](#)
- [Republic of Korea](#)
- [Republic of Montenegro](#)
- [Republic of Serbia](#)
- [Romania](#)
- [Russian Federation](#)
- [Samoa](#)
- [Senegal](#)
- [Slovakia](#)
- [Slovenia](#)
- [Solomon Islands](#)
- [South Africa](#)
- [Spain](#)
- [Sri Lanka](#)
- [Sudan](#)
- [Suriname](#)
- [Sweden](#)
- [Switzerland](#)
- [Syrian Arab Republic](#)
- [Thailand](#)
- [The Former Yugoslav Republic of Macedonia](#)
- [Trinidad and Tobago](#)
- [Tunisia](#)
- [Turkey](#)
- [Tuvalu](#)
- [Ukraine](#)
- [United Kingdom of Great Britain and Northern Ireland](#)
- [United States of America](#)
- [Uruguay](#)
- [Venezuela](#)



- [Viet Nam](#)
- [Yemen](#)
- [Zimbabwe](#)

## New Zealand - Eligibility and Quantum of Compensation for Wrongful Imprisonment

Source: (New Zealand POL Min (01) 34/5, 12 December 2001 - Compensation and Ex Gratia Payments for Persons Wrongly Convicted and Imprisoned in Criminal Cases

<b>Cabinet guidelines</b>	Cabinet has established guidelines for deciding whether or not someone receives compensation for wrongful conviction and imprisonment and how much compensation they receive.
<i>Eligible claimants must be imprisoned, and subsequently pardoned or convictions quashed</i>	The Cabinet guidelines require claimants to: <ul style="list-style-type: none"> <li>• be alive at the time of application</li> <li>• have served all or part of a sentence of imprisonment</li> <li>• have received a free pardon or have had their convictions quashed on appeal without order of retrial.</li> </ul>
<i>Investigation and determination of claims</i>	The Ministry of Justice initially assesses each claim. Claims meriting further assessment are referred by the Minister of Justice to a Queen’s Counsel for advice. The Queen’s Counsel then reports to the Minister on the merits of the claim. If the Queen’s Counsel is satisfied that the applicant is innocent on the balance of probabilities, the Queen’s Counsel will recommend an appropriate amount of compensation in line with the guidelines. Cabinet makes the final decision on the recommendation of the Minister.
<i>Types of compensation</i>	The Cabinet guidelines contemplate three kinds of compensation for successful claimants: <ul style="list-style-type: none"> <li>• payments for non-pecuniary losses following conviction (for example, loss of liberty or emotional harm) – based on a starting figure of \$100,000 for each year in custody</li> <li>• payments for pecuniary losses following conviction (for example, loss of livelihood and future earnings)</li> <li>• a public apology or statement of innocence.</li> </ul>
<i>Process for determining eligibility and quantum of compensation</i>	The process for determining eligibility and quantum of compensation for claims within Cabinet guidelines is set out in this <a href="#">flow chart</a> .

<b>Claims outside guidelines</b>	<p>In making the guidelines, Cabinet reserved the discretion to pay compensation to an applicant who was not eligible in extraordinary circumstances, where it is in the interests of justice.</p> <p><i>Non-eligible</i> claimants include persons who have had their convictions quashed or set aside under the following circumstances:</p> <ul style="list-style-type: none"> <li>• where a retrial is ordered by an appeal court but the trial does not proceed;</li> <li>• where a retrial is ordered by an appeal court and the person is acquitted at the retrial; or</li> <li>• where the conviction is quashed on a rehearing in the District Court.</li> </ul>
<i>Investigation and determination of claims outside guidelines</i>	<p>Cabinet prescribed no additional criteria or process for consideration of claims falling outside the Cabinet guidelines. However, current practice is to ensure that, where relevant, important principles in the Cabinet guidelines are applied in a consistent manner to such claims.</p> <p>Claimants outside guidelines must show, at a minimum, that they are innocent on the balance of probabilities. They must also show that there are extraordinary circumstances that justify compensation. Unlike claims inside the Cabinet guidelines, there is no requirement that the claim be considered by a Queen’s Counsel. The Ministry of Justice may, however, seek a Queen’s Counsel’s assistance in relation to any or all aspects of a claim.</p>
<i>Types of compensation</i>	<p>There is no requirement to apply the Cabinet guidelines relating to calculation of compensation. However, an approach is usually adopted that is generally consistent with the guidelines.</p>
<i>Process for determining eligibility and quantum of compensation</i>	<p>The process for determining eligibility and quantum of compensation for claims outside guidelines is set out in this <a href="#">flow chart</a>.</p>

## **Process for determining eligibility and quantum of compensation**

Compensation for wrongful conviction and imprisonment Conviction set aside or quashed Applicant writes to Minister of Justice seeking compensation Minister seeks advice of Ministry of Justice Ministry advises Minister whether claim “merits further assessment” Ministry assesses whether there are “extraordinary circumstances” Advice is NO Minister writes to applicant declining compensation Eligible for consideration under Cabinet guidelines Not eligible under Cabinet guidelines But discretion to compensate in “extraordinary circumstances” Advice is YES, Minister appoints QC to assess the claim QC advises whether the applicant is “innocent on the balance of probabilities” If YES, QC recommends an amount of compensation calculated under Cabinet guidelines Minister makes recommendation to Cabinet, which decides on payment of compensation Applicant must be “innocent on the balance of probabilities” and there must be extraordinary circumstances such that it is in the interests of justice that compensation be paid Advice is YES, Ministry recommends amount of compensation taking Cabinet guidelines into account