Looking Backwards and Forwards: A Critique of New Zealand's System for Compensating the Wrongly Convicted

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Introduction

In a well-functioning democratic society we conceive of the State as a protector. The State supports its citizens, in part by guaranteeing certain fundamental human rights. Where criminal wrongdoing is perceived, the State's vast coercive power is brought to bear on the individual. The State must play the role of persecutor rather than protector, and we view this as a necessary part of the criminal justice system. We rely on the Courts to act as a gatekeeper, ensuring only the guilty are sent to prison. However the system can prove fallible when confronted with complex human circumstances. Innocent people are nonetheless convicted and imprisoned because of eyewitness error, inadequacy of counsel, false accusation, police misconduct and more.[1] Wrongful convictions are an unfortunate systemic feature of many criminal justice systems.[2]

Once the legal system acknowledges that wrongful conviction has occurred, society must ask what should be done to address the harm done to these individuals. International human rights law suggests that individuals should receive monetary compensation as a matter of right. A right to compensation has not been widely accepted in any Commonwealth jurisdiction, despite its pedigree sitting alongside rights such as free speech and the right to life. In New Zealand, the compensation process is governed by discretionary Cabinet Guidelines introduced in 1998. This dissertation will assess how New Zealand has responded to the international position.

For the purposes of this dissertation, "wrongful conviction and imprisonment" requires an individual to have spent time in prison, and their conviction must be overturned in proceedings unconnected to their initial trial. The boundaries of this definition will be discussed further in Chapter 1.4.

[1] C. Ronald Huff et al "Guilty Until Proved Innocent: Wrongful Conviction and Public Policy" *Crime & Delinquency* 1986 32 Sage Publications, at 524-533.

[2] There are many well-publicised cases of wrongful conviction across different jurisdictions. Estimating the prevalence of wrongful conviction is a notoriously difficult challenge, in part because cases of wrongful conviction are not identified for many years. In the American context, Zalman estimates a general incidence rate of 0.5% to 1%. Gross estimates this number is even higher at 4.1% for prisoners on death row in America.
Marvin Zalman "Qualitatively Estimating the Incidence of Wrongful Convictions" (2012) *Thomson Reuters Criminal Law Bulletin* vol. 48 no. 2. at p246.
Samuel R. Gross et al "Rate of false conviction of criminal defendants who are sentenced to death" (2014) *Proceedings of the National Academy of Sciences of the United States of America* vol. 111 no. 20 at 7230.

Speaking of compensation for a "miscarriage of justice" or "wrongful conviction" is somewhat of a misnomer. A wrongful conviction in and of itself does not necessarily give rise to a claim for compensation. It is more correct to speak of wrongful imprisonment, as that aligns more closely with New Zealand's position.[3] Nevertheless, the terms wrongful conviction and miscarriage of justice are sufficiently embedded in the public consciousness that this paper will use all terms interchangeably.

Approach

This dissertation has two primary focuses. The first provides a thorough review of compensation determinations in New Zealand, so as to establish patterns in how our system currently operates. The second proposes recommendations where change is desirable.

Accessing information was the main challenge for this project. Since 1998 there have been seven successful compensation claims. Of these, the documents for three claims are publicly available, while four were sourced under Official Information Act 1982 (OIA) requests.[4] Similarly, there have been 20 declined claims in this time period. Three are available either publicly or under an OIA request.[5] The remaining 17 declined claims have been suppressed to protect the privacy of natural persons and because the documents are covered by legal professional privilege. A full analysis of New Zealand's compensation claims is not possible while lacking 17 cases. New Zealand's compensation scheme stands in direct contrast to principles of open information under our judicial system.

Very little formal research or publications exist on this topic within New Zealand, although this may change subsequent to the Pora and Bain determinations. This dissertation consequently draws on cases and legal theorists from other jurisdictions.

Chapter 1 establishes the scope of New Zealand's compensation scheme and contrasts it to the international law position. Chapter 2 looks at the scheme in practice, applied to New Zealand's 27 claims for compensation. Chapter 3 details seven areas of reform which should be considered moving forward.

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[3] See Chapter 1.4.

[4] Documents relating to Farmer, Johnston and Pora are publicly available. Dougherty, M, F, and Akatere were sourced under the OIA request.

[5] Documents relating to Haig, Rosenberg and Bain are available.

Why is this topic important?

Compensation determinations are relevant to only a handful of people every year, compared to other government actions with a much broader ambit. Since 1998 only 27 claims have been made. This equates to 1.5 claims per year over 18 years. One could argue that with such minimal numbers, expending time and money to reform an adequate system would be excessive and wasteful.

However, what these cases lack in quantity is balanced by the sheer impact on claimants' lives. Research undertaken in Canada has assessed the negative impact of wrongful conviction. Often, the deleterious effects of the prison environment are vastly exacerbated for wrongfully imprisoned individuals. While in custody, these prisoners feel isolated from other inmates and cannot easily form relationships during their incarceration. This leads to "withdrawal, isolation and suicidal ideation".[6] They show a fixation on obtaining their exoneration, which in turn is interpreted as a "lack of remorse and inability to adapt to the prison environment".[7] Substantial damage is done to family relationships.[8] Despite having their convictions overturned, many individuals cannot escape the social opprobrium that attaches to criminal wrongdoing, especially if labelled a sexual offender. These people demonstrate deep anger and mistrust towards public institutions, including a "specific hatred of the justice system".[9]

There is no reason to doubt the Canadian experience equally applies in New Zealand. In 1998, M[10] applied for compensation. In his impact statement he said "I started to feel a total hatred for the system that had got me there and an absolute hatred and bitterness against the Police because they had got it so wrong … That anger is still inside of me today".[11] As Chapter 2 will demonstrate, every case of wrongful imprisonment in New Zealand has had a lasting impact on the individual involved.

We are fortunate to live in a jurisdiction where wrongful conviction is not a major feature of our legal landscape. But when wrongful conviction occurs, our society should have a system in place that does its best to moderate the harm suffered. It is critical we continue to learn from the past, assess our current position and improve upon the legal response to such cases in future.

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[6] Kathryn Campbell and Myriam Denov "Miscarriages of Justice: The Impact of Wrongful Imprisonment" *Justresearch* Edition no. 13 Department of Justice.
[7] Above n 6.
[8] Above n 6.
[9] Above n 6.
[10] Name suppressed. See full case analysis in Chapter 2.4.
[11] David Williams QC "Report to the Minister of Justice Concerning Claim by M for Compensation for Wrongful Conviction" (2000), released under the Official Information Act at 9.23.

Chapter 1 – New Zealand's Current Arrangement

1.1 No legal right to compensation in New Zealand

<u>Domestic law</u>

No statute or other legal instrument in New Zealand provides any mechanism by which the government must pay compensation to a claimant. The system in place is entirely voluntary.

Case law will not assist in imposing obligations on the government to pay compensation. New Zealand's constitutional arrangements place a great deal of emphasis on Parliamentary supremacy and Cabinet freedom, thus the judiciary is deferential where Cabinet reserves powers to itself.[12] The judiciary has created and applied compensatory public law remedies slowly, restrictively, and comparatively miserly compared to other Commonwealth jurisdictions.[13]

Therefore, the government is under no legal obligation to pay compensation. One cannot speak of a 'right' to compensation in domestic New Zealand law.

<u>International law</u>

The International Covenant on Civil and Political Rights (ICCPR) does establish a legal right to compensation for wrongful conviction:

> *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.*[14]

[12] *Laws of New Zealand* Basic Principles of Parliamentary Sovereignty (online ed) at [71]. See also discussion at Chapter 1.3 on reviewability of Cabinet Guidelines.

[13] See for instance the Court narrowing principles of compensatory public law remedies in *Brown v Attorney General* [2005] 2 NZLR 405 and *Attorney General v Chapman* [2011] NZSC 110. The majority approach in *Chapman* "remains unsatisfying because it leaves no room for deeper consideration of the principles", meaning the approach is "overly cautious" – Stephanie Woods "Judicial immunity: State immunity?" in *New Zealand Law Journal* [2012] NZLJ 6.

[14] International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 14(6).

New Zealand is a signatory to this treaty.[15] The provision states that if the conditions are met, compensation "shall" be awarded. However, international law is not binding domestically because New Zealand operates under a dualist system which requires international documents to be incorporated into domestic law through statute.[16]

Many other ICCPR rights, such as the right to life and the right to a fair trial, have been incorporated into domestic law.[17] In fact, only two were deliberately excluded from the NZBORA: the right to compensation based on Art 14(6) of the ICCPR, and the right to privacy.[18]

Rights to privacy have been developed by the judiciary.[19] Thus all ICCPR rights are now recognised and managed by the judiciary or Parliament, with the exception of compensation for wrongful conviction which is exclusive to the executive branch.

New Zealand has further entered a reservation to the ICCPR:

> *The Government of New Zealand reserves the right not to apply article 14(6) to the extent that it is not satisfied by the existing system for ex gratia payments to persons who suffer as a result of a miscarriage of justice."*[20]

Thus the right exists in neither domestic nor international law.[21] New Zealand's reservation is an "oblique, even elliptically expressed, reservation" which ensures "the Crown remain[s] immune from liability".[22] The reservation is telling in two respects. Firstly, it demonstrates an institutional refusal to acknowledge a formal, legally binding system in relation to compensation. Secondly, it envisions that some claims would succeed under the ICCPR but fail under New Zealand's *ex gratia* system. However, it also implies that our discretionary domestic system will provide a satisfactory remedy in the majority of cases.

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[15] Office of the High Commissioner for Human Rights "Country Profile for New Zealand". (2014) Status of Ratification <http://indicators.ohchr.org/>.

[16] Andrew Byrnes and Catherine Renshaw "Within the State" in Daniel Moeckli (ed) et al *International Human Rights Law* (Oxford University Press, Oxford, 2010) at 464.

[17] See New Zealand Bill of Rights Act 1990, s 8-27.

[18] Geoffrey Palmer, "A Bill of Rights for New Zealand: A White Paper" [1984-1985] I AJHR A6 at [10.18].

[19] See *Hosking v Runting* [2005] 1 NZLR 1.

[20] Above n 15.

[21] Reservations are used to "modify [a State's] obligations under international human rights treaties". See Frédéric Mégret "Nature of Obligations" above n 16 at 105.

[22] *Akatere v Attorney-General* [2006] 3 NZLR 705 at [16].

1.2 *Ex gratia* payments

Compensation payments are *ex gratia,* meaning they are voluntary, discretionary and represent the government's graciousness or benediction.[23] Such payments do not admit any fault.[24] The only intention attributable to Cabinet is the base intention to compensate, rather than an intention to acknowledge or correct a breakdown in the justice system.

1.3 Status of Cabinet Guidelines

Cabinet published guidelines in 1998 and again in 2000 and 2001 (the Guidelines) to clarify the way compensation determinations are made. This document has no force of law in itself; it merely illustrates Cabinet's approach. The Guidelines are not easily susceptible to judicial review. A claim in judicial review must establish three elements: that the Guidelines are justiciable; that there was an error in the decision-making process; and that a remedy can be granted.

The courts have held that the Guidelines are "decisions of Cabinet … rest[ing] finally on a policy calculus".[25] Where a document is a policy document, it should not "be construed with strictness … It is a working document … [which] must be construed sensibly".[26] The Cabinet Guidelines do not appear to be susceptible to judicial review on the basis of illegality or ultra vires decision-making simply because they do not create legal standards and boundaries.

Wednesbury unreasonableness may provide one ground of review. The High Court in *Akatere* stated "The standard against which Cabinet's decisions … are to be measured, if they are to be measured at all, can only be, it seems to me, *Wednesbury* unreasonableness".[27] This would require a decision "so

[23] "The very nature" of an *ex gratia* payment "presupposes there is no obligation to make it". *R v Secretary of State for the Home Department, ex parte Harrison* [1988] 3 All ER 86 (QB) at [30]. See also *McLellan v Attorney General* [2015] NZHC 3218.

[24] The payments are made "without any admission of liability . It perpetuates the fiction that nothing has really gone wrong". Law Commission *Compensating the Wrongly Convicted* (NZLC R49, 1998) at 183.

[25] Above n 22 at [38].

[26] *Patel v Chief Executive of the Department of Labour* [1997] NZAR 264 at [270].

[27] Above n 22 at [40].

unreasonable that no reasonable authority could ever have come to it".[28] Unreasonableness in a judicial review sense is a strict test with a high threshold, and is unlikely be met in many cases.[29]

Furthermore, it is difficult to see what kind of relief would be available under judicial review.

> *Certiorari and mandamus do not lie against the Crown: High Court Rule 622 and s 12(1) of the Crown Proceedings Act. Declaratory relief, also, would have been of doubtful use … because ultimately it is for the Cabinet to say on what terms it will make compensatory payments that it has no duty to make, and to which the claimants have no enforceable right."*[30]

The courts can refuse to grant a remedy on the grounds that the remedy would be "futile or impracticable".[31] Overall, the Guidelines are reviewable in very narrow circumstances, and the unlikelihood of receiving relief means judicial review claims would likely be ineffectual.

1.4 Eligibility criteria

To fall within the Guidelines, a claimant must meet four criteria.[32]

<u>Alive at the time of application</u>

The claimant must be alive at the time the claim is lodged, so a deceased's estate cannot claim for compensation. This underscores the *ex gratia* nature of the payments; there is no entitlement to a compensation payment, and so the claimant has no tangible pecuniary interest. Rather, it is a voluntary payment to a claimant in their personal capacity, so it is cogent to exclude claims unless lodged personally.

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[28] *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223 per Lord Greene MR.

[29] The High Court in Akatere commented "Cabinet's decisions, in the circumstances of this case, are not susceptible of review". This was an *obiter* comment, as the Court further found no error could have been made by Cabinet in the circumstances regardless of whether the Guidelines were justiciable. See above n 22 at [39].

[30] Above n 22 at [69].

[31] *Martin v Ryan* [1990] 2 NZLR 209 at 216.

[32] See Cabinet Guidelines, quoted in Ministry of Justice "Compensation for wrongful conviction and imprisonment" (2015) Downloaded from <https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/miscarriages-of-justice/compensation-for-wrongful-conviction-and-imprisonment/>.

Time spent in custody

A claimant must have "served all or part of a sentence of imprisonment" to claim for compensation.[33]

This requirement excludes claims where the individual is released on bail and subsequently acquitted. The trial process can often be severely distressing. However, being deprived of one's liberty is generally considered the most significant harm done to wrongfully imprisoned individuals. Those on bail have spent no time in custody. This provides a persuasive justification for distinguishing between these two classes of individuals. Thus claimants who are acquitted without any time in custody are not eligible for compensation.

Furthermore, time spent on remand, or time in prison before succeeding at a direct appeal from the original trial is also not eligible for compensation.[34] If we recognise "serious hardships and injustices … can be suffered by innocent persons who are remanded in custody",[35] on what basis do we deny compensation? Three reasons become apparent: the presumption of innocence, the corrective nature of normal appeals, and practical concerns.

An individual's presumptive innocence remains intact until a final determination is made.[36] When a verdict is appealed we reasonably conclude that an official pronouncement of guilt is still pending. In theory, this presumption of innocence mitigates harm to the individual because the allegations are not yet proven, and so the defendant's reputation remains undamaged.

The normal appeal process provides a corrective mechanism by which "the majority of mistakes are remedied".[37] The defendant is "exercising ordinary rights of appeal" and an acquittal on appeal represents a "normal outcome" of the judicial system.[38] Normal appeals can be contrasted with more exceptional post-appeal cases. This argument relies on the moral assumption that only exceptional cases should be eligible for compensation.

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[33] Above n 32.

[34] This "normal appeal process" is distinguished from an appeal unconnected to the particulars of the initial trial, perhaps due to new evidence coming to light (hereafter referred to as the "post-appeal" process).

[35] Above n 24 at 114, citing the Canadian theorist Kaiser and a Ministry of Justice inquiry in England.

[36] New Zealand Bill of Rights Act, s 25(c).

[37] Above n 24 at 119.

[38] Above n 24 at 119.

Practical concerns can also justify restricting eligibility. Allowing claims by all individuals who are acquitted on appeal drastically expands the category of potential claimants and signifies enormous governmental expenditure.[39] There are also fears that wide eligibility would have a chilling effect on the criminal justice system. The Police may hesitate to prosecute weak cases,[40] and juries may be less likely to return a not guilty verdict if they suspect the accused may receive compensation.[41]

The Law Commission acknowledged these arguments but did not find them "conclusive".[42] Rather than making a recommendation, they recognised the government must make a value judgment. This issue exemplifies a choice where there is no legally correct answer. The government retains the prerogative to structure the compensation scheme according to their own particular values, which may be scrutinised by the public.

Limiting eligibility to post-appeal claimants appears cogent and justified. As such, this issue is not revisited in Chapter 3's recommendations. However, the author acknowledges that this issue is open to a wide range of opinions based on one's own moral evaluation of the limitation.

<u>Correct determining body</u>

A claimant must have:

> *I. Had their convictions quashed on appeal … in the High Court (summary convictions); Court of Appeal (including references under section 406 of the Crimes Act 1961); or Courts Martial Appeal Court; or*
>
> *II. Received a free pardon under section 407 of the Crimes Act 1961.*[43]

This is a matter of formality which is unlikely to exclude claimants.

<u>No order for retrial</u>

A claimant's conviction must be "quashed on appeal, without order of retrial".[44] The government distinguishes between convictions quashed outright, and convictions quashed and sent back for

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[39] Above n 24 at 120.

[40] "It is not feasible to require the police to have a watertight case in order to bring a prosecution". Above n 24 at 96.

[41] H Archibald Kaiser, "Wrongful Conviction and Imprisonment: Towards an end to the Compensatory Obstacle Course" (1989) 9 Windsor Yearbook of Access to Justice 96 at 109.

[42] Above n 24 at 121.

[43] Above n 32.

[44] Above n 32.

retrial. The reasoning for this distinction is neither clear nor compelling. On this issue, the Law Commission simply stated that "the retrial must be treated as equivalent to an original trial".[45]

This distinction seems problematic for New Zealand's compensation system especially in light of the cases discussed in Chapter 2.[46] Chapter 3.7 will discuss whether excluding such claimants is justified.

1.5 Advancing a claim

An applicant must apply to the Minister of Justice for compensation. At this first stage, the Minister forms a provisional opinion on whether the claim "merits further assessment".[47] This opinion is final, and a claim can be declined at this stage. It is unclear what is needed to merit further assessment. It perhaps requires an arguable prospect of success.[48]

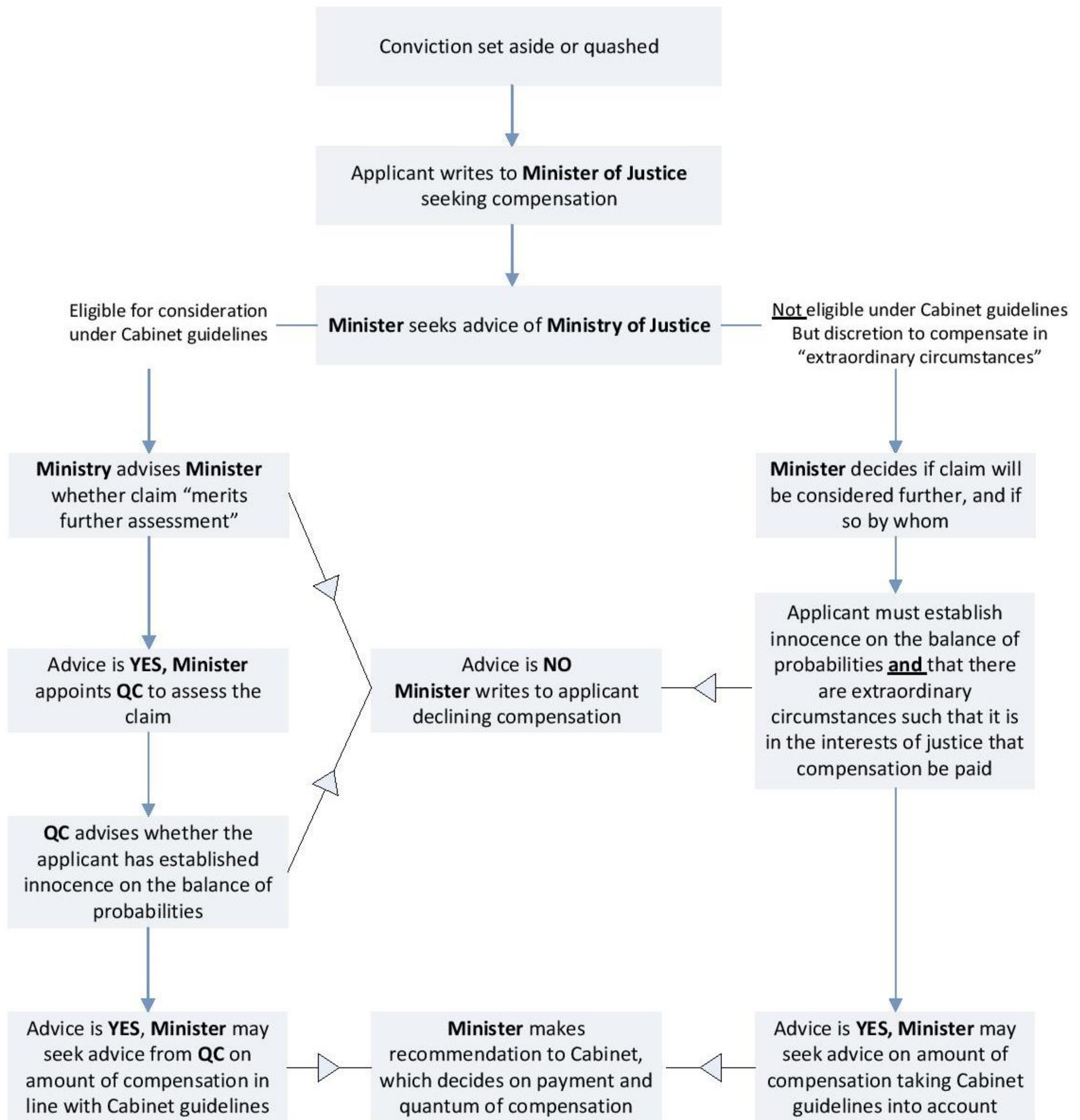
The Minister determines whether a claimant is eligible for compensation. If so, the claim is dealt with through the eligible pathway of the Guidelines.[49] If ineligible, Cabinet retains a "residual discretion" to consider claimants who demonstrate "extraordinary circumstances".[50]

Attention must be drawn to an inherent contradiction within Cabinet's Guidelines. A full process is described for claimants who are "ineligible" and "outside the guidelines". The Guidelines purport to exclude these claimants while simultaneously providing an alternate mechanism by which their claims can be determined. Ineligible claims are subject to Cabinet's "discretion" – but this neglects acknowledging that eligible claimants also rely on Cabinet's discretion.

The Ministry of Justice provides a helpful flowchart summarising the process.

[45] Above n 24 at 88.
[46] See for instance Dougherty and Farmer.
[47] Above n 32.
[48] Access to the 17 declined claims would assist understanding of this stage. No publicly available claim thus far has been denied at this provisional stage. There is therefore no available information as to how this threshold operates.
[49] See Chapter 1.6 discussing this pathway.
[50] Above n 32. See Chapter 1.7 discussing this pathway.

Process for determining eligibility and quantum of compensation



1.6 Process for an eligible claim

If the claim is eligible and merits further assessment, a Queen's Counsel (QC) must investigate. The QC assesses whether the claimant can establish innocence on the balance of probabilities (on balance). If innocence cannot be established, the claim is denied.

Innocence on balance is different from the usual court standard of guilt beyond reasonable doubt. The QC cannot treat the court's findings as determinative, and must reassess guilt or innocence. The claimant must show it is more likely than not that they did not commit the crime. Importantly, this is an investigation into "innocence in fact", so simply asserting that an allegation cannot be proved will be insufficient.[51] The inquiry aims to establish the truth of what occurred.

The QC's recommendation on innocence is put to Cabinet, but is not binding. The QC's findings are formally considered to be mere suggestions, and Cabinet has absolute decision-making power. Cabinet may choose to disregard the QC's conclusions as they see fit. However, this rarely happens in practice.[52] The QC has immense skill, expertise and prestige, and provides thorough analysis of highly contested information. Cabinet almost exclusively accepts the QC's innocence determination as written.

1.7 Process for an ineligible claim

Of the four kinds of ineligible claims, applications most commonly come from claimants who have had a retrial ordered.[53] These are also the only claims where an ineligible claimant has successfully obtained compensation. While it is possible for a deceased individual's estate to advance a claim, or a claimant who has served no time in prison to advance a claim, no such case has succeeded in New Zealand.[54] For ease, this dissertation may refer to 'claimants directed to a retrial' more generally as ineligible claimants.

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[51] Stuart Grieve QC "Report to the Minister of Justice Concerning Claim by David Dougherty for Ex Gratia Payment" (2000), released under the Official Information Act, at 6.1.1.

[52] The rejection of Justice Ian Binnie's report into Bain's innocence remains the only time Cabinet has disagreed with an innocence assessment. See Chapter 2.13 for further discussion.

[53] See Farmer, Johnston, and Bain. See also discussion at Chapter 2.15.

[54] Indeed, it may be possible that no such claims have been brought at all, but we cannot know due to the 17 declined cases which have been withheld.

The Minister of Justice determines whether the ineligible claim should be considered further, and delegates this assessment. Unlike eligible claims, ineligible claims need not be assessed by a QC, although they frequently are.[55]

An ineligible claimant must establish two things. Firstly, that they are innocent on the balance of probabilities (as eligible claimants must do). Secondly, that there are "extraordinary circumstances such that it is in the interests of justice that compensation be paid".[56]

This extraordinary circumstances test is deliberately indefinite. It allows Cabinet the utmost discretion at the expense of certainty. Cabinet has not "provided formal guidance on what it considers extraordinary circumstances".[57] However, without limiting their discretion or excluding other circumstances, Cabinet's past indication to a decision-maker "illustrate[s] the general approach that Cabinet might take":[58]

> ***unequivocal innocence*** *– i.e. cases in which it was demonstrable that the claimant was innocent beyond reasonable doubt, for example, due to DNA evidence, strong alibi evidence, etc; or*
>
> ***no such offence*** *– i.e. the claimant had been convicted of an offence that did not exist in law; or*
>
> ***serious wrongdoing by authorities*** *– i.e. an official admission or judicial finding of serious misconduct in the investigation and prosecution of the case. Examples might include bringing or continuing proceedings in bad faith, failing to take proper steps to investigate the possibility of innocence, the planting of evidence or suborning perjury.* [59]

Circumstances two and three are rare and fact-specific, and have never been relied upon to meet the extraordinary circumstances test.[60] In practice, ineligible claimants most often attempt to show they are innocent beyond reasonable doubt. This is a demanding standard for a claimant to meet.

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[55] Bain's case remains the only case where decision-makers have been sought from outside New Zealand. See Chapter 2.13.

[56] Above n 32.

[57] Jeff Orr, response to Official Information Act 1982 request submitted by Nicola Southall (27 May 2016) at 7.

[58] Above n 57.

[59] Letter from Mr Simon Power (Minster of Justice) to Hon Ian Binnie regarding claim for compensation for wrongful conviction and imprisonment: David Cullen Bain (10 November 2011) at 39.

[60] To date, only the court in Rosenberg (see Chapter 2.9) has found no such offence existed. Similarly, Thomas' case (see Chapter 2.1) is the only New Zealand example of serious wrongdoing by authorities. In both cases the extraordinary circumstances test was inapplicable and thus irrelevant to the claimant.

1.8 Determining quantum

Once innocence (and, if necessary, extraordinary circumstances) are established, the QC[61] will recommend a quantum of compensation they feel adequately recognises the claimant's harm.

Quantum is made up of two elements: pecuniary and non-pecuniary loss. Pecuniary loss encompasses all provable financial losses such as legal fees and lost income. Non-pecuniary loss constitutes the majority of the compensation. It addresses the intangible harm of wrongful conviction such as lost liberty and damage to family relationships.

The QC's recommendation again goes before Cabinet, which makes the final determination. Just as Cabinet regularly defers to the QC's innocence assessment, so too do they defer on quantum.[62] Thus, while Cabinet remains the ultimate decision-maker, the QC's opinions are often determinative and are not disregarded lightly.

1.9 New Zealand's guidelines compared to the ICCPR

The ICCPR functions as a comparator for New Zealand's discretionary compensation system. It is important to assess how well New Zealand approximates the ICCPR, and unpack any differences.

The ICCPR requires the presence of a "new fact" causing a conviction reversal.[63] New Zealand has never incorporated this problematic requirement which caused lengthy litigation in other jurisdiction.[64] In this respect, New Zealand construes eligibility for compensation more widely than the ICCPR.

The ICCPR relies upon the concept of "miscarriage of justice", which can be a challenging term to define. Fundamentally a miscarriage of justice is an error in the legal system which makes the initial

[61] Or alternative decision-maker if the claim is ineligible.

[62] See previous discussion above at n 52. Cabinet has disagreed but deferred to the QC on two occasions out of seven (M and F), and overruled the QC on one occasion (Pora): see discussion at Chapter 2.15.

[63] Above n 14.

[64] New Zealand's system benefits greatly by removing this requirement. In some cases it would seem intuitive to award compensation, and yet the new fact test was not met. In *Matveyev v Russia* (26601/02) First Section, ECHR 3 July 2008 at 43, a conviction was quashed due to "reassessment by the Presidium of the evidence" rather than new evidence. This meant there was no new fact. Similarly in *Bachowski v Poland* (32463/06) Fourth Section, ECHR 4 August 2006 at 8, the claimant had been wrongfully imprisoned under an "oppressive political regime". Once the government had changed, his conviction was quashed but the court held it was not due to any new fact.

conviction unsafe in some respect. Whether a claimant's innocence is included within that definition tends to differ between jurisdictions.

This was the subject of debate in the UK House of Lords case *R v Adams*.[65] By a bare majority the Court concluded that innocence is not required to suffer a miscarriage of justice; rather, a miscarriage of justice can be identified if "no reasonable jury properly directed could have convicted the accused".[66] The UK Government subsequently passed legislation overruling this decision. For the purposes of compensation awards in the UK, miscarriage of justice has only occurred if it can be shown that "the person did not commit the offence".[67]

It is unclear whether the ICCPR incorporates innocence into the miscarriage of justice test, so we cannot directly compare the ICCPR to New Zealand in this respect. In New Zealand; the term "miscarriage of justice" does not require innocence. Instead, the innocence test forms its own explicit inquiry.

Overall, the ICCPR is bereft of legal force in New Zealand. These international provisions can only be viewed as a statement of best practice, or an ideal to strive for. They represent international consensus as to the protection that should be afforded to our civil and political human rights. The following Chapters will assess how closely New Zealand's system aligns with ICCPR principles.

[65] *R v Adams* [2011] UKSC 18.

[66] Above n 65 at 194.

[67] Sally Lipscombe and Jacqueline Beard "Miscarriages of justice: compensation schemes" *House of Commons Library* SN/HA/2131 (6 March 2015) at 1.

Chapter 2 – A Timeline of Reform in New Zealand

Chapter 1 has established the shape of Cabinet's current approach to compensation claims. But in order to assess what changes ought to be made, we must review the incremental developments within New Zealand. This paper is the first to collate and establish a timeline of New Zealand's compensation cases. The timeline includes both successful and unsuccessful compensation cases, as well as periods of governmental review. Trends become apparent when reviewing the full body of cases. Furthermore, this context becomes an essential platform on which Chapter 3's recommendations are built.

While every successful compensation claim is publicly available, accessing the 20 rejected claims has proven more difficult. Three of the 20 rejected claims are available, while details of the remaining 17 are withheld under the OIA. The unsuccessful claims "did not lead to any publicity at the time and they did not involve the payment of any sums of public money",[68] thus the Ministry of Justice does not consider that public interest justifies releasing the information. This point will be discussed further in Chapter 3.6.

Our system for determining compensation claims is best described as reactionary. The specific cases either build upon or challenge particular aspects of the compensation scheme. Claims for wrongful imprisonment are rare in New Zealand, and every case is inherently unique and cannot be anticipated. Past determinations have influenced future claims despite lacking precedential authority. Assessed as a whole, they demonstrate the trajectory of mostly unwritten development within this area.

For the purposes of this dissertation, the facts provided for each case are necessarily brief. Wrongful conviction cases are fraught with unanswered questions, causing intense scrutiny of the evidence. We must accept that "all of the questions cannot always be answered, and all of the issues neatly resolved".[69] The following case summaries provide a mere snapshot of the claimant's case rather than a comprehensive assessment. Dates in the title specify when the claim was advanced and determined.

[68] Jeff Orr, response to Official Information Act 1982 request submitted by Nicola Southall (2 August 2016).
[69] Ian Callinan "David Cullen Bain – Claim for Compensation for Wrongful Conviction and Imprisonment" (2016) at 407.

2.1 Arthur Allan Thomas (1980)

Thomas' case was the first substantial case for compensation.[70] No formal process existed by which his claim could be determined.

In 1970, two individuals were fatally shot and their bodies disposed of in the Waikato River. Police suspected Thomas because material recovered from the bodies was the same kind as that used on Thomas' farm.[71] Ballistic evidence was ambiguous; the fatal shots did not conclusively come from that rifle, but the rifle could not be ruled out.[72]

Four months after the investigation commenced, two constables searched the scene once more. They discovered a cartridge shell which conclusively came from Thomas' rifle.[73] At the time the shell casing was discovered, the Police were in possession of Thomas' rifle and ammunition.[74] The casing also displayed no corrosion despite having allegedly been buried outside for four months.[75] Despite this, Thomas was convicted in 1971 to life imprisonment.

Nine years later, the government granted Thomas a royal pardon due to doubts over his conviction. A Royal Commission inquiry investigated whether Police misconduct had occurred, and whether Thomas should be awarded compensation. The Commission's report was condemnatory. The constables had "planted the shellcase ... and did so to manufacture evidence".[76] Additionally, an officer had destroyed questionable evidence so as to "prevent any further investigation".[77]

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[70] Before 1980, only two compensation payments had been made. The first was to Meikle in 1908, who was wrongfully convicted of sheep stealing. For further information on this historical period see Jeremy Finn "John James Meikle and the problem of the wrongly convicted: an enquiry into the history of criminal appeals in New Zealand" (2010) 41 VUWLR.
The second was to Griqual in 1938. Information on these cases is scant. The payments were made on an ad hoc basis, and their rarity indicates compensation was not a formal or developed feature of New Zealand's early legal system.
[71] An axle and fencing wire.
[72] Royal Commission "Report of the Royal Commission to Inquire into the Circumstances of the Convictions of Arthur Allan Thomas for the Murders of David Harvey Crewe and Jeanette Lenore Crewe" (1980) at 15.
[73] Above n 72 at 52.
[74] Above n 72 at 42.
[75] Above n 72 at 324.
[76] Above n 72 at 350.
[77] Above n 72 at 402.

The Commission found the remaining evidence against Thomas insufficient.[78] The case against him was found to be so weak that "he should never even have been charged by the Police".[79] The Commission referred to English guidelines for assistance in awarding compensation.[80] Thomas received $1,087,450.35 for his nine years in prison.[81]

To date, it remains the only compensation case where Police actions amounted to misconduct. The Royal Commission's report captures the shock felt by the public.

> *"The fact that [Thomas was] imprisoned on the basis of evidence which is false to the knowledge of Police Officers, whose duty it is to uphold the law, is an unspeakable outrage. Such action is no more and no less than a shameful and cynical attack on the trust that all New Zealanders have and are entitled to have in their Police Force and system of administration of justice."*[82]

Thomas' case was widely publicised and greatly controversial.[83] It remains etched in the public's psyche as one of the first times where a breakdown of the legal system created a grave miscarriage of justice.[84] The government's response indicated they viewed this case as a standalone occurrence that they hoped would never be repeated.

2.2 Dougherty (1998-2001)

Over the next 18 years, all was quiet. No formal system had been proposed after the disposition of Thomas' case. Dougherty's case caught the government by surprise. It became clear that some process for determining claims would be required.

Dougherty lived next door to the victim SW, an 11-year-old girl. One evening SW was abducted from her home and raped. SW identified Dougherty as the offender. DNA evidence was recovered from SW but there was not enough for a viable sample. On the basis of SW's testimony Dougherty was convicted in June 1993.[85]

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[78] Above n 72 at 237.
[79] Above n 72 at 482.
[80] Above n 72 at 476.
[81] Above n 72 at 515.
[82] Above n 72 at 491-492.
[83] *Re Royal Commission on Thomas Case* [1982] 1 NZLR 252 at 3.
[84] *Chamberlains v Lai* [2007] 2 NZLR 7 at [217].
[85] *R v Dougherty* [1996] 3 NZLR 257 at 147-10.

Three months later, the DNA sample became viable for testing. The results showed someone other than Dougherty must have been involved.[86] The Crown had until this point maintained that there was only one offender. The Court noted it was still possible Dougherty could be guilty,[87] but these were suppositions "that reasonably may not be accepted".[88] The Court ordered a retrial, and despite SW's "unwavering assertion"[89] that she identified Dougherty, the jury found him not guilty.

Years later, and after the compensation determination had been made, another individual Reekie was apprehended and found guilty. Reekie had told SW during the assault that his name was David.[90]

In response to Dougherty's claim, the government issued interim guidelines to assist the QC. The interim guidelines were drafted by the Ministry of Justice over six weeks.[91] Unsurprisingly given the short time frame, the interim guidelines draw heavily from the ICCPR. Claimants had to show a "new or newly discovered fact".[92] Claimants were eligible if their conviction was overturned at retrial. Dougherty was therefore eligible under the interim guidelines, but would be ineligible under the current Guidelines.

Stuart Grieve QC provided the Ministry of Justice with recommendations on both innocence and quantum. Innocence was required on the balance of probabilities. The QC faced two possibilities. Either, that SW had correctly identified Dougherty and it was possible there was a co-offender; or there had only been one offender and that person was not Dougherty, despite SW's identification. The QC found that "the DNA profiling evidence ... has convinced me that Mr Dougherty has discharged the burden of proving his innocence on balance of probabilities".[93]

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[86] The DNA indicated a strong presence of allele 3, and a weak presence of allele 4. Dougherty's DNA type was alleles 1.2 and 4. The presence of allele 4 DNA meant Dougherty could not be categorically excluded, but the presence of allele 3 DNA showed another individual must have been involved.
[87] For instance, if there were two co-offenders, or if the seminal fluid containing allele 3 DNA was unrelated to the abduction.
[88] Above n 85 at 155-20.
[89] Stuart Grieve QC "Report to the Minister of Justice Concerning Claim by David Dougherty for Ex Gratia Payment" (2000), released under the Official Information Act at 6.5.2.
[90] *R v Reekie* CA339/03, 3 August 2004 at [8] of the trial judgment.
[91] Above n 89 at 6-6.1.
[92] The QC found this test was clearly established by the DNA evidence, above n 89 at 2.5.
[93] Above n 89 at 9.7.

The QC awarded $868,729 to Dougherty for three years and three months in prison.[94] The non-pecuniary loss component accounts for $700,000 of this figure. The QC respectfully disagreed with Cabinet's indication that non-pecuniary damages should amount to approximately $100,000 per year.[95]

In the period between 1998 and 2001 when Dougherty's claim was being processed, Cabinet created a formal compensation system. However because Dougherty's claim "was referred for consideration ... before the Cabinet decided to adopt the new criteria" the formal Guidelines did not apply.[96] Dougherty's case provided the impetus for governmental action, and is the only case decided under the nascent interim guidelines.

2.3 Law Commission Report and Cabinet Guidelines (1998)

At Cabinet's request, the Law Commission conducted a thorough investigation into the *ex gratia* system. This report formed the basis of Cabinet's formal Guidelines published in 1998.

The Law Commission concluded that claimants must establish innocence beyond reasonable doubt. Such a condition is "necessary to prevent the 'guilty' claimant, acquitted on a technicality, from profiting from their crime".[97] This became a feature of Cabinet's first iteration of guidelines. Aside from lowering the standard of innocence to the balance of probabilities, the 1998 Guidelines remain valid today.[98]

The Law Commission made two recommendations which Cabinet did not act upon: firstly, recognising a right to compensation in statute,[99] and secondly, establishing a Compensation Tribunal to act as decision-maker.[100] These points of divergence will be returned to in Chapter 3.5 and 3.6 respectively.

[94] Stuart Grieve QC "Report to the Minister of Justice Concerning Claim by David Dougherty for Ex Gratia Payment Part 2 – Quantum" (2001), released under the Official Information Act at 7.1.
[95] Above n 94 at 5.30 – 5.38.
[96] Doug Graham "Compensation for Wrongful Conviction and Imprisonment" (10 December 1998) Beehive Press Release <https://www.beehive.govt.nz/release/compensation-wrongful-conviction-and-imprisonment>.
[97] Above n 24 at 127.
[98] Above n 32.
[99] Above n 24 at 188.
[100] Above n 24 at 136.

2.4 M (1998 – 2000)

M is the first and only claimant whose case was decided under the 1998 Guidelines alone. M was required to prove innocence beyond reasonable doubt.

M was charged with sexual offending against his twelve year old son, R. R exhibited symptoms of sexual abuse and when pressed to identify the offender, named his father M. R retracted his allegation before the trial, but this was not communicated to M's defence counsel.[101] The Crown continued to prosecute as retractions by victims of sexual offending are not uncommon and do not necessarily mean the allegation was false. M was convicted in 1995.[102]

R continued to protest that M had not in fact abused him. M appealed his conviction upon learning that R's retraction had not been communicated to him. The Court of Appeal quashed M's conviction in 1996 without ordering a retrial.[103]

In 1997, R's stepfather A was discovered abusing an "autistic child in his care",[104] and pleaded guilty to indecently assaulting R.[105]

M applied for compensation in 1998. There is a palpable tension running throughout David Williams QC's assessment of innocence. While A clearly abused R, it is not impossible that M did too. To be eligible, M bears the burden of proving a negative assertion that he did not abuse R. Because the innocence inquiry is one of innocence in fact, it is not enough to say there is no proof.

The QC resolves this tension by distinguishing reasonable doubt from "vague or fanciful doubt".[106] He concludes that "while it is not possible to state with absolute certainty that M is innocent ... I consider that the possibilities [of M abusing R] are speculative at best and are unsubstantiated".[107] Any doubt was therefore not reasonable, so M had met the innocence threshold.

[101] David Williams QC "Report to the Minister of Justice Concerning Claim by M for Compensation for Wrongful Conviction" (2000), released under the Official Information Act at 2.8.
[102] Above n 101 at 2.7.
[103] Above n 101 at 2.13.
[104] Above n 101 at 2.14.
[105] Above n 101 at 2.15.
[106] Above n 101 at 6.2.
[107] Above n 101 at 6.45.

The QC approached compensation very generously, awarding $570,696 including $400,000 for non-pecuniary loss for 14 months in prison.[108] In part this recognises the extraordinary pain and fear felt by M knowing that the real offender might still have access to R.[109]

Cabinet expressed its displeasure with the recommended quantum which was "arguably higher than comparable awards made by New Zealand courts".[110] They worried it would appear as if claimants were receiving "'golden handouts' rather than ... genuine reparation".[111] However, Cabinet deferred to the decision-maker, saying "reopen[ing] the recommended amount would invite criticism of the Government for undermining the independence of an established procedure".[112] As the first official Guidelines case, Cabinet recognised problems arising on the facts but had no reference point by which they could propose a different outcome.

2.5 Review of Cabinet Guidelines and Additional Criteria (2000 – 2001)

In 2000, Cabinet provided explicit guidance for quantum determination, presumably to curtail the previous QC generosity. Cabinet commented that the "criteria … for establishing compensation claims need[s] greater precision"[113] to create a more principled and consistent system.[114] By creating "firmer guidelines" Cabinet could guide the QC's discretion.[115]

The Guidelines identify two distinct calculations that should be made when determining non-pecuniary compensation.

Firstly, "the starting figure for calculating non-pecuniary losses should be set at $100,000" per year, multiplied on a pro-rata basis.[116] This calculation is designed to compensate exclusively for loss of liberty. It appears Cabinet intended that the $100,000 value would remain fixed with no provision

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[108] Above n 101 at 12.2.

[109] Above n 101 at 9.19.

[110] Phil Goff, Minister of Justice "Memorandum for Cabinet Policy Committee – Compensation for a Wrongly Convicted Individual" [Re M] (2001), released under the Official Information Act at 1.

[111] Above n 110 at 15.

[112] Above n 110 at 1.

[113] Phil Goff, Minister of Justice "Memorandum for Cabinet Policy Committee – Compensation for a Wrongly Convicted Individual" [Re 2000 Reform] (2000), released under the Official Information Act at 2.

[114] See also Cabinet Document CAB (00) 463 (21 July 2000), released under the Official Information Act and Cabinet Policy Committee POL (00) 72 (17 July 2000), released under the Official Information Act.

[115] Above n 113 at 3.

[116] Above n 114 at m.

for aggravating or mitigating factors,[117] although the wording is ambiguous given "starting figure" could reasonably indicate a changeable value.

Secondly, an additional lump sum is determined to compensate for other non-pecuniary loss. Consideration of aggravating or mitigating factors is relevant for this value. Cabinet states "only those cases with truly exceptional circumstances would attract general compensation … that is greater than $100,000 and that on average the relevant figure should even out around $100,000".[118]

For clarity, the calculation process can be expressed as follows:

- Stage One (loss of liberty): $100,000 x (period of imprisonment/year); plus
- Stage Two (general non-pecuniary compensation): aggravating factors – mitigating factors ≈ $100,000 on average; plus
- Stage Three (pecuniary loss).

The Guidelines do not elucidate this difference clearly. In some cases, Stage One and Stage Two have been conflated; that is, the yearly value for loss of liberty has been uplifted due to aggravating factors.[119]

This reform response highlights the tension between Cabinet and QCs. Even when Cabinet disagrees with the proposed compensation value they often feel obliged to accept it, as in M's case. The additional criteria are "not binding on the Queen's Counsel investigating [a] claim", but they "may serve as helpful reference".[120] Cabinet seemed to appreciate that they would suffer political backlash from either removing the QC's ability to recommend quantum, or frequently overruling recommendations. By simply guiding the QC's discretion, Cabinet hoped to agree with future compensation awards. The 2000 reform is best viewed as a stern reminder to QCs to follow Cabinet's lead when determining quantum.

[117] See the example provided in above n 113 at 24.

[118] Above n 113 at 23.

[119] For further analysis on this point, see the second table in Chapter 2.15.

[120] Above n 113 at 28.

In 2001 Cabinet made two additional changes to the Guidelines.[121] [122] Before 2001, only individuals who were initially convicted under the standard criminal procedure could apply for compensation. This was widened to include persons who were "wrongfully convicted and imprisoned as a result of a courts martial process".[123] This change was not particularly contentious or impactful; it merely rectified an oversight that precluded some individuals from bringing claims.[124]

More importantly, the 2001 Guidelines modify the standard of proof for innocence. The 1998 standard of innocent beyond reasonable doubt was altered to the "balance of probabilities",[125] which remains in effect. The reasoning for this change includes "innocent claimants being denied compensation" and that a high threshold for innocence "adds to the complexity of the assessment".[126] These reforms exemplify one of the greatest strengths of the compensation system; Cabinet promptly identified and responded to M's case and addressed the inherent "unfair[ness]" of the system.[127]

2.6 F (2001 – 2005)

F's application for compensation was directly responsible for including courts martial proceedings in the previous reform. However, the Guidelines were less effective at curtailing compensatory generosity.

F was a member of the Royal New Zealand Air Force (RNZAF). He came into possession of a small explosive device while on base. F faced difficulties in his personal life and "was in a rather desperate mental and emotional state".[128] His relationship with his warrant officer severely deteriorated because he blamed her for his personal troubles. F approached a chaplain for help,

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[121] Phil Goff, Minister of Justice "Memorandum for Cabinet Policy Committee – Compensation Persons Wrongfully Convicted and Imprisoned" [Re 2001 Reform] (2001), released under the Official Information Act.

[122] See also Cabinet Policy Committee POL (01) 380 (7 December 2001), released under the Official Information Act.

[123] Above n 121 at 32.

[124] This change was needed to allow F's pending claim (see Chapter 2.6) to proceed. Above n 121 at 21.

[125] Above n 121 at 1.

[126] Above n 121 at 4.

[127] Above n 121 at 18.

[128] Paul Davison QC "Report of Paul Davison QC as to the application for compensation for wrongful conviction and imprisonment by [F]" [innocence] (2003), released under the Official Information Act at p3.

said that he "wanted to kill the warrant officer" and mentioned the explosive device he possessed.[129] F was referred to a psychologist for assessment and treatment.

Charges were subsequently laid against F for threatening to kill contrary to section 306(a) of the Crimes Act 1961.[130] He was dismissed from the RNZAF and sentenced at court martial to 90 days imprisonment, of which he served 29 days.[131] F's conviction was subsequently quashed.

Paul Davison QC made two findings regarding the alleged crime. Firstly, F's discussions with the chaplain and psychologist were confidential and should not have been admitted.[132] Furthermore, even with that evidence, the relevant criminal threshold was not met. F was "actively seek[ing] help" rather than taking "action in furtherance of those thoughts".[133] F's actions "fell well short of an expression of a threat" and he was therefore innocent.[134]

In determining quantum, the QC departed dramatically from the Guidelines. The QC determined compensation would be appropriate for a period of 110 days because F was effectively "under conditions resembling house arrest".[135] The QC also determined that non-pecuniary losses should be quantified at $100,000, despite acknowledging the relatively short period of imprisonment and that this case was not "truly exceptional".[136] The QC emphasised "the deep sense of injustice that must have been felt ... whilst he was motivated by a desire to obtain help for his condition".[137]

The Minister of Defence invited the QC to "review his report" given the inconsistencies with the Guidelines.[138] The QC removed his recommendation to compensate for non-custodial time, but retained his recommendation for $100,000 non-pecuniary loss. The Ministry felt this was a "disproportionately high award"[139] but could not confidently say that "Mr Davison's assessment is

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[129] Mark Burton, Minister of Defence "Compensation for Wrongful Conviction and Imprisonment" (2005), released under the Official Information Act at 3.
[130] Above n 128 at 1.
[131] Above n 129 at 4-5.
[132] Above n 128 at 2.
[133] Above n 128 at 11.
[134] Above n 128 at 11.
[135] Paul Davison QC "Report of Paul Davison QC to the Minister of Defence as to the application for compensation for wrongful conviction and imprisonment by [F]" [quantum] (2004), released under the Official Information Act at 3.6.
[136] Above n 135 at 5.7.
[137] Above n 135 at 5.6.
[138] Above n 135 at 11.
[139] Above n 135 at 14.

erroneous or does not comply with the Cabinet Guidelines".[140] Ultimately, while Cabinet remained "concerned" by this determination they once again deferred to the QC for policy reasons.[141]

2.7 Akatere, Fuataha and Vini (2002 – 2003)

Three girls aged 14 to 15 – Akatere, Fuataha and Vini – were convicted of aggravated robbery. The victim had been accosted at a local mall. The victim was punched and cut, and her money was taken. No facial identification could be made.[142]

Another girl (with name suppression) came forward and testified against the girls, giving evidence that she was a co-offender who committed this act alongside them. The claimants were convicted substantially on this basis. It later transpired that the informant's testimony could not be trusted, and she retracted her testimony.[143] The Court of Appeal quashed the convictions outright, stating "we have here three young persons let down by the system".[144] The girls had spent 7 months in prison.[145]

Kristy McDonald QC found the claimants innocent on balance due to the informant's untrustworthiness. Furthermore, the victim testified that she was certain Akatere was not one of her attackers, and other details about the attackers' appearances were inconsistent with the three girls.[146]

The QC was particularly conscious of Cabinet's intention in updating the Guidelines. Her report states "those Criteria make it clear that awards of compensation are now to be pitched at a significantly lower level than previous awards".[147] The QC awarded Akatere and Vini $135,000 and

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[140] Above n 135 at 16.

[141] Above n 129 at 17. These policy reasons were: Cabinet appearing to undermine the independent process, increased litigation risk, lengthening the time the proceedings have been active and the lack of any danger in setting an undesirable precedent in future.

[142] Kristy McDonald QC "Report to the Minister of Justice Concerning Claim by Tania Vini, Lucy Akatere and McCushla Fuataha for Compensation for Wrongful Conviction" (2003), released under the Official Information Act at 3.2.

[143] *R v Akatere* CA114/01, 16 October 2001 at [1].

[144] Above n 143 at [6].

[145] Above n 142 at 40.14.

[146] Above n 142 at 16.4.1.

[147] Above n 142 at 40.12.

Fuataha $137,500 for non-pecuniary losses, plus established pecuniary losses.[148] Cabinet accepted the recommendation in full.[149]

A claim in judicial review was lodged, alleging the reform in 2000 did not apply and therefore the QC was not bound by a starting point of $100,000 per annum.[150]

The Court held Cabinet's 2000 and 2001 amendments were valid and supplemented the initial 1998 Guidelines.[151] The Guidelines were not justiciable, and in any event no error or unreasonable decision could be shown.[152]

In part due to the QC's principled and deferential approach to Cabinet, and the Court's authoritative review, this case marked a turning point after which determinations were less volatile. Future cases referred back to Akatere and assessed quantum in a more moderate and balanced manner.

2.8 Haig (2006 – 2009): Unsuccessful

Haig is the first in a string of unsuccessful compensation claims. Compared to the previous successful claims, these following cases were considered less deserving.

Haig and his nephew Hogan operated a fishing vessel. Another crewmember, Roderique, argued with Haig and Hogan over illegal paua poaching. Roderique subsequently disappeared, and the Crown contends that "the deceased's body … was dropped into the sea".[153] Hogan testified in exchange for immunity that Haig had murdered Roderique.[154] At trial, despite claiming Hogan committed the murder, Haig was found guilty.

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[148] Above n 142 at 37.2.

[149] Cabinet Policy Committee Minute of Decision POL Min (03) 5/2, released under the Official Information Act at 3, and Cabinet Business Committee Minute of Decision CBC Min (02) 6/7, released under the Official Information Act.

[150] This was substantially because the 2001 reform did not reference the reform in 2000, and it was alleged that the 2001 reform represented the totality of the Guidelines and had replaced the 2000 document. By contrast, the QC had considered the 2001 reform was additional to the 1998 and 2000 documents. See *Akatere v Attorney-General* [2006] 3 NZLR 705 at [5].

[151] Above n 150 at [47].

[152] See earlier discussion at Chapter 1.3.

[153] *R v Haig* (2006) 22 CRNZ 814 at [6].

[154] Above n 153 at [28].

New evidence around Hogan's involvement arose after the trial.[155] The Court of Appeal held that "the new evidence casts major doubt on the reliability of Hogan's evidence and … provides an evidential basis for the proposition that Hogan murdered the deceased".[156] The Court did not enter an acquittal for Haig as a credible case "remain[ed] … against the appellant".[157] However a retrial was not practical in the circumstances, so a permanent stay of proceedings was ordered.[158]

Robert Fisher QC investigated Haig's claim. He conducted a substantial investigation and put forward a new hypothesis that "[Haig] and Hogan were acting together when they killed Roderique".[159] The QC concluded "I am satisfied that Mr Haig has failed to show that on the balance of probabilities he is innocent … If anything, the inquiry suggests the reverse".[160] Compensation was therefore declined.[161]

The QC's determination has attracted some academic criticism. Professor Joseph commented that "Fisher's finding of probable guilt was based on a hypothesis that was entirely novel and untested … Fisher could be confident that he, and only he, really knew what happened … Such prescience is truly admirable".[162]

This case shows the difficulties in establishing innocence in fact. The QC is often required to look far beyond the evidence presented at trial and assert new factual scenarios. This process lacks the judicial system's rigour and is more susceptible to doubt and error.

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[155] In particular, Hogan was overheard by a number of individuals admitting that he was involved in the murder. Above n 153 at [79].
[156] Above n 153 at [103].
[157] Above n 153 at [108].
[158] Above n 153 at [109].
[159] Robert Fisher QC "Report for Minister of Justice on Compensation Claim by Rex Haig" (2008), released under the Official Information Act at 248.
[160] Above n 159 at 272.
[161] Simon Power, Minister of Justice "Claim for Compensation for Wrongful Conviction and Imprisonment: Rex Haig" CON 35-25 (14 January 2009), released under the Official Information Act.
[162] Philip Joseph, quoted in "Haig to seek review of his case" (11 September 2012) *Otago Daily Times* <https://www.odt.co.nz/news/dunedin/haig-seek-review-his-case>.

2.9 Rosenberg (2006 – 2009): Unsuccessful

In 1943, Rosenberg pleaded guilty to possessing parts of a United States military uniform without lawful authority. He was convicted and served 6 months in prison. The conviction was set aside in 2005 after the District Court Judge held this was not a valid offence in 1943.[163]

The Ministry of Justice investigated the claim and found, contra to the Judge's finding, that "Mr Rosenberg's conduct was … an offence at the time".[164] As such they denied compensation because Rosenberg was not innocent.

This case is anomalous because the conviction appears to have been overturned in error. Before Rosenberg, the criminal conviction was viewed as incontrovertibly unsafe. Compensation determinations had assessed the innominate gulf between a legally correct overturned conviction and innocence in fact. This case serves as a useful reminder that in very rare circumstances, the court's disposition of a conviction may be incorrect.[165]

2.10 Mason (2009 – 2010): Unsuccessful

Mason was charged with importing pseudoephedrine, a Class C controlled drug. Mason accepted delivery of the package, but claimed he was expecting an EFTPOS machine and specifically asked the courier whether this was his machine. Mason advised his counsel to follow up this lead and get supporting documentation from EFTPOS New Zealand, but counsel failed to do so and Mason was convicted. The EFTPOS evidence "procured his discharge" when put before the Court on appeal.[166] Mason brought proceedings against his trial counsel for negligence.

All details about this claim were withheld under the OIA.[167] The fact that Mason applied for compensation is only known because proceedings against Mason's counsel mention he "applied, in

[163] Simon Power, Minister of Justice "Briefing on petition of Heinz Rosenberg for compensation for miscarriage of justice" CON 35-23 (26 February 2009), released under the Official Information Act at 3-4.
[164] Above n 163 at 6.
[165] Here, the legal error seems to be easily verifiable. However it raises questions as to when the QC should inquire into the factual correctness of a verdict. It may strain the relationship between the judiciary and executive to have Cabinet asserting that the courts were incorrect.
[166] *Mason v Glover* [2012] NZHC 1313 at [6].
[167] See earlier discussion at n 4 and 5.

April 2009, to the Minister of Justice for compensation … That application was declined on 16 September 2010".[168]

We can presume Mason's case required substantial analysis given the result took 17 months.[169] It seems plausible that Mason was denied because he could not prove innocence on balance. Any further conjecture is unwise. We lack vital information which would allow further assessment of the innocence standard or extraordinary circumstances test working in practice.[170]

Some information about this case was publicly available and yet withheld under the OIA. This perhaps demonstrates that the Ministry of Justice is too vigorously withholding information.

2.11 Farmer (2009 – 2011)

In 2003, the complainant was pulled into the bushes and raped by a motorcyclist. Farmer was in the general vicinity on a motorcycle at the same time the offending occurred. Later, when the complainant was shown a photograph of Farmer, she stated she was "90% sure" he was the offender.[171] Farmer was convicted of sexual violation and served 2 years and 3 months in prison.

Farmer appealed, alleging his trial counsel failed to follow up an alibi witness. The witness confirmed he was with Farmer mere minutes before the offending, which would have "diminished considerably" the "window of opportunity available in the Crown's timeline".[172] Additionally, the complainant's description of the offender's clothing and motorcycle were inconsistent with Farmer's possessions.[173] The Court of Appeal found the original conviction unsafe and ordered a retrial.

While awaiting retrial, advances in DNA testing methods meant a DNA sample recovered from the complainant could now be tested. This test "excluded the Applicant as the donor".[174]

[168] Above n 166 at [7].
[169] However, we cannot know whether this decision was made by the Minister of Justice alone at the preliminary stage, or whether a QC was also engaged.
[170] This point will be returned to in Chapter 3.6.
[171] *R v Farmer* [2007] NZCA 229 at [18].
[172] Above n 171 at [41].
[173] Above n 171 at [32].
[174] Robert Fisher QC "Report for Ministry of Justice on Compensation Claim by Aaron Lance Farmer" (25 February 2010) at 9.

As the Court had ordered a retrial, Farmer was required to prove extraordinary circumstances entitled him to compensation. Robert Fisher QC held that Farmer had "established his innocence beyond reasonable doubt" given the DNA evidence.[175] [176]

Unusually, the QC only reported on innocence. Quantum was set by the Associate Minister of Justice,[177] who proposed compensation of $351,575. The pro-rata yearly value was set at $150,000, recognising particular harm suffered by Farmer.[178] It is unclear why the QC did not advise Cabinet on quantum. One can hypothesise that Cabinet wanted greater control over the quantum given the previous awards were either higher than anticipated or challenged under judicial review.

This case is notable because of the QC's comments on the extraordinary circumstances test. It was argued that trial counsel's failure to follow up the alibi witness could constitute extraordinary circumstances. The QC commented that "it seems unlikely that [this] would ever be accepted as a relevant consideration".[179] Not only does this show the strictness of the extraordinary circumstances test, it also raises questions about a QC's suitability to explicate Cabinet's test. It is unclear whether this should simply be treated as Fisher's opinion or whether this reasoning will apply to other claims.

2.12 Johnston and Knight (2010 – 2011)

Johnston and Knight were convicted of arson in 2004. After serving 9.5 months the Court of Appeal quashed their convictions and ordered retrials "on the basis that the trial Judge's summing up lacked adequate direction to the jury".[180]

An ongoing Police investigation uncovered new evidence. This evidence remains suppressed, but in response the Police apologised and stated "the offence for which you were charged, convicted and incarcerated had not been committed by you".[181]

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[175] Above n 174 at 58-59.

[176] Nathan Guy, Associate Minister of Justice "Compensation for a wrongly convicted and imprisoned individual" [Farmer on innocence] (24 April 2010).

[177] At the time of determination, this was Nathan Guy.

[178] Nathan Guy, Associate Minister of Justice "Compensation for a wrongly convicted and imprisoned individual" [Farmer on quantum] (5 March 2011) at 18.

[179] Above n 174 at 62.

[180] Cabinet Minute of Decision CAB Min (10) 5/6 (15 February 2010) at 9.

[181] Above n 180 at 11.

The compensation determination was made by the Minister of Justice[182] rather than a QC. The Minister of Justice viewed the Police's evidence and concluded that innocence on balance was established. This determination is inscrutable given the evidence establishing innocence cannot be released. The Minister found the extraordinary circumstances test was met because "the Police and the Crown have resiled from [their] position" and "the Police have formally apologised".[183] Johnston received $146,011.47[184] and Knight received $221,936.08[185] in compensation.[186]

This case expands the extraordinary circumstances test and allows the Police to act as arbiter of guilt or innocence. While a very practical response, it is arguable whether Police advocating a claimant's innocence is truly an extraordinary circumstance.

2.13 Bain (2010 – 2016): Unsuccessful

In 1995 Bain was convicted of murdering his immediate family.[187] Bain appealed unsuccessfully a number of times[188] until, in 2007, the Privy Council ordered a retrial due to "fresh, admissible and apparently credible evidence" which had not been available to the jury.[189] At his retrial, Bain was acquitted on all counts.[190]

The government appointed Ian Binnie[191] to determine the claim.[192] Binnie's report, which concluded Bain was innocent on balance, was rejected by Justice Minister Judith Collins. The Minister commissioned a peer review of the report, which found "Binnie J went beyond his

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[182] At the time of determination, this was Simon Power.

[183] Above n 180 at 25.

[184] This consisted of $110,082 for non-pecuniary loss and $35,929.47 for pecuniary loss.

[185] This consisted of $106,151 for non-pecuniary loss and $115,785.08 for pecuniary loss.

[186] Cabinet Minute of Decision CAB Min (11) 14/15 (4 April 2011) at 2.

[187] A great deal of analysis has gone into the facts of this case, and whether they more reasonably support the proposition that Bain murdered his family, or that Bain's father Robin murdered his family before committing suicide. A detailed discussion of the facts is outside the scope of this paper.

[188] For a full summary see Ian Callinan "David Cullen Bain – Claim for Compensation for Wrongful Conviction and Imprisonment" (24 December 2015) at 8-14.

[189] *Bain v R* (2007) 23 CRNZ 71 (PC) at 103.

[190] Above n 188 at 14.

[191] A retired Canadian Supreme Court judge.

[192] Ian Binnie "Report for the Minister of Justice on Compensation Claim by David Cullen Bain" (30 August 2012).

mandate" and "made fundamental errors of principle".[193] [194] A new report was commissioned, to be determined by Ian Callinan.[195]

Callinan's report concluded Bain failed to establish innocence on balance.[196] Explanations of Bain's innocence "failed to establish possibilities as probabilities".[197] As such, "no statement of innocence or compensation payment will be made" to Bain.[198] However, the government recognised Bain's case was "one of the most complex, unique and high profile cases New Zealand has ever known".[199] Bain accepted an *ex gratia* payment of $925,000 "in recognition of the time involved and expenses incurred … and the desirability of avoiding further litigation".[200]

While a pragmatic approach, this decision is inconsistent with previous cases and is politically motivated. No other unsuccessful claimant has received compensation for costs. Cabinet put itself in a position as an interested party with vested interests; "no one benefits from this matter continuing to drag on".[201] This seriously calls into question Cabinet's ability to make decisions impartially.[202]

2.14 Pora (2015 – 2016)

In 1992 a woman was raped and murdered in her Papatoetoe home. Pora confessed to Police that he was present, and he was charged and convicted. Four years later, Malcolm Rewa was arrested and charged with a number of offences, including the crime in question. The jury convicted Rewa of

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[193] Robert Fisher QC "Interim Report for Minister of Justice on Compensation Claim by David Bain" (13 December 2012) at 9.

[194] Detailed analyses of Binnie's report and Fisher's peer review response are outside the scope of this paper. See above n 192 and 193.

[195] A retired High Court of Australia judge.

[196] Above n 188 at 407.

[197] Above n 188 at 390.

[198] Amy Adams "Conclusion reached in Bain compensation case" (2 August 2016) Beehive Press Release <https://www.beehive.govt.nz/release/conclusion-reached-bain-compensation-case>.

[199] Above n 198.

[200] Above n 198.

[201] Above n 198.

[202] Cabinet may have simply desired to conclude the matter promptly and avoid additional cost to the taxpayer. However, because of the position Cabinet has put themselves in, it is possible for the public to infer additional motives. Perhaps Cabinet wished to preclude any scrutiny of their decision-making actions by preventing a judicial review claim from proceeding. Similarly, there are political benefits for Cabinet in concluding the matter now rather than in an election year.

rape but could not agree on whether Rewa committed the murder. Pora was retried due to the new Rewa evidence, but convicted again in 2000. In 2015 Pora successfully appealed to the Privy Council, who quashed his conviction without order for retrial.[203]

The conviction was quashed outright, substantially because of the quality of Pora's confession. His confession was "wildly inconsistent" with the facts and often contradictory.[204] Pora was 17 at the time he confessed, and suffered from foetal alcohol syndrome which affected his "processes of judgment, reasoning … [and the ability to] think through to the consequences of one's actions".[205] This explained why Pora might confess to a crime he did not commit, and the Privy Council held this new information had a "potentially significant impact on the safety of the convictions".[206]

Rodney Hansen QC assessed Pora's claim. The QC found Pora's account "so plainly a fabrication that it collapses under its own weight", which should not have formed the basis for conviction.[207] Furthermore, there is no independent evidence tying Pora to the crime, and what evidence there is "leads to the irresistible inference that Malcolm Rewa acted alone and was solely responsible".[208] The QC concludes innocence on balance is established and Pora "in my view… could have proved his innocence to an even higher standard".[209]

In relation to quantum, the QC determined Pora was in custody for an operative period of 19 years, 7 months and 13 days of his 21.11 years since arrest. This operative period is multiplied by the rate of $100,000 per year equalling $1,961,895.[210] An additional one-off lump sum of $225,000 recognised additional non-pecuniary losses.[211] The QC advised Cabinet that "consideration should be given to adjusting compensation … to reflect the decline in the value of money".[212] However,

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[203] Rodney Hansen "Report for Minister of Justice on Compensation Claim by Teina Anthony Pora" (23 March 2016) at 8-13.
[204] *Pora v R* [2015] UKPC 9 at 11.
[205] Above n 204 at 37.
[206] Above n 204 at 40.
[207] Above n 203 at 309.
[208] Above n 203 at 311.
[209] Above n 203 at 312.
[210] Rodney Hansen QC "Second Report for Minister of Justice on Compensation Claim by Teina Anthony Pora" (31 May 2016) at 16.
[211] Above n 210 at 82.
[212] Above n 210 at 19.

Cabinet made no adjustment for inflation.[213] In fact, the official press release makes absolutely no reference to the QC's recommendation.[214] Cabinet awarded Pora $2,520,949.42.[215]

Both Pora and Bain's cases were determined in 2016, renewing substantial public interest in this topic.

2.15 Overall trends and analysis

Aggregate results

Since 1998, seven claims have been successful.[216] Of these, five fell within the Guidelines and were solely required to establish innocence.[217] Two fell outside the Guidelines and established innocence plus extraordinary circumstances.[218]

20 claims have been unsuccessful.[219] Haig, Rosenberg and Bain all failed to establish innocence on balance. The reasons for declining the other 17 claims remain unknown. Of the 20 denied claims, "11 were considered under the Cabinet Guidelines, and [9][220] were outside the scope of the Guidelines and considered under the "extraordinary circumstances" discretion".[221] Haig and Rosenberg were eligible under the Guidelines, leaving 9 other eligible claimants denied compensation for unknown reasons. Mason and Bain were ineligible, leaving 7 other ineligible claims denied for unknown reasons. Given the number of eligible claimants declined, it seems many cannot prove innocence on balance.

[213] This will be discussed at length in Chapter 3.2.
[214] Amy Adams "Teina Pora to receive compensation" (15 June 2016) Beehive Press Release <https://www.beehive.govt.nz/release/teina-pora-receive-compensation>.
[215] Above n 210 at 102.
[216] Dougherty, M, F, Akatere, Farmer, Johnston and Pora.
[217] Dougherty (under the interim guidelines showing innocence on balance); M (under the 1998 guidelines showing innocence beyond reasonable doubt); F, Akatere and Pora (all under the current Guidelines showing innocence on balance).
[218] Farmer (extraordinary circumstances were innocence beyond reasonable doubt) and Johnston (extraordinary circumstances were the Police statement of innocence and apology).
[219] Jeff Orr, response to Official Information Act 1982 request submitted by Nicola Southall (27 May 2016): "Since 1998, nineteen claims for wrongful conviction and imprisonment compensation have been declined". This number is now 20 since Bain's claim has been declined.
[220] Increased from 8 to account for Bain's claim.
[221] Above n 219.

The cases demonstrate a number of different causes for wrongful conviction. These include:

- Police misconduct[222]
- Incorrect eye-witness testimony[223]
- New evidence discovered or available for DNA testing[224]
- Wrongfully admitted evidence[225]
- Insufficient evidence to sustain a conviction[226]
- No offence existed[227]
- Failure of trial counsel[228]
- Untrustworthy confession.[229]

These various factors underscore the unpredictability of wrongful convictions, and indicate the criminal justice system cannot always anticipate or prevent miscarriages of justice from occurring. The importance of a robust compensation scheme is of paramount importance.

Cabinet's deference to decision-makers

Across the body of compensation claims, Cabinet has outwardly expressed reservations about the decision-maker's recommendations in four cases: M, F, Pora and Bain. In M and F Cabinet disagreed with the quantum of compensation awarded, but showed deference to the QC's assessment. By contrast, it seems that recently Cabinet is much less inclined to be deferential where their opinions conflict with the QC or the decision-maker. In Pora, the QC's recommendation to adjust for inflation was entirely ignored. This is the first and only time Cabinet has acted in direct opposition to the QC's recommendation. Similarly, in Bain, Cabinet identified problems with Binnie's report, and ultimately sought a new report from Ian Callinan. While there were undoubtedly issues with the

[222] See Arthur Allan Thomas.
[223] See Dougherty, M, Akatere and Haig.
[224] See Dougherty, Farmer and Johnston.
[225] See F.
[226] See F, Haig and Bain.
[227] See Rosenberg.
[228] See Mason and Farmer.
[229] See Pora.

Binnie report, the manner in which Cabinet rejected the report appeared needlessly acrimonious.[230] Overall, Cabinet appears to be taking a more vocal role in determining compensation claims, especially where the point of conflict is political in nature.

QCs assigned to determine claims

It is worth briefly noting that many different QCs have been approached to assess claims. In fact, Robert Fisher QC is the only person who has assessed more than one claim.[231] There is no information publicly available as to how Cabinet selects particular QCs.

Amount of quantum trending downwards

The table below provides details on the successful claims.[232] To provide a similar basis for comparison, the data has been transformed in a number of ways.[233]

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[230] Binnie commented in the media "I expected the Minister to follow a fair and even-handed process ... The purpose of this email is to give people the facts to enable them to determine for themselves whether or not the process has been even-handed ... The Minister is keen to repatriate the Bain case to her home turf". Ian Binnie "Full text: Justice Ian Binnie's statement" (December 12 2012) New Zealand Herald <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10853513>.

[231] Fisher assessed Haig's unsuccessful claim, Farmer's successful claim, and provided a peer review of Ian Binnie's report in Bain's case.

[232] The white entries indicate the claim predates the Cabinet Guidelines. Light green entries were determined under the Guidelines, but without the Additional Cabinet Criteria of 2000 specifying compensation guidance. Dark green entries were determined with reference to the Guidelines and Additional Cabinet Criteria. Arthur Allan Thomas and Dougherty's compensation claims are often invoked as a comparator to later cases, but fundamental differences in the underlying scheme means drawing this comparison is undesirable.

[233] Column E specifies the total compensation received by each claimant, but this includes fact-specific pecuniary losses. Column F excludes pecuniary losses, but the non-pecuniary values cannot be directly compared because they cover different timeframes. Column G multiplies Column F by Column D to give the non-pecuniary compensation figure per year. Finally, Column H accounts for the temporal disparity by providing the amount that a claimant would have received today if a Column G payment was made, rather than payment made at the date in Column C. The Reserve Bank of New Zealand's inflation calculator was used for this purpose. All years in Column C were specified as Q1 of that financial year. Similarly, all values in Column H were set to Q1 of the 2016 financial year.
Reserve Bank of New Zealand "Inflation Calculator" (2016) <http://www.rbnz.govt.nz/monetary-policy/inflation-calculator>.

A. Name	B. Year (Applied)	C. Year (Claim Determined)	D. Time In Prison	E. Total Compensation	F. Compensation for Non-Pecuniary Harm	G. Non-Pecuniary Figure per Year	H. Figure per Year, Adjusted to Today's Dollar Value
Thomas	-	1980	9 years	$1,087,450	$950,000	$105,555	$514,735
Dougherty	1998	2001	3 years and 2 months	$868,729	$700,000	$221,057	$305,415
M	1998	2000	1 year and 2 months	$570,697	$400,000	$342,859	$488,194
F	2001	2005	1 month	$144,221	$108,219	$1,298,628	$1,634,505
Akatere, Fuataha and Vini	2002	2003 (determined), 2006 (judicial review concluded)	7 months	$162,000 - $176,000 each.	$135,000 - $137,500	$231,429 - $235,715	$304,018 - $309,648
Farmer	2009	2011	2 years and 3 months	$351,575	$351,575	$156,255	$163,617
Johnston and Knight	2010	2011	9.5 months	$146,011 and $221,936	$110,082 and $106,151	$138,992 and $134,029	$145,541 and $140,344
Pora	2015	2016	21.11 years (QC determines operative period of 19 years, 7 months and 13 days)	$2,520,949	$2,186,895	$111,468 taking the operative period	$111,468 taking the operative period

The value in Column H for F's case contextualises just how anomalous F's compensation award was. It appears to be out of all proportion to other awards due to the generous amount of compensation given for such a short period of imprisonment.

The values in Column H from Akatere onwards show a clear downwards trend in the amount of non-pecuniary compensation being awarded. Two factors appear to be at work. Firstly, the downwards trend indicates the effect of inflation, and Cabinet's failure to account for this change. The buying power of money diminishes over time, meaning earlier awards appear comparatively high.[234] Secondly, Cabinet's aim to set compensation levels at approximately $100,000 per year is having an effect. The cases demonstrate the QCs are framing their awards so as to be consistent with the Additional Criteria Guidelines. Recent wrongful conviction cases have not incited in the QC the same level of moral outrage as earlier cases. Either the QC is more taken by the particular injustice of a case and recommends a higher award, or they are more deferential to Cabinet and do not greatly emphasise extraordinary factors.[235] It seems the QCs have favoured a more deferential approach recently.

[234] See further discussion in Chapter 3.2.

[235] Compare for instance Paul Davison QC's approach in F to Rodney Hansen's approach in Pora.

Consistency in quantum calculations post-2000

Confusion has resulted from Cabinet's Stage One and Two quantum calculations. This table demonstrates the various approaches to quantum analysis post-2000.

A. **Name**	**B.** **Relevant Period of Imprisonment**	**C.** **Stage One Per-Year Figure**	**D.** **Per-Year Figure multiplied on a pro-rata basis**	**E.** **Stage Two Additional Lump Sum**	**F.** **Total Non-Pecuniary Compensation**
F	1 month	$100,000	$8,219	$100,000	$108,219
Akatere, Fuataha and Vini	7 months	$100,000	$60,000	$75,000 - $77,500	$135,000 - $137,500
Farmer	2 years and 3 months (819 days)	$150,000	$336,575	$15,000	$351,575
Johnston and Knight	Approximately 9.5 months	$140,000 and $135,000	$110,082 and $106,151	Nil	$110,082 and $106,151
Pora	19 years, 7 months and 13 days	$100,000	$1,961,895	$225,000	$2,186,895

The Guidelines reform in 2000 attempted to clarify non-pecuniary compensation calculations.[236] Cabinet intended Column C (the value for calculating loss of liberty) should be fixed at $100,000. However, in Farmer and Johnston's cases, Stage One and Stage Two appear to have been conflated. Aggravating factors have uplifted the Column C value rather than the Column E value. Curiously, these two anomalous cases are the only two cases in which compensation was determined by the Minister of Justice rather than a QC.

[236] See previous discussion above at Chapter 2.5.

This suggests one of three things:

- The QCs (and this paper) have fundamentally misinterpreted the quantum calculation, if we assume the Minister's approach speaks to Cabinet's intention in 2000; or
- The Minister's approach in Farmer and Johnston is anomalous and perhaps indicates a less rigorous process of analysis; or
- Both approaches are legitimately open under the Cabinet Guidelines, leading to disparate and unfair results.

Regardless of which view is correct, this is a troubling inconsistency. These diverging approaches have serious implications for uniformity across cases.[237] Chapter 3.3 recommends reform to clarify this issue.

Personal advocates and public opinion

Recent cases appear to have attracted more public interest than earlier cases. Both Pora and Bain received copious media and public attention in the wake of their compensation claims. In part, we see a heavy reliance on personal advocates to create public support and sympathy, increasing public awareness and governmental pressure. However, this notoriety can be double edged, resulting in individuals being vilified in the court of public opinion. Bain's case is particularly apposite here; New Zealanders seem to hold strong, categorical opinions on Bain's guilt or innocence.[238]

A dedicated personal advocate featured in Thomas' case. The Royal Commission recognised "the immense labour of Mr Patrick Booth in the field of investigative journalism".[239] For Pora, former policeman Tim McKinnel has "taken a leading role" in the case.[240] For Bain, Joe Karam has remained a vocal and committed advocate for many years, and features heavily throughout Bain's story.[241]

[237] Consider for instance, that Farmer may have received much less compensation if the Stage One value was set at $100,000 rather than $150,000; at that starting point his Stage One compensation would be $224,000 (to 3 significant figures). It seems unlikely that the Stage Two value would have increased correspondingly, from $15,000 to $127,000. Similarly, given Pora's compensation was calculated over 19 years, any uplift to the Stage One value would have likely resulted in a far higher compensation award.
[238] Above n 230 at 8.
[239] Above n 72 at 516.
[240] Above n 210 at 98. See also Michael Bennett *In Dark Places* (Paul Little Books, Auckland, 2016).
[241] Above n 188 at 10. See also Joe Karam *David and Goliath* (Reed Books, 1997).

It is unclear whether these two recent cases show that cultivating a strong public presence is becoming standard practice for claimants, or whether Pora and Bain are simply exceptional cases. If this trend continues, it indicates the political arena may be more important than the legal arena when seeking compensation.[242]

Conclusion

The cases outlined in Chapter 2 demonstrate the great strengths of New Zealand's compensation system. Determinations are pragmatic and responsive, constantly adapting due to previous cases and public sentiment. However these strengths come with corresponding weaknesses; decisions can be arbitrary, politically motivated or a product of the particular decision-maker's temperament. These characteristics are not desirable in a process so closely related to the criminal justice system and of such importance to claimants.

[242] "A high public profile seems to be a good start in terms of background circumstances, although even this does not guarantee success"; see Adrian Hoel "Compensation for wrongful conviction" in Australian Institute of Criminology No. 356 (2008) at 3.

Chapter 3 – Recommendations for Reform

This Chapter builds upon the factual history of *ex gratia* payments established in the previous Chapter. Are there features of our current system which can be improved upon? This Chapter identifies seven aspects of the New Zealand compensation system which would benefit from review.

These recommendations are structured based on their consistency with the fundamental underpinnings of our current system. The early recommendations propose administrative or procedural reform. Later reform recommendations require challenging the government's underlying policy rationale for compensation payments.

3.1 Framework for critique

As with any proposed improvement, one must ask by what metric improvement is assessed. My recommendations are informed by three main assumptions: that lessened political influence, greater administrative clarity, and greater consistency with international law would all be beneficial. These assumptions lead me to critique elements of the current compensation system, and advance alternatives which better align with this normative position.

Cabinet's decisions are inherently political. I posit that greater formality and principled analysis would benefit the compensation process. Compensation claims can be reconceptualised as a continuance of the criminal process. We strive for institutional impartiality when convicting or acquitting individuals. The same should be true for providing compensation when that criminal system wrongly imprisons an individual.

Administrative clarity benefits the legal system in many ways. Fundamentally, administrative matters establish the legal relationship between the State and its citizens. Requiring cogent justifications and making information available for public evaluation allows decision-making bodies to foster a relationship of trust and confidence between themselves and the public. The State has great power at its disposal, and makes frequent decisions which affect the public. Where possible, these decisions should be made consistently and fairly rather than arbitrarily. Administrative clarity leads to an informed public who are aware of their rights and responsibilities.

Our current compensation system fails to give enough weight to the idea of compensation as a right. Compared to other ICCPR rights, the right to compensation has been relatively overlooked in New

Zealand. Approaching compensation from an international framework of rights would allow New Zealand to elevate and develop the fundamental human rights its citizens rely upon. Reform which aligns New Zealand with international best practice should be embraced.

3.2 Recommendation 1 – Adjusting compensation quantum for inflation

In 2000, Cabinet strenuously insisted that "the starting figure for calculating non-pecuniary losses should be set at $100,000".[243] Cabinet has not revisited this starting point since 2000. $100,000 in 2000 equates to $142,000 at the time of writing.[244]

Inflation becomes more problematic as time progresses. The QC in Pora's case stated "In real terms, claimants will be compensated on a different basis depending on when their claim is settled. Later claimants will be disadvantaged. The rate at which claimants … will be compensated, will decline the longer they remain in prison. That appears to be anomalous and unjust."[245]

Creating a mechanism within the Guidelines to adjust for inflation would improve administrative consistency and fairness between compensation cases in future.

<u>Applied to Pora's case</u>

For claimants such as Pora, $42,000 per year makes a great difference when the relevant period of wrongful imprisonment is over 19 years. Had Pora's case been determined in 2000, the practical value of his compensation figure would have been far greater. If Pora's non-pecuniary losses were adjusted for inflation, his compensation would increase by over $820,000, or 32% of his actual compensation award.[246]

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[243] Above n 114 at m.

[244] Specifically, $142,389.29. This figure was generated by comparing $100,000 in the first financial quarter of 2000 against the first financial quarter of 2016, using the calculator above n 233.

[245] Above n 210 at 18.

[246] Calculations are simplified for ease, and are as follows: $42,000 multiplied by (19 + 7/12) = $822,500. $822,500 divided by $2,520,000 = 32.6% increase.

Timeframe for reform

In the wake of Pora's compensation determination, Prime Minister John Key indicated that "the Government may well make a policy change around inflation adjustment".[247] However, such a change is "something [the Government would] rather consider as a stand-alone policy", applying prospectively only.[248] It seems likely that Cabinet intends to address this anomaly in the future; the contentious issue is whether the change will apply retrospectively to Pora's claim.

The government argues that the Guidelines make no provision for inflation adjustments, and to inflate Pora's claim would be unfair to past claimants.[249] However, this value judgment can be challenged on four grounds.

Firstly, the Guidelines are inherently discretionary. Generally this works in Cabinet's favour by granting great flexibility in making *ex gratia* payments. Here, however, it emphasises that there is no legal constraint on adjusting Pora's compensation package for inflation. Instead, Cabinet is making a deliberate political choice.[250] The Guidelines are flexible and have no legal force; thus they can be departed from at will.

Secondly, it is unconvincing to say that such a change would be unfair to past claimants. Change is by nature unfair; decisions made before a change occurs are fundamentally different to subsequent decisions. Deferring the introduction of an inflation mechanism simply prolongs this unfairness to encompass Pora as well. Taken to its logical conclusion, Cabinet's position means the first claimant whose payment is adjusted will be unfairly advantaged over all previous claimants. If this is an acceptable scenario, it is illogical that the change cannot begin with Pora. Concern that future

[247] John Key quoted in "Key defends Teina Pora's comp, says it 'is inflation-adjusted'" (16 June 2016) One News <https://www.tvnz.co.nz/one-news/new-zealand/key-defends-teina-poras-compo-says-inflation-adjusted>.

[248] John Key quoted in "Teina Pora: Minister rejected inflation adjustment for compo - Pora will go to court for it" (28 July 2016) Stuff <http://www.stuff.co.nz/national/politics/82557067/Teina-Pora-Minister-rejected-inflation-adjustment-for-compo-Pora-will-go-to-court-for-it>.

[249] Amy Adams in "Revealed: Minister whose compo call cost Pora $800,000" (28 July 2016) NZ Herald <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11682614>.

[250] See further discussion on the desirability of this approach at Chapter 3.6.

claimants will be advantaged over past claimants would render necessary systemic change impossible.[251]

Thirdly, actual fairness between claimants is often illusory. Justice Minister Amy Adams claimed "the system is best served when there is a standard system and approach that is applied across every case".[252] However, many factors affect a claimant's compensation award. There is no consistency and oversight across cases; while the system may be standardised, the results are not. The QC's approach can differ substantially case by case.[253] The quality and availability of evidence before the QC may also have an effect.[254] It is artificial to assert that all claims under the Guidelines are fully consistent and fair.

Finally, specific features of Pora's claim make a strong moral case to adjust for inflation. Firstly, Pora is the only claimant to explicitly request an adjustment.[255] Secondly, it is the first case where the QC specifically recommended an adjustment to Cabinet. Finally, the sheer amount of time Pora spent in prison exacerbates the injustice if he is excluded from consideration.

A legal challenge to the Guidelines

At the time of writing, Pora's legal team intends to bring a claim in judicial review.[256] The claim may argue that it was unreasonable for Cabinet to fail to adjust for inflation, because Cabinet should have acted upon the QC's recommendation.

Legally, it is doubtful whether a claim in judicial review would succeed.[257] Judicial review addresses failures within a decision-maker's process, rather than the undesirability of any particular outcome.

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[251] This argument is also unconvincing when compared to Bain's case, where costs were awarded for the first time to an unsuccessful claimant. In Bain's case there seemed to be no consideration of fairness with respect to past cases; it is only distinguishable as a policy Cabinet actively wished to pursue.

[252] Amy Adams quoted in "Teina Pora may challenge $2.5 million compensation offer from Government" (16 June 2016) Stuff <http://www.stuff.co.nz/national/politics/81141316/Teina-Pora-may-challenge-2-5-million-compensation-offer-from-Government>.

[253] Compare for instance Paul Davison QC's approach in F (2001) with Kristy McDonald QC's approach in Akatere (2003).

[254] Perhaps Dougherty would have received a greater amount of compensation if evidence categorically establishing his innocence was available before the determination was made, rather than subsequently.

[255] Above n 210 at 17: "Mr Pora has sought an adjustment to compensation for loss of liberty by reference to the consumer price index".

[256] Radio New Zealand "Teina Pora to appeal compensation decision" (28 July 2016) <http://www.radionz.co.nz/news/national/309625/teina-pora-to-appeal-compensation-decision>.

[257] See discussion at Chapter 1.3.

Asserting that Cabinet's decision-making process was unreasonable requires showing an element of illogicality, or a "gap in the chain of reasoning".[258] Cabinet's decision to reject the QC's recommendation seems to be "a subject on which different minds may have different views", which is outside the scope of judicial review.[259] Additionally, even if a claim in judicial review could be made out, the available remedies seem futile.[260]

Recommendation

This paper recommends the government should immediately implement a mechanism to adjust for inflation moving forward. This will address the fundamental unfairness between claimants at different times, where the effective buying power of their compensation award has been eroded.

Additionally, the government should strongly consider adjusting Pora's claim for compensation. While Pora is unlikely to succeed under judicial review, the strength of the policy arguments weigh strongly in Pora's favour.

3.3 Recommendation 2 – Clarifying quantum assessment

The process by which quantum is determined is currently unclear and inconsistent. The Additional Cabinet Guidelines have been interpreted and applied in two different ways; either the yearly value for loss of liberty is considered fixed at $100,000, or it is uplifted for aggravating factors.[261] It is undesirable that quantum is not assessed by a consistent process, as this creates irregularities between cases and may result in unfairness.

The difference between the Stage One and Stage Two calculations should be further clarified. The terms "starting point" and "general compensation" are vague and may be misconstrued.[262] The QC in Akatere expressed a similar sentiment; "it may be appropriate that the Ministry give consideration to re-drafting the Additional Cabinet Criteria to clarify the ambiguity that in my view arises from the unclear wording".[263]

[258] *Martin v Ryan* [1990] 2 NZLR 209 at 208.
[259] *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223.
[260] See discussion at Chapter 1.3.
[261] See discussion at Chapter 2.5, and the tabulated data in Chapter 2.15.
[262] Above n 114 at m – o.
[263] Above n 142 at 31.2.

Cabinet should consider publishing another document akin to the reform in 2000 which clarifies this element of the compensation process.

3.4 Recommendation 3 – Reconsidering comparisons to false imprisonment

Cabinet's fundamental approach to compensation relies on a comparison to false imprisonment. The 2000 Guidelines are explicit that "calculation of compensation payments … should be firmly in line with the approach taken by New Zealand courts in false imprisonment cases".[264] If we accept this comparison is valid, we must ask whether the Cabinet Guidelines are indeed consistent with false imprisonment cases.

<u>Consistency</u>

When the Minister of Justice set $100,000 as the starting point for calculating non-pecuniary compensation, he noted the "judgment of Hammond J in *Manga* is quite pertinent".[265] In *Manga,* the plaintiff was falsely imprisoned for a period of 9 months. Justice Hammond adopted a starting point of $90,000 for Manga, reduced due to mitigating factors. Manga therefore received $60,000 for 9 months of false imprisonment.[266] Justice Hammond continued "the worst kind of case … could conceivably attract general damages in excess of $100,000".[267] The Minister considered these comments "particularly apt" and accordingly "recommend[ed] that Cabinet adopt the figure of $100,000".[268] However this approach fundamentally misunderstands the context of Hammond J's comment. $100,000 would be a suitable amount to compensate the worst kind of case for a period of 9 months (as relevant to Manga), not a per annum figure as the Minister recommended. Stuart Grieve QC noted this discrepancy when assessing Dougherty's compensation, commenting "A careful reading of the statements of Hammond J … [indicates] the figures referred to … are not derived by reference to a one year period".[269] To sustain the comparison to Manga, the appropriate per annum compensation figure would be $133,000.

Compensation determinations have recently diverged from false imprisonment cases over inflation adjustment. In *Wright v Bhosale,* the Court noted the "lack of any guidance as to the effect of

[264] Above n 114 at (k).
[265] Above n 114 at (19).
[266] *Manga v Attorney-General* [2000] 2 NZLR 65 at [96].
[267] Above n 266 at [95].
[268] Above n 113 at 20.
[269] Above n 94 at 5.35.

inflation on the level of damages".[270] Justice Hinton determined that "it is inappropriate not to make some allowance for inflation".[271] This view gives added credence to the argument for inflation adjustment, as discussed in Chapter 3.2.

These points of difference between compensation claims and false imprisonment claims do not, in themselves, adversely affect the *ex gratia* scheme's operation. Nevertheless, if Cabinet continues asserting that the two circumstances are alike, they must address these widening disparities.

Whether the comparison is beneficial

The previous paragraphs assume Cabinet's comparison to false imprisonment cases is cogent and beneficial. However this assertion is open to question. Not every compensation case is alike; similarly, false imprisonment cases come in many forms. In *Wright v Bhosale,* Wright was falsely detained for "two to three hours".[272] He was awarded $2,000 in recognition of this breach of his rights.[273] This figure, if extrapolated, would result in compensation of $16,000 per day, or $5.84 million per year. Clearly this is not a reasonable or sustainable value. However it does demonstrate that not all false imprisonment cases are apt for comparison. When Cabinet asserts that compensation claims should be in line with false imprisonment cases, it seems Cabinet truly means the cases should be in line with *Manga* specifically.

Many decision-makers explicitly reject treating *Manga* as determinative. The QC in Akatere commented "I have considered carefully the comments … in *Manga v AG* … However no two cases are the same … The exercise of setting an award of compensation … does not lend itself to precision".[274] The Court in *Akatere* commented "those cases are not a fetter".[275] The QC in F decided "close comparison is inappropriate and indeed impossible by reason of the diversity of circumstances".[276] The utility of comparing compensation to false imprisonment may have been critical in 2000 when the compensation system was still nascent; however this utility diminishes in the face of an established body of claims.

[270] *Wright v Bhosale* [2015] NZHC 3367 at [118].
[271] Above n 270 at [124].
[272] Above n 270 at [115].
[273] Above n 270 at [133].
[274] Above n 142 at 31.3 – 31.4.
[275] Above n 143 at [65].
[276] Above n 135 at 5.4.

Recommendation

If Cabinet continues asserting that wrongful conviction compensation should be firmly in line with false imprisonment compensation, they must address the disparity between *Manga's* starting point and the Guidelines' starting point. Further, they must consider adjusting for inflation as the courts have done.

Alternatively, it may be possible to abandon the comparison altogether. This paper considers the comparison to *Manga* is no longer helpful. New Zealand's wrongful conviction cases can now speak for themselves, and the comparison is inapt given many instances of false imprisonment are for very short periods of time.

3.5 Recommendation 4 – Statutory recognition

No right to compensation is recognised in New Zealand law.[277] However, Parliament could legislate to recognise it as a right. This recognition may either be minimal or substantial.

Minimal recognition

At minimum, legislation could be passed which simply asserts a right to compensation in New Zealand. This need not change the substantive operation of the current compensation arrangement, as no specific process for determining claims would be required by the Act. Minimal recognition is beneficial by reframing compensation away from discretionary government generosity towards a situation where parties have rights and obligations. Compensation would gain equal recognition alongside other important rights recognized in the NZBORA. Minimal recognition may also allow New Zealand to comply more closely with the ICCPR and remove its reservation.[278]

Substantial recognition

In addition to establishing a right to compensation, legislation could establish the process by which claims are determined. The benefits of minimal recognition would accrue, as would additional benefits. Incorporating the current Guidelines into legislation would promote consistency and transparency at the cost of decision-maker discretion. If the compensation process were to break

[277] See Chapter 1.1.
[278] Above n 24 at 181 – 185.

down or be disregarded,[279] decisions made pursuant to legislation would be clearly amenable to judicial review.[280] This provides the judiciary with a strong mandate to scrutinise public decision-making, and provides claimants with an avenue for redress. Administrative clarity is increased, as is the accountability of decision-makers.[281]

Overseas examples

Overseas jurisdictions provide examples of how statutory recognition could work in practice.

Hong Kong's Bill of Rights Ordinance exemplifies minimal statutory recognition; Article 11(5) incorporates the ICCPR standard into domestic law, providing that if a claimant is eligible they "shall be compensated according to law".[282] [283] The government retains the ability to make "an *ex gratia* payment in certain exceptional circumstances".[284]

In the UK, there is no residual discretion; compensation is wholly dictated by statute. The Criminal Justice Act 1988 grants the Secretary of State the ability to determine compensation claims.[285] Section 133A provides the process for determining claims, and dictates what the assessor "must have regard to".[286] Any determination made by the Secretary of State "will be open to challenge by way of judicial review".[287]

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[279] It is impossible to know whether an obviously meritorious claim has been declined, as we do not have the particulars of 17 declined claims. We can assume that the Ministry of Justice and Cabinet declined the claims in a principled manner, thus this probability is very minimal. However, if a case were to arise in future where the Guidelines were entirely ignored, the claimant would have no legal recourse outside of an uncertain claim in judicial review.

[280] The courts are much better positioned to assess whether a decision-maker has complied with a legislative document as opposed to a discretionary executive document. Additionally, claims could be advanced on the grounds that the decision-maker acted in an ultra vires manner.

[281] Above n 24 at 183.

[282] Hong Kong Bill of Rights Ordinance (Cap. 383) at Article 11(5).

[283] This approach is substantially similar to that taken in Australia. There is no federal recognition of a right to compensation; however the ACT has incorporated Art 14(6) of the ICCPR article into the Human Rights Act 2004 (ACT), s 23. The process by which determinations are made is still the prerogative of the decision-maker.

[284] Hong Kong Department of Justice "Compensation for persons wrongfully imprisoned – Information for claimants" (2004) at 6. Accessed at <www.doj.gov.hk/eng/public/pdf/ann20040624e.pdf>.

[285] Criminal Justice Act 1988 (UK), s 133.

[286] Above n 285, at s 133A.

[287] Sally Lipscombe and Jacqueline Beard "Miscarriages of justice: compensation schemes" *House of Commons Library* SN/HA/2131 (6 March 2015) at 3.1.

Either option could be applied to the New Zealand context without great difficulty.

New Zealand support for statutory recognition

The Law Commission recognised the “powerful arguments” for recognising compensation through statute.[288] The Commission recommended a “statutory foundation” for the compensation scheme “at the end of the 3-year trial period”.[289]

The Justice Minister noted the Commission’s recommendations, and stated “it has been decided that the new regime will remain within the Crown prerogative and will be reviewed after three years. This means the new criteria can come into force immediately”.[290]

It is ambiguous whether this quote implies Cabinet intended to specifically consider creating a statutory mechanism after three years. None of Cabinet’s reviews addressed the option to legislate. Whether through oversight, apathy, or deliberate disagreement, Cabinet has never pursued the Commission’s recommendation for statutory recognition.

Recommendation

This paper recommends recognising a right to compensation in statute. Either minimal or substantial recognition would legally advance the importance of compensating individuals who suffer wrongful convictions. Statutory recognition will also make the system more accountable and transparent.

3.6 Recommendation 5 – Independent decision-making body

This paper asserts that Cabinet is not best placed to make compensation determinations for the following reasons.

Cabinet’s political role

Cabinet is an inherently political body. We do not expect the same level of impartiality from Cabinet as we do from the judiciary. Cabinet is subject to political concerns such as allocating public funds and taking an institutional stance on criminal matters; for instance appearing ‘tough on crime’.

[288] Above n 24 at 186.
[289] Above n 24 at 187.
[290] Doug Graham “Compensation for Wrongful Conviction and Imprisonment” (10 December 1998) Beehive Press Release <https://www.beehive.govt.nz/release/compensation-wrongful-conviction-and-imprisonment>.

Cabinet also shows a preoccupation with preventing the system from being exploited; it is politically untenable to give criminals "'golden handouts' rather than ... genuine reparation".[291]

Where Cabinet's decisions are open to challenge, their accountability is political rather than legal in nature. The Law Commission stated "to maintain public confidence in the administration of justice, decisions concerning the rights of citizens should in general be vested in independent bodies free of executive influence or power".[292] Past reforms have already demonstrated that political policies influence the compensation scheme. When the Minister of Justice lowered the standard of proof from beyond reasonable doubt to the balance of probabilities, he stated "it was a Labour party manifesto commitment to change the standard of proof".[293]

To some extent, Cabinet's political influence is mitigated by the QC recommendations. The QC provides detailed analysis insulated from political pressure. However, Cabinet has increasingly shown less deference to the QC recommendations and made overt political decisions.[294] Cabinet's political influence cannot be entirely excised from determinations.

Access to documents

Cabinet has withheld documents relating to 17 declined compensation claim under the OIA. This makes it difficult to assess why claimants are declined, whether the standard of innocence test is applied consistently, and whether the extraordinary circumstances test is applied consistently. Even the successful claims are not well publicised. Much of the information assessed in this paper involved documents released pursuant to OIA requests, rather than documents available in the public domain. The current compensation process is opaque and not easily susceptible to o.

Problems with QCs as decision-makers

No decision-maker has determined more than one successful compensation claim.[295] As the cases demonstrate, each QC evaluates quantum in a distinctly different way.[296] Aggravating and

[291] Above n 110 at 15.
[292] Above n 24 at 184.
[293] Above n 121 at 4.
[294] See Chapter 2.15 "Cabinet's deference to decision-makers", and Chapter 3.2 at n 250 and 251.
[295] See also Chapter 2.15 "QCs assigned to determine claims".
[296] See Chapter 2.15 "Consistency in quantum calculations post-2000". Not only are there discrepancies in the way decision-makers calculate the Stage One yearly value for loss of liberty, each QC will necessarily have to weigh the importance of aggravating and mitigating factors in order to determine a lump sum payment for Stage Two.

mitigating factors will take on subjective levels of importance in each case.[297] As a function of having disparate decision-makers in every case, overall consistency becomes difficult to achieve.

The QC is expected to fill an inquisitorial role, seeking out new evidence. The Royal Commission in Thomas noted:

> *"This Commission is not in an adversary situation. We have searched for the truth, probed, inquired, and interrogated where we thought necessary; made our displeasure apparent at prevarication and reluctance to speak the truth. We have not been content with so much of the truth as some saw fit to put before us".*[298]

In Akatere, the QC undertook extensive community investigation, performing interviews with many of the involved parties.[299] Investigation beyond the court case is often a necessity, as evidence in judicial proceedings does not establish innocence.[300] The extent to which QCs can exercise legal powers to assist their inquiry is unclear. It is arguable that a QC is not ideally placed for such an intensive inquisitorial investigation.

While minor, it should be noted that the decision-maker is appointed by the Ministry of Justice subsequent to ascertaining the claimant's identity. There is no indication this foreknowledge has been abused by appointing a specific QC due to the claimant's identity. Nevertheless, this highlights the disparity between absolute decision-maker impartiality sought in criminal trials, and the informal compensation approach.

The argument for an independent tribunal

Establishing an independent tribunal to assess claims would address the problems identified above. The determinations would no longer rest with a politically motivated decision-maker. Documents relating to determinations would become publicly available. If the same tribunal members presided over every application for compensation the claims would be considered in a more consistent manner. The tribunal members' investigative powers would be clearly articulated, and the process would be impartial and transparent.

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[297] Compare for instance the approach in F awarding $100,000 on the basis that F was seeking help, as against the approach in Akatere awarding $75,000 given the claimants' very young ages, extensive damage to social reputation, and the seriousness of the crime they were charged with.

[298] Above n 72 at 486.

[299] See for instance "I have endeavoured to speak to [REDACTED] but her mother told me [REDACTED] did not want to speak to me … I also tried to contact [REDACTED]'s sister". Above n 142 at 7.6.12.

[300] See also Chapter 3.8.

In their 1998 review, the Law Commission concluded "an independent tribunal is the most appropriate decision-maker".[301] The tribunal "would have the advantage of being separate from both the executive and the courts".[302] Interestingly, this option was also the most favoured in submissions to the Law Commission; "the submissions were almost unanimous in their support for an independent tribunal, while the least favoured option was to keep decision-making power with Cabinet".[303] The Commission emphasised that "the process [for determining compensation claims] should be as transparent and objective as possible", with claims determined "so far as possible, by the same people, to ensure fairness between claimants".[304]

<u>Fiscal cost</u>

In 1998, Cabinet rejected the Law Commission's proposal for an independent tribunal because "the costs would be difficult to justify given the small number of claims expected".[305] The Ministry of Justice anticipated at most 6 cases per year;[306] the actual figure is even lower at approximately 1.5 claims per year.[307] The necessary government expenditure is certainly the most prohibitive factor in establishing a tribunal. However fiscal concerns alone should not preclude consideration of whether this would be an effective and desirable change. It may well be that the costs are justified, or that governmental expenditure can be reduced by assimilating this function into an already existing tribunal.

3.7 Recommendation 6 – Removing the retrial eligibility criterion

One factor which determines eligibility under the Cabinet Guidelines is whether the Court quashes the claimant's conviction outright, or whether a retrial is ordered.[308] This paper will show that there is no cogent justification for such a distinction.

The Law Commission asserted that "those whose case is remitted to a lower court for a retrial are more likely to be guilty of the offence than those whom the appellate court has the confidence to

[301] Above n 24 at 136.
[302] Above n 24 at 133.
[303] Above n 24 at 135.
[304] Above n 24 at 136.
[305] Above n 290.
[306] Above n 290.
[307] 27 claims over an 18 year period equates to one claim every 1.5 years.
[308] See Chapter 1.4 "No order for retrial".

acquit. The retrial must be treated as equivalent to an original trial".[309] No further analysis is provided; the point simply stands as an assertion. Two factors seem to inform this point. Firstly, that the courts are more likely to quash an innocent person's conviction. Secondly, that a judge's finding is more authoritative than a jury's finding. Both of these justifications can be challenged. Again, this eligibility requirement shows the pervasive fear that guilty criminals will game the system and receive compensation.

A claimant whose conviction is quashed on appeal is not necessarily more likely to be innocent. The court may quash a conviction for any number of reasons. If evidence which formed the basis for the conviction is excluded, quashing might be the appropriate response as there is no arguable case. Similarly, it may not be practical to order a retrial; see for instance Haig's case where the conviction was quashed despite the court expressing reservations as to Haig's guilt.[310] Additionally, the court recognises the jury's role in the criminal justice system. The court may "consider it essentially a jury task…" to make the final determination.[311] Practical limitations and judicial function equally bear on the question of whether a retrial will be ordered, but this puts those claimants who have a retrial ordered at a serious disadvantage for receiving compensation.[312]

Dougherty's case is apposite. As it was decided under the interim guidelines, Dougherty simply had to prove innocence on balance. If his case were decided today, he would be ineligible and need to establish an "extraordinary circumstance".[313] While the QC was convinced Dougherty was innocent on the balance of probabilities, at the time he found "conclusive proof is not available in this case".[314] Under the current Guidelines it seems unlikely Dougherty would have received any compensation, due to the fact that a retrial was ordered in his case.

Furthermore, the preoccupation with innocence at the criminal stage is misguided for two reasons. The court is not engaged in any assessment of innocence; they simply consider whether guilt can be proven. Additionally, it is illogical to differentiate between claimants based on hypothetical

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[309] Above n 24 at 88.

[310] Refer to Haig's case at Chapter 2.8. See above n 153 at [108].

[311] This was the Court's finding in Dougherty's case. The presence of DNA evidence meant the Court was almost certain Dougherty was innocent; however, given it was new evidence and there were some possible (but highly implausible) explanations, the Court considered the evidence should properly be assessed by a jury. Above n 85 at 156.

[312] They are disadvantaged because they must meet the additional threshold of proving some extraordinary circumstance.

[313] See Chapter 1.7.

[314] Above n 89 at 72.

innocence at this stage because the compensation process has an inbuilt test for innocence. This distinction makes a mockery of the later innocence inquiry. Either a claimant's conviction is quashed (under the Law Commission's view, indicating a high likelihood of innocence) so they must only prove innocence on balance; or a retrial is ordered (indicating a lower likelihood of innocence) so functionally they must prove innocence beyond reasonable doubt.[315]

The other reason acquittals at retrial may be treated with mistrust is a belief that juries are less likely to correctly determine a case, whereas a judge will be correct in law. This belief does not always square with reality; see the Rosenberg case for an example of a quashed conviction made in error.[316]

Excluding claimants from the standard Guidelines procedure simply because a retrial was ordered is unjust. The effective standard of innocence a claimant has to meet should not be contingent on the way in which their conviction was set aside. In every other legal context, a quashed conviction and acquittal at retrial are identical verdicts of not guilty. Retaining such a distinction erodes the importance of the later innocence inquiry innocence and is substantially a triumph of form over substance likely to result in injustice.[317] This paper recommends quashed convictions and orders for retrial should both be eligible under the Guidelines.

3.8 Recommendation 7 – Removing the standard of innocence test

Throughout this paper, the importance of a claimant's innocence has been paramount. After all, society envisions compensating *innocent* individuals for their wrongful imprisonment. Anyone who is guilty in fact is already lucky to have escaped conviction, and should not be rewarded further with compensation. This ethos underlies the functionality of many compensation systems globally.

It is possible to reimagine the purpose for compensation. Compensation could accrue to individuals who have suffered a miscarriage of justice and who should never have been imprisoned.

[315] Or alternatively, to fall within one of the other rare categories of extraordinary circumstances.

[316] Above at Chapter 2.9.

[317] If this eligibility criterion had applied to Dougherty, he would likely have been denied compensation. Similarly, we do not know whether any of the 7 declined claims outside the Guidelines (see Chapter 2.15 "Aggregate results") could show innocence on balance but fail to establish extraordinary circumstances. Conversely, none of the three unsuccessful claims – Haig, Rosenberg, or Bain – would have received compensation if this change were made, as all failed to meet the lower threshold of innocence on balance before establishing an extraordinary circumstance. Thus it is not likely that such a change would automatically result in 'unmeritorious' claimants being eligible for compensation.

Blackstone's formulation is familiar to all: "It is better that ten guilty persons escape than that one innocent suffer".[318] However this sentiment is inverted when it comes to compensation; the government would prefer to deny compensation to ten innocent persons rather than give compensation to one guilty person. We risk factually guilty people being released back into the community rather than imprisoning an innocent individual; why do we baulk at the prospect of unmeritorious claimants receiving compensation if this ensures that every wrongly imprisoned innocent person can be adequately compensated? Even the factually guilty have suffered a conviction which the legal system later acknowledges should never have occurred. We can compensate not for innocence, but for unsafe convictions made in error.

This is certainly a controversial claim, and one which depends on one's moral and political inclinations. However it is not unheard of amongst legal experts. Baroness Hale commented:

> *"A person is only guilty if the state can prove his guilt beyond reasonable doubt… if it can be conclusively shown that the state was not entitled to punish a person, it seems to me that he should be entitled to compensation for having been punished. He does not have to prove his innocence at his trial and it seems wrong in principle that he should be required to prove his innocence now".*[319]

Similar comments have been made in New Zealand. The Royal Commission in Thomas' case said:

> *"At our hearings there have been often repeated statements about whether Mr Thomas can be proved innocent … Such a proposition is wrong and contrary to the golden thread which runs right through the system of British criminal justice, namely that the Prosecution has the duty to prove the accused guilty and until so proved he had to be regarded as innocent. Once we are satisfied the Prosecution case … has not been proved… then, just as a Court would acquit him and the community thereafter accept his innocence, so we believe we are entitled to proclaim him innocent".*[320]

<u>Policy arguments</u>

Proving innocence is not something the criminal system is well-equipped to do. "Innocence as such is not a concept known to our criminal justice system. We distinguish between the guilty and the not guilty".[321] Frequently the evidence a claimant will rely on is no different to that assessed in

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[318] William Blackstone *Commentaries on the Laws of England* (Vol. 2, Collins & Hannay, 1830) at 276.

[319] *R (Adams) v Secretary of State for Justice* [2011] UKSC 18 at 116.

[320] Above n 72 at 483.

[321] Above n 319.

criminal proceedings, but the nature of the inquiry is substantially different. New Zealand's compensation claims have evidenced the difficulty of proving innocence.[322]

Our adversarial court system relies upon the State positively proving criminal offending, with the defendant merely negating the allegation. For compensation the claimant is put to the proof, despite lacking the significant resources of the Crown. The Law Commission noted "any procedure for establishing innocence or guilt following acquittal or discharge will be an onerous one, imposing emotional pressures on the participants and costing them time and resources".[323] This is not a burden we require the individual in a criminal matter to bear, so it seems equally inappropriate in the compensation inquiry.

An inquiry into factual innocence defeats the presumption of innocence that follows an acquittal. Legally, the NZBORA only guarantees "the right to be presumed innocent until proved guilty according to law".[324] If a guilty conviction is subsequently overturned, this right is not reinstated. Canadian legal theorists in particular have strongly emphasised this point.[325] MacKinnon argues that "one who is acquitted or discharged is innocent in the eyes of the law and the sights of the rest of us should not be set any lower".[326] Many claimants seek the apology that comes with a Crown payment because it seems necessary to establish their innocence and restore their standing in the community. Failure to compensate claimants effectively "introduces the third verdict of 'not proved' or 'still culpable' under the guise of a compensatory scheme".[327] This fundamentally erodes the public's faith in the judicial system's determinations.[328]

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[322] See Akatere for the extensive investigative work undertaken by the QC to form a view on innocence. See also the Haig determination, where Robert Fisher QC was criticized for advancing an alternate hypothesis to the view which had been tested in the courts.

[323] Above n 24 at 19.

[324] New Zealand Bill of Rights Act 1990, s 25(c).

[325] Care must be taken in comparing New Zealand to Canada. In Canada the primacy of the Canadian Charter of Rights and Freedoms contributes to a culture where rights are of the utmost importance. Additionally, judges have the capacity to overrule the Canadian Parliament for breaches of the Charter. Thus the context in which these writers are publishing is less applicable to New Zealand's arrangement of unwritten rights and Parliamentary sovereignty.

[326] Peter MacKinnon "Costs and Compensation for the Innocent Accused" (1988), 67 Can. Bar Rev. 489-505 at 497.

[327] H. Archibald Kaiser "Wrongful Conviction and Imprisonment: Towards an End to the Compensatory Obstacle Course" at 139.

[328] Consider for instance Bain's case, where the finding that Bain had not established innocence on balance leads irresistibly towards the public opinion that he is guilty, despite his acquittal at retrial.

Fiscal cost

Providing compensation for every wrongful imprisonment case may be dismissed as financially untenable. However, the number of eligible claims is still very minimal.[329] Furthermore, the increased expenditure can be offset against the decreased legal costs. All Crown expenditure which would have been paid to a QC to determine innocence[330] could now be allocated directly for compensation. It is difficult to establish the precise cost of engaging a QC to determine innocence, as this information is not public. However by comparison, in Bain's case the three commissioned reports alone cost $877,000.[331] Bain's case establishes that Cabinet is sometimes willing to make payments to individuals who cannot prove innocence simply due to practical concerns.

Overall, it does not seem fiscally unreasonable to compensate eligible claimants regardless of innocence. This paper recommends the government consider this novel approach to compensation. Such a change means New Zealand would be more consistent with the ICCPR, and would be a world pioneer for compensating claimants who were incorrectly imprisoned.

[329] Claimants will still need to show their conviction was unsafe, and have the conviction overturned subsequent to the normal appeal process. Even if every one of the 27 claims since 1998 received compensation, this is still only a rate of 1.5 successful claims per year. Additionally, the decision-maker could retain some discretion not to award compensation. For instance, there may be exceptional circumstances indicating that compensation should *not* be awarded. Rosenberg would perhaps be an appropriate example; compensation could be denied because the court made a verifiable error in overturning the conviction.

[330] This process would often take over a year, requiring extensive investigation and analysis and presumably accruing a high cost.

[331] The three reports are those by Binnie, Fisher and Callinan.
See Jo Moir and Sam Sherwood "The $7m bill for David Bain's innocence campaign" (3 August 2016) Waikato Times <http://www.stuff.co.nz/waikato-times/news/national-news/82752673/The-7m-bill-for-David-Bains-innocence-campaign>.
See also Radio New Zealand "David Bain denied compensation" (2 August 2016) <http://www.radionz.co.nz/news/national/309946/david-bain-denied-compensation>.

3.9 Conclusion

New Zealand's compensation is in dire need of clarification and fine-tuning. This paper has made seven recommendations to that effect. Recommendations 1 through 3 are procedural reforms which envision no drastic change to the compensation system. Recommendation 4 asserts that it is time we recognised a right to compensation in New Zealand. If this proposition is accepted, recommendations 5 through 7 become more palatable. If claimants have a right to be compensated for wrongful imprisonment, determinations should be made formally, legally and impartially. Eligibility should be determined in a principled and even-handed manner. Wrongful imprisonment can be recognised as a *de facto* harm requiring governmental response. These changes capture the spirit of the ICCPR and would show New Zealand recognises the importance of an individual's ability to recover from being wrongly imprisoned.

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