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# GRIFFITH JOURNAL OF LAW & HUMAN DIGNITY

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# REFLECTING ON WRONGFUL CONVICTIONS OF WOMEN IN AUSTRALIA: DEFINITIONS, DEBATES AND DATA

ROBYN BLEWER\* AND DR. CELINE VAN GOLDE<sup>†</sup>

\*\* Please note this article includes the name of a First Nations woman who has died and may include names of other First Nations women who have died.\*\*

*The quashing of Kathleen Folbigg's convictions in June 2023 caused many to reflect upon the way in which Australian criminal justice systems might judge women. The growing body of research into wrongful convictions of women overseas is developing an understanding of how and why the criminal justice process often fails to consider the experiences of women, incarcerates them – and makes it more difficult for their wrongful convictions to be uncovered and corrected. This article considers that research and applies its findings to known cases of wrongful convictions of women in Australia. The exploratory analysis offered in this article highlights possibilities for further research that will develop a more precise understanding of prosecution processes in Australia, the risk factors for wrongful conviction of women, and the barriers to uncovering wrongful convictions. Understanding these issues will help prevent wrongful convictions and improve pathways to justice.*

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\* Robyn Blewer is a lecturer at Griffith Law School, where she teaches Criminal Law. Her research focuses on criminal trial procedure and the treatment of vulnerable witnesses. She is the Director of Griffith University Innocence Project.

<sup>†</sup> Dr. Celine van Golde, a Senior Lecturer at the University of Sydney's School of Psychology, specialises in researching the reliability of eyewitness memory in children and adults, examining how forensic interviewing techniques impact memory accuracy. She is also the founder and director of Not Guilty; The Sydney Exoneration project. The authors also acknowledge the valuable contributions in research and reviews from Dr Lisanne Adam and Wen Boa Amy Liu as well as the feedback from the anonymous reviewers.

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## I INTRODUCTION

At 8:00am on 6 October 1909 Martha Rendall was executed in Fremantle gaol, in Western Australia. She is said to have ‘walked firmly to the scaffold’, her last words: ‘I will meet my end peacefully’. A prison warden, Mrs Cook, later made a statement to the press:

She was a brave woman, Mrs Rendall. I have ministered to numerous women in this gaol during many years, but I have seldom believed in a woman’s innocence as I did in hers.... Now and then, when opportunity offered, she repeated the statement of her innocence. *I did not kill those little children.*<sup>1</sup>

Less than one month earlier, on 15 September 1909, Rendall had been convicted of murdering her teenage stepson (and was suspected of murdering her five, and seven-year-old stepdaughters over the course of the previous three years).<sup>2</sup> While five doctors apparently could not agree on the cause of the teen’s death (or that of Rendall’s stepdaughters), circumstantial evidence of a child witnessing Rendall buy ‘spirits of salt’ (hydrochloric acid) and evidence that she and the father of the children had been ‘trying to delude the world into believing they were man and wife’ appears to have been enough

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<sup>1</sup> ‘A Woman Executed’, *Leader* (Melbourne, 16 October 1909) 34 <<http://nla.gov.au/nla.news-article197078087>>.

<sup>2</sup> Mark Finnane et al, ‘Western Australian Courts’, *The Prosecution Project Database* (28 July 2023) <<https://prosecutionproject.griffith.edu.au/other-resources/western-australian-courts/>>.

for the all-male jury to convict Rendall while acquitting her partner and co-accused, Morris.<sup>3</sup>

One hundred and fifteen years on, we will never know if Rendall was innocent or not. The circumstances in which she was tried, convicted, and executed, however, are reminders of the hurdles and inequities women have long faced in Australia's criminal justice systems. The differences between Rendall's and Morris' experiences of the same prosecution were described in one press report as 'the woman is consigned to the scaffold, and the man is left with his thoughts'.<sup>4</sup>

In this article we set out to do two things: first, review research findings that demonstrate various ways in which women come to be wrongly convicted, and how those so-called 'causes' of wrongful conviction differ from cases involving men; second, consider how this research can explain known cases of miscarriages of justice involving female defendants in Australia – or not.

We conclude by considering the extent to which this small collection of cases reflects research and issues that arise in the extant literature. We do not suggest that emerging themes are to be interpreted as evidence of guilt or innocence of women, or that these cases are representative of all convictions (wrongful or otherwise) of women. This article is not intended to be a comprehensive study. Rather, our intention is to start the critical consideration of how women might be wrongly convicted in Australia, how these miscarriages of justice exhibit or could be explained by the broader research on wrongful convictions of women that point to issues of gendered, racial, and classed stereotypes as contributing factors to wrongful convictions of women. Our intention here is to establish a starting point for further academic debate and research into defining wrongful convictions and understanding the nuances of a prosecution process that purports to treat all defendants equally.

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<sup>3</sup> 'The Murder of Arthur Morris', *The Sunday Times* (Perth, 19 September 1909) 9–16 <<http://nla.gov.au/nla.news-article57593131>> ('Murder of Arthur Morris').

<sup>4</sup> 'The Murder of Arthur Morris' (n 3).

## II FACTORS IN WRONGFUL CONVICTIONS OF WOMEN GENERALLY

Like men, women have been wrongly convicted and are at risk of wrongful conviction. Globally and historically, however, research on wrongful convictions has disproportionately focused on men.<sup>5</sup> This is at least partially because the confirmed cases of wrongful convictions have occurred in relation to serious crimes, such as murder and sexual assault that tend to involve male defendants at greater rates than female defendants.<sup>6</sup> Dioso-Villa's 2015 study stands out as an important contribution documenting 71 known Australian cases of wrongful conviction.<sup>7</sup> In that study, thirteen per cent ( $n = 9$ ) of the 71 wrongful convictions involved female defendants.<sup>8</sup> Of the 3,316 known exonerations in the USA since 1989, however, 9 per cent ( $n = 285$ ) of the wrongly convicted were women.<sup>9</sup>

Since the late 1980s, studies of DNA-related exonerations have identified a broader range of factors that are now recognised to most frequently contribute to wrongful convictions, not just in relation to DNA cases.<sup>10</sup> These causal and contributing factors include eyewitness misidentification, issues with police and prosecution practices, erroneous forensic science, false confessions, inadequate defence representation, and false informant testimony.<sup>11</sup>

Subsequent research now indicates these causal factors of wrongful conviction impact wrongfully convicted men and women differently. In Ruesink and Free Jr's 2005 study of wrongful convictions in the USA, for example, eyewitness misidentification was the main cause of wrongful convictions for men, followed by police or prosecutorial misconduct.<sup>12</sup>

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<sup>5</sup> Marvin D Free Jr. and Mitch Ruesink, *Wrongful Convictions of Women: When Innocence Isn't Enough* (Lynne Rienner Publishers, 2022) 16.

<sup>6</sup> Ibid.

<sup>7</sup> Rachel Dioso-Villa, 'A Repository of Wrongful Convictions in Australia: First Steps Toward Estimating Prevalence and Causal Contributing Factors' (2015) 17(2) *Flinders Law Journal* 163.

<sup>8</sup> Dioso-Villa (n 7) 179.

<sup>9</sup> Newkirk Center for Science & Society, 'Exonerations by year: DNA and Non-DNA', *The National Registry of Exonerations* (Web Page, 28 July 2023) <<https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx>>.

<sup>10</sup> Brandon L. Garrett, 'Convicting the Innocent Redux' in Daniel S Medwed (ed), *Wrongful Convictions and the DNA Revolution: Twenty-Five Years of Freeing the Innocent* (Cambridge University Press, 2017) 45–6.

<sup>11</sup> Ibid. See also Dioso-Villa (n 7) 181–2; Debra Parkes and Emma Cunliffe, 'Women and Wrongful Convictions: Concepts and Challenges' (2015) 11 *International Journal of Law in Context* 219, 225.

<sup>12</sup> Mitch Ruesink and Free D. Marvin Jr., 'Wrongful Convictions Among Women: An Exploratory Study of a Neglected Topic' (2005) 16(4) *Women & Criminal Justice* 1, 13.

For women, however, the situation was reversed with police or prosecutorial misconduct impacting 86 per cent of cases with female defendants, 'far exceeding any other factor' in the study.<sup>13</sup> In comparison, eyewitness issues (the primary factor impacting men) only 19 per cent of cases impacting women.<sup>14</sup>

Police conduct that contributes to a wrongful conviction is a complex issue. Many cases can be attributed to misconduct, even corruption, on the part of officers. Other cases, however, can be attributed to conduct that Brian Reichart describes as 'something shy of intentional misconduct'.<sup>15</sup> Tunnel vision, for example, is a type of police and prosecutorial misconduct that refers to a common cognitive bias that leads investigators and/or prosecutors to selectively focus on information appearing to support what they already believe and resulting in them disregarding contradictory evidence.<sup>16</sup> In Australia, more than half of the cases in Dioso-Villa's 2015 study involved some form of police misconduct and it was the most common of the causal and contributing factors identified at 55 per cent of the 71 cases ( $n = 39$ ).<sup>17</sup> While the cohort of cases with female defendants is small, at only nine, significantly, police misconduct impacted upon seven of these cases (77 per cent).<sup>18</sup>

Police [mis]conduct in relation to female defendants or suspects is frequently particularly insidious. Parkes and Cunliffe 'observed a pervasive police strategy' that essentially exploits 'a mother's presumed sense of responsibility' for her children'.<sup>19</sup> US case law has demonstrated instances where police officers have threatened a mother's custody of her children to coerce a confession or guilty plea.<sup>20</sup> Having dependents may form a strong

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<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Brian Reichart, 'Tunnel Vision: Causes, Effects, and Mitigation Strategies' (2016) 45(2) *Hofstra Law Review* 451, 451.

<sup>16</sup> Reichart (n 15) 453; Keith A. Findley, 'Tunnel Vision' in Brian L. Cutler (ed), *Conviction of the Innocent: Lessons from Psychological Research* (American Psychological Association, 2012) 303, 303.

<sup>17</sup> Dioso-Villa (n 7) 182.

<sup>18</sup> Dioso-Villa (n 7).

<sup>19</sup> Parkes and Cunliffe (n 11) 233.

<sup>20</sup> See, e.g., *Lynumn v. Illinois* 372 U.S. 528 (1963) cited in Dean A. Strang, 'Inaccuracy and the Involuntary Confession: Understanding *Rogers v Richmond* Rightly' (2020) 110(1) *The Journal of Criminal Law and Criminology* 69, 78; Allison Redlich, 'False confessions, false guilty pleas: Similarities and differences' in G. D. Lassiter and C. A. Meissner (eds.), *Police interrogations and false confessions: Current research, practice, and policy recommendations* (American Psychological Association, 2010) 49–66; Stephen Jones, 'Under Pressure: Women Who Plead Guilty to Crimes They Have Not Committed' (2011) 11(1) *Criminology & Criminal Justice* 77–90.



motivation for women to avoid or minimise the time spent in prison.<sup>21</sup> Police have been found to exploit this relationship in cases where evidence of the cause of death may be weak and confession evidence is used in varying ways to obtain evidence that the woman intended to harm or kill her child/ren.<sup>22</sup> False confessions and false guilty pleas are alike in that both refer to accepting responsibility for a crime that was not committed and they often involve similar motives.<sup>23</sup> Some studies have indicated that women, especially Indigenous women, appear to be more likely to falsely confess or plead guilty than men, possibly because of gratuitous concurrence.<sup>24</sup>

A further difference between wrongful convictions of men and women is that wrongly convicted women are overrepresented in cases where it is subsequently found that not only was the woman innocent, but there was actually no crime to begin with.<sup>25</sup> The National Registry of Exonerations in the USA reports that women are nearly twice as likely to be wrongly convicted for these 'no-crime' cases as men.<sup>26</sup> In Gross and Shaffer's 2012 study, '54% of female exonerees (31/57), but only 12% of the men (96/816), were convicted of crimes that never occurred'.<sup>27</sup> No-crime cases often involve convictions for child abuse-related crimes, or where babies have died.<sup>28</sup> In the USA, for example, it took Kristine Bunch 17 years to prove an electrical fault in her home had caused the fire that killed her young son, not that she had deliberately started the fire, killing her child in the process.<sup>29</sup>

At the core of these differences in how men and women come to be wrongly convicted is likely to be a fair degree of stereotypes and sexism, both in terms of how police and

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<sup>21</sup> Jones (n 20). See also Rowena Lawrie, 'Speak out, speak strong: Researching the needs of Aboriginal women in custody' (2003) 5(24) *Indigenous Law Bulletin* 5.

<sup>22</sup> Parkes and Cunliffe (n 11) 233.

<sup>23</sup> Redlich (n 20).

<sup>24</sup> Kent Roach, 'The Wrongful Conviction of Indigenous People in Australia and Canada' (2015) 17(2) *Flinders Law Journal* 203, 229.

<sup>25</sup> Samuel Gross and Michael Shaffer, 'Exonerations in the United States, 1989–2012: Report by the National Registry of Exonerations' (2012) *University of Michigan - Michigan Law Scholarship Repository* 13 <<https://repository.law.umich.edu/other/92>>.

<sup>26</sup> *Ibid.*

<sup>27</sup> Gross and Shaffer (n 25) 30.

<sup>28</sup> Gross and Shaffer (n 25) 13.

<sup>29</sup> Bluhm Legal Clinic – Center on Wrongful Convictions, 'Kristine Bunch – Convicted of Murder by Arson but the Fire was Accidental', *Northwestern Pritzker School of Law* (Web Page) <<https://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/in/kristine-bunch.html>>.

prosecutors conduct the case, how defence lawyers defend women, how juries determine guilt or innocence, and within judicial decision-making.<sup>30</sup> Parkes and Cunliffe have argued that there is ‘no one “women’s story” of wrongful conviction’ but it is nevertheless important to consider ‘gendered, raced and classed stereotypes’ when considering wrongful convictions of women.<sup>31</sup> Common tropes in cases involving female defendants accused of harming or killing their children rely on an expectation that women will naturally take to motherhood and where there is a suggestion that they have not, they are often condemned more harshly than men in cases of child abuse or killing.<sup>32</sup> Lewis and Sommervold demonstrate, for example, how ‘flawed mothers’ are often victims of wrongful conviction and, like Kristine Bunch, mentioned above, whose house burned down resulting in her son’s death, how many wrongly convicted women have come to be suspects *because* they were women and mothers.<sup>33</sup>

Stereotypes can also come in to play when it comes to race.<sup>34</sup> In Australia, there is a vast overrepresentation of First Nations peoples within the criminal justice systems, both as suspects and victims. For example, while less than 3 per cent of the Australian population identifies/classifies as Indigenous, 27 per cent of prisoners do so.<sup>35</sup> One of the reasons for this overrepresentation, among other reasons, is the historically fraught relationship Indigenous peoples have with police, caused by, and resulting in over-policing of Indigenous peoples. This over-policing can be explained by often racist stereotypes held by law enforcement personnel, associating Indigenous peoples with crime.<sup>36</sup>

Similarly, but not surprisingly, when it comes to wrongful convictions, this discrepancy is still present. Of the 71 cases documented by Dioso-Villa 17 per cent concerned Indigenous peoples.<sup>37</sup> However, when it comes to Indigenous women, this discrepancy is even bigger. Not only do Indigenous women suffer from sexism and accompanying

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<sup>30</sup> For a detailed analysis, see Andrea L. Lewis and Sara L. Sommervold, ‘Death, but Is It Murder: The Role of Stereotypes and Cultural Perceptions in the Wrongful Convictions of Women’ (2014) 78(3) *Albany Law Review* 1035.

<sup>31</sup> Parkes and Cunliffe (n 11) 220.

<sup>32</sup> Elizabeth Webster and Jody Miller, ‘Gendering and racing wrongful conviction: Intersectionality, “normal crimes,” and women’s experiences of miscarriage of justice’ (2015) 78(3) *Albany Law Review* 973, 1004-1005; Lewis and Sommervold, (n 30) 1036.

<sup>33</sup> Lewis and Sommervold (n 30) 1041.

<sup>34</sup> Parkes and Cunliffe (n 11) 220.

<sup>35</sup> Roach (n 24) 204.

<sup>36</sup> *Ibid* 206.

<sup>37</sup> *Ibid* 206.

stereotypes, but racism comes into play as well. Moreover, reflecting on the main causes of wrongful convictions for women (i.e. overzealous policing and police misconduct), compared with the type of crimes women often get wrongfully convicted for (i.e. no-crime crimes), it becomes apparent why Indigenous women are at a greater risk of being wrongfully convicted than non-Indigenous women.

### III WRONGFUL CONVICTIONS OF WOMEN IN AUSTRALIA

Given what research tells us about wrongful convictions of women, in this section we turn to applying those research findings to known cases of wrongful conviction of women in Australia. To locate this cohort of cases, we drew on the work of Moles,<sup>38</sup> Dioso-Villa,<sup>39</sup> and Langdon and Wilson.<sup>40</sup>

Before addressing these cases, it is important to explain the approach we have taken in relation to identifying women who have been wrongly convicted and the limitations of this approach. Currently, 'wrongful conviction' is usually limited to factual innocence, meaning instances whereby a person was convicted for a crime they did not commit or a crime that did not occur.<sup>41</sup> In the past, this focus on factual innocence has formed the basis of the Innocence movement in the US, as well as many US studies surrounding wrongful convictions.<sup>42</sup> If we accept the above body of research that indicates racism and sexism may impact upon convictions and wrongful convictions of women, it is appropriate to consider the very definition of a 'wrongful' conviction as it might apply to women.<sup>43</sup>

There are several reasons why deeper consideration of the definition of a wrongful conviction is important. First, defining what is a wrongful conviction allows for more accurate data collection to better understand the causes of wrongful convictions and how

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<sup>38</sup> Robert Moles, 'Welcome to Networked Knowledge' *Networked Knowledge* (Web Page) <<http://netk.net.au/>>.

<sup>39</sup> Dioso-Villa (n 7).

<sup>40</sup> Langdon, Juliette and Paul Wilson, 'When Justice Fails: A Follow-Up Examination of Serious Criminal Cases Since 1985' (2005) 17(2) *Current Issues in Criminal Justice* 179.

<sup>41</sup> Keith A. Findley, 'Defining Innocence' (2010) 74(3) *Albany Law Review* 1157, 1159-60; Dioso-Villa (n 7) 175; Parkes and Cunliffe (n 11) 223-4.

<sup>42</sup> Findley (n 41); Dioso-Villa (n 7) 175; Parkes and Cunliffe (n 11) 223-4.

<sup>43</sup> For more on the definition of a wrongful conviction more broadly see Roach (n 24) 218. See also David Hamer, 'Conceptions and degrees of innocence: the principles, pragmatics, and policies of the innocence movement' (2023) 35(1) *Current Issues in Criminal Justice* 81.

miscarriages of justice can be mitigated.<sup>44</sup> Second, it allows the determination of the impact of such a definition on procedural matters, including which women can appeal against their convictions and on what basis.<sup>45</sup> Third, as Parkes and Cunliffe note, if women are being convicted of crimes that may not have even occurred because of racism or sexism, it is appropriate to consider, more broadly, the possibility that many women will be wrongly convicted in circumstances where they may have had a defence but pleaded guilty.<sup>46</sup> Canadian academic Kent Roach highlights the importance of not limiting wrongful convictions to cases of proven factual innocence.<sup>47</sup> In identifying and accepting the following cases as examples of wrongful convictions of women in Australia in this article, we have adopted Roach's view<sup>48</sup> and thus prioritised cases where convictions of women have been quashed on appeal, including via High Court appeals, second or subsequent appeals, and following an Attorney-General or Governor's referral back to a state court of appeal. We acknowledge that in several of the cases below, the women's convictions that were quashed may not meet the definition of wrongful conviction according to some. However, in addition to considering convictions of women, we want this article to raise questions and contribute to discussions of the appropriate definition of a wrongful conviction.

The cases are set out in chronological order of the date of the woman's conviction. These cases are deserving of far more analysis and critique than this article has scope for. We intend to continue with more detailed consideration of these cases in future research.

#### 1. *Perry v The Queen* - 1981<sup>49</sup>

Emily Perry was convicted of two counts of attempting to murder her third husband. The circumstances of her convictions are set out in the decision of Gibbs CJ in *Perry v The Queen* (1982) 150 CLR 580.<sup>50</sup> The issue in Perry's case was the admission at trial of evidence that three other men close to Perry had died of poisoning as well. Like Rendall, at the start of this article, Perry was not charged with any offences in relation to the other

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<sup>44</sup> Findley (n 41).

<sup>45</sup> *Ibid.*

<sup>46</sup> Parkes and Cunliffe (n 11) 230.

<sup>47</sup> Roach (n 24) 241.

<sup>48</sup> A view that mirrors those of other academics such as Parkes and Cunliffe (n 11) and Hamer (n 41).

<sup>49</sup> *Perry v The Queen* (1982) 150 CLR 580, 582.

<sup>50</sup> *Ibid.*

men. Instead, evidence was led to suggest some propensity for Perry to kill or attempt to kill by poisoning. The South Australian Court of Criminal Appeal dismissed Perry's appeal following her convictions. She appealed to the High Court which quashed her convictions.<sup>51</sup>

## 2. *R v Chamberlain - 1982*<sup>52</sup>

Lindy Chamberlain was convicted of murdering her nine-week-old daughter, Azaria in 1982. Chamberlain maintained her daughter had been taken from the family tent by a dingo as their family camped at Uluru in central Australia. Witnesses testified to having heard dingoes in and around the campsite that night. A forensic scientist gave evidence at the trial that suggested foetal blood was found in the family's car. It was this evidence that appears to have been instrumental in Chamberlain's conviction.<sup>53</sup> A subsequent inquiry in 1987 confirmed the 'foetal blood' in the car was not blood but rather very likely to be a liquid used in car batteries.<sup>54</sup>

The later discovery of baby's clothing in a dingo lair a short distance from where the family had been camping that evening was finally recognised in 2012 thus confirming Chamberlain's assertions.

## 3. *R v Hayman - 1987*

Suezanne Hayman, a New Zealand citizen, was convicted in New South Wales in 1988 of conspiracy to import heroin into Australia. A detective later admitted that Hayman's entire unsigned confession had been falsified.<sup>55</sup> Hayman was deported to New Zealand following her release from prison and it took her 13 years to be granted permission to re-enter Australia (despite having had her conviction overturned). A New Zealand press report of Ms Hayman's fight to visit Australia suggests an Australian departmental

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<sup>51</sup> *Ibid.*

<sup>52</sup> *Chamberlain v R (No. 2)* (1984) 153 CLR 521.

<sup>53</sup> *Chamberlain v R (No. 2)* (1984) 153 CLR 521, 598 (Brennan J). See also Lynne Weathered, 'Pardon Me: Current Avenues for the Correction of Wrongful Conviction in Australia' (2005) 17(2) *Current Issues in Criminal Justice* 203, 204.

<sup>54</sup> Weathered (n 53); *Royal Commission of Inquiry into Chamberlain Convictions* (Final Report, 5 June 1987) <<https://catalogue.nla.gov.au/catalog/1731342>>.

<sup>55</sup> Langdon and Wilson (n 40) 184, 187.

spokesperson's response to her predicament was a comment suggesting Hayman was 'just one of a heap of people who were done basically by these crooked cops'.<sup>56</sup>

4. *R v Schafer - 1987*<sup>57</sup>

Colleen Schafer was exonerated by the Queensland Court of Appeal in 1988 following an appeal against her conviction a year earlier for murdering her fiancé.<sup>58</sup> In a two-to-one decision, the Court of Appeal quashed Schafer's conviction. The decision of the Court of Appeal indicates that the jury heard evidence that Schafer had 'giggled' when being questioned by police,<sup>59</sup> did not mention having screamed when first questioned by police (she was not asked if she screamed until a subsequent conversation),<sup>60</sup> referenced to 'inappropriate behaviour'<sup>61</sup>, and being 'calm and composed at the scene'.<sup>62</sup> The Court of Appeal ultimately determined the conviction was based on the jury's inappropriate impression of Schafer which, in turn, had been constructed around police tunnel vision and the Crown's over-reliance on evidence suggesting Schafer had not screamed.

5. *R v Kina - 1988*<sup>63</sup>

Robyn Kina, an Indigenous woman, was convicted in 1988 of murdering her partner.<sup>64</sup> Her trial took less than three hours. Kina did not call or give evidence and was sentenced to life in prison with hard labour. Kina's case is usually excluded from the narrow definition of wrongful convictions because factually she did kill her partner.<sup>65</sup> However, in considering her pardon application, Queensland's Court of Appeal agreed Ms Kina's case was a clear miscarriage of justice. Analysis of this case illuminates and enhances understanding of how women, particularly Indigenous women, can become a victim of a wrongful conviction.

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<sup>56</sup> Catherine Masters, 'Goff Fights to Clear Woman' *New Zealand Herald* (Web Page, 28 June 2002) <<https://www.nzherald.co.nz/nz/goff-fights-to-clear-woman/NIBUZGBYXMWAHUAWD23VLBYOZ4/>>.

See also Langdon and Wilson (n 40) 187.

<sup>57</sup> *R v Schafer* [1988] QSCCCA 50 ('Schafer').

<sup>58</sup> Langdon and Wilson (n 40).

<sup>59</sup> *Schafer* (n 57) 4.

<sup>60</sup> *Ibid* 10.

<sup>61</sup> *Ibid* 12.

<sup>62</sup> *Ibid* 25.

<sup>63</sup> *R v Kina* [1993] QCA 480 ('Kina').

<sup>64</sup> *Ibid* 3.

<sup>65</sup> See, e.g., Dioso-Villa (n 7) 178; Roach (n 24).

The decision of the Court of Appeal in this case illustrates some of the limitations of ordinary common law trial and appellate processes. Ms Kina had been subjected to horrendous violence at the hands of her partner.<sup>66</sup> Self-defence or provocation were not raised as possible defences. In pardoning Ms Kina, the Court of Appeal acknowledged Ms Kina's tragic and violent life – even before meeting the deceased, and the difficulties she experienced in communicating with her legal representatives. The Court concluded its decision:

The matter is one in which it must be conceded the evidence was available at the trial, and in that sense the evidence was not 'fresh'. It is nevertheless one of those exceptional instances ... in which the conviction should be quashed and the verdict set aside because of a serious doubt about whether the petitioner was guilty of the offence of which she was convicted.<sup>67</sup>

6. *R v Angel - 1989*<sup>68</sup>

Jeanie Angel, an Indigenous woman from the Pilbara region in Western Australia, was convicted of murdering her stepmother in South Headland, Western Australia, in 1989 and sentenced to life in prison. Western Australia's Court of Criminal Appeal's decision to quash Angel's conviction in 1991 is only half a page long and briefly notes Angel was granted an extension of time to appeal following which the Crown conceded the appeal should be allowed.<sup>69</sup> The Court noted a retrial would not be useful given the evidence that had since become available and been investigated.<sup>70</sup> No information about this evidence was provided in the Court's reasons.

Additional information, however, was reported by journalist Tony Barrass in *The Australian* in 2007.<sup>71</sup> A prison officer set in motion the actions that led – within weeks – to new evidence that other women had committed the offence. Angel later alleged detectives physically assaulted her and tricked her into signing a confession 'despite her

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<sup>66</sup> Details of this violence are set out in the judgment wherein the Court states a 'summary of the appellant's life with the deceased would not be as eloquent as her own sworn statements'. See *Kina* (n 63) 9–16.

<sup>67</sup> *Kina* (n 63) 53.

<sup>68</sup> *Angel v R* [1997] WACCA 67.

<sup>69</sup> *Ibid* [3].

<sup>70</sup> *Ibid*.

<sup>71</sup> Tony Barrass, 'Murder suspect forced to confess', *The Australian* (Web Page, 6 December 2007) <netk.net.au/Aboriginal/Aboriginal66.asp>.

being unable to read or write' by telling her she would be released on bail and allowed to see her children if she confessed.<sup>72</sup> Angel was released from prison in 1991 – tragically, not before her three-year-old son died during her incarceration.

7. *R v Catt-Beckett - 1991*<sup>73</sup>

Roseanne Catt-Beckett served 10 years in prison, convicted in 1991 of attempting to murder her husband.<sup>74</sup> The investigator, a friend of her husband's, appears to have framed Catt-Beckett by planting a gun in her bedroom, forcing witnesses to provide false testimonies and likely falsifying evidence regarding poisoning.<sup>75</sup>

8. *R v Hanson - 2003*<sup>76</sup>

Hanson's conviction for electoral fraud was quashed by Queensland's Court of Appeal due to an alternative interpretation of contract law principles that led the Court to find the verdict was unsafe and unsatisfactory.<sup>77</sup>

9. *R v Folbigg - 2003*<sup>78</sup>

Like Martha Rendall and Lindy Chamberlain before her, Kathleen Folbigg was widely despised as a child-killer – and a *serial* child-killer at that.<sup>79</sup> Folbigg was convicted in 2003 of five separate charges relating to harm (including murder) of four of her children based on a case that included equivocal medical evidence as to the children's health at the times of their deaths.<sup>80</sup> Medical opinions were divided as to how the babies died and whether

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<sup>72</sup> Ibid.

<sup>73</sup> *R v Catt* [2005] NSWCCA 279.

<sup>74</sup> Ibid [6].

<sup>75</sup> Ibid.

<sup>76</sup> *R v Hanson; R v Ettridge* [2003] QCA 488.

<sup>77</sup> Ibid.

<sup>78</sup> *Folbigg v R* [2023] NSWCCA 325.

<sup>79</sup> Donna Lu, 'Kathleen Folbigg: Science Sheds New Light on Case of Mother Convicted of Murdering her Children', *The Guardian* (Web Page, 7 May 2023) <<https://www.theguardian.com/australia-news/2023/may/07/kathleen-folbigg-science-sheds-new-light-on-case-of-mother-convicted-of-murdering-her-children>>.

<sup>80</sup> Folbigg was convicted of: the manslaughter of Caleb Folbigg on 20 February 1989; maliciously inflicting grievous bodily harm upon Patrick Folbigg on 18 October 1990, with intent to do grievous bodily harm; the murder of Patrick Folbigg on 13 February 1991; the murder of Sarah Folbigg on 30 August 1993; and the murder of Laura Folbigg on 1 March 1999.



sudden infant death syndrome (SIDS) could recur.<sup>81</sup> Circumstantial evidence in the form of diary entries written by Folbigg were interpreted at trial as being admissions of guilt.

In June 2023 NSW's Attorney-General unconditionally pardoned Kathleen Folbigg.<sup>82</sup> Expert opinions of over 100 scientists established that genetic features of the children were likely causes of their deaths. In December 2023 Court of Criminal Appeal for New South Wales formally quashed the convictions.<sup>83</sup>

#### 10. *R v Campbell – 2008*<sup>84</sup>

Vivian Campbell, an Indigenous woman, was one of five charged with affray. In relation to Campbell's co-accused (all Indigenous men), evidence demonstrated police had not followed correct procedure for interviewing Indigenous witnesses/suspects. Campbell, however, did not give a statement to police nor give evidence at court. Her conviction thus rested on the evidence of the complainant identifying Campbell as one of his assailants. While the trial judge (in a judge-alone trial) accepted that evidence and convicted Campbell, on appeal, Hidden J rejected those findings. Hidden J concluded: 'I am left with a sense of real unease about this conviction. In all the circumstances, I am satisfied that his Honour ought to have had a reasonable doubt about this charge'.<sup>85</sup>

#### 11. *R v Greensill - 2010*<sup>86</sup>

Greensill, a teacher, was convicted of various sexual offences against children (students of hers). Part of a previously undisclosed psychologist's report was accepted as fresh evidence. The Court of Appeal found the undisclosed report undermined the credibility of the relevant witness which, in turn, led them to quash Greensill's conviction.<sup>87</sup>

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<sup>81</sup> Sharmila Betts and Jane Goodman-Delahunty, 'The case of Kathleen Folbigg: How did justice and medicine fare?' (2007) 39(1) *Australian Journal of Forensic Sciences* 11, 14.

<sup>82</sup> Tamsin Rose, 'Kathleen Folbigg pardon: what evidence emerged over her children's deaths and what happens next?', *The Guardian* (Web Page, 5 June 2023) <<https://www.theguardian.com/australia-news/2023/jun/05/kathleen-folbigg-pardon-what-evidence-emerged-over-her-childrens-deaths-and-what-happens-next>>.

<sup>83</sup> *Folbigg v R* [2023] NSWCCA 325.

<sup>84</sup> *Campbell and Ors v Director of Public Prosecutions (NSW)* [2008] NSWSC 1284.

<sup>85</sup> *Ibid* [49].

<sup>86</sup> *Greensill v R* [2012] VSCA 306.

<sup>87</sup> *Ibid*.

## IV IMPLICATIONS FOR RESEARCH AND REFORM

This set of cases is too small for a systematic analysis that would allow for observable patterns. Notwithstanding such limitations, it is worth considering these cases both thematically and doctrinally contribute to the current discourse on women in Australian criminal justice systems that has been enlivened by Kathleen Folbigg's case.

Even in this small group of cases, findings of the research overseas regarding causes of wrongful convictions of women are clearly demonstrated. Of these eleven cases of women being wrongly convicted in Australia, seven involved murder/manslaughter or attempted murder of family members; five involved police misconduct; seven were, or possibly were, 'no-crime' cases; and three involved First Nations women.

Further avenues for research could include more detailed analysis of how each woman came to be a suspect in each case, how they were prosecuted, and the different pathways to their convictions being quashed, or pardons granted. Options for reform that could be explored considering the above discussion include the definition of 'fresh' evidence, and the need for streamlined pathways back into court. Ones that do not rely on personal and highly political applications to Attorneys-General as we saw in Chamberlain and Folbigg's cases. Importantly, given the high proportion of cases involving police misconduct, more research needs to be done on how police biases impact their investigations of cases like those referred to above.

## V CONCLUSION

In even beginning to answer the question of how a miscarriage of justice like Kathleen Folbigg's happened – or how the justice system can prevent such cases – it is important to understand more broadly just how women come to be wrongly convicted. In this article we started to outline how the main causes of wrongful convictions of women are different to those of men. This was followed by the types of (non) crimes women were more likely to be wrongfully convicted of. We demonstrated how stereotypes, sexism and racism increased the risk for women to be wrongfully convicted, after which we provided various examples of women who have been exonerated or pardoned in Australia. While certainly addressing the main factors to consider regarding women and miscarriages of

justice, this article is merely the start of a broader discussion which should be had around the myriad ways in which women can be wrongly convicted.

To ensure the substantive equality of all who come before them, Australian criminal justice systems should acknowledge and confront the problems that create opportunity for bias, racism, and sexism to unjustly pervade the prosecution process.

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