

# David Bain compensation claim Q&As

## What has been agreed by Cabinet?

Cabinet has agreed to set aside the advice of Justice Binnie and Dr Fisher, and that a new inquirer will be appointed to conduct a fresh inquiry into Mr Bain's claim.

## What's the rationale behind this decision?

Despite the further delay, Cabinet believes conducting a fresh inquiry is the best approach in the circumstances and enables Mr Bain's claim to be progressed on a principled basis, with a proper and robust process directed at obtaining sound, reasoned advice.

It is important that the final decision on Mr Bain's claim is durable and withstands the close scrutiny this case attracts.

## What's the next step?

The Justice Minister will now seek advice on an appropriate inquirer and develop their terms of reference. There will be a further announcement in due course.

## Why can't the government pay compensation in line with Justice Binnie's report?

It wouldn't be appropriate to pay compensation on the basis of advice that was found to be unreliable.

## What were the concerns raised with Justice Binnie's report?

The then Justice Minister Judith Collins had concerns about Justice Binnie's report. After receiving advice from the Solicitor General and an Assistant Commissioner of Police, the former Minister sought a peer review by Dr Fisher in order to decide whether Justice Binnie's report could properly be relied on as a basis for determining Mr Bain's application.

Dr Fisher identified a number of concerns with Justice Binnie's report, and concluded that it would be unsafe for Cabinet to rely on Justice Binnie's report as a basis for compensating Mr Bain.

Dr Fisher advised that the correct principles should be applied to the evidence in a fresh inquiry, and noted that a fresh assessment could well vindicate Justice Binnie's overall conclusions.

The government is satisfied that, in these circumstances, it wouldn't be appropriate to rely on Justice Binnie's advice as a basis for compensating Mr Bain.

## Why can't the government decline Mr Bain's claim now?

It wouldn't be appropriate to decline a claim without any reliable advice on which to base such a decision.

Cabinet cannot rely on Justice Binnie's report given Dr Fisher's advice. Secondly, Dr Fisher's advice did not constitute a full inquiry into Mr Bain's claim, but rather a peer review of Justice Binnie's report, i.e. he did not review all the evidence. As matters stand, a new

inquiry is required to assess all the evidence and address the test applied in these kinds of compensation cases – whether Mr Bain can prove his innocence and any factors relevant to Cabinet’s assessment of “extraordinary circumstances”.

It would be exceptional for Cabinet to make a decision on a claim for compensation without full advice on these questions and doing so would be likely to invite legal challenge.

### **How long will a further inquiry take?**

While the Minister is seeking the advice as soon as practicable, there is no set timeframe. Justice Binnie took around 10 months to provide advice.

### **What is involved in a further inquiry?**

The process followed by an inquirer is largely a matter for them, but the usual practice is for the inquirer to review all the evidence and other relevant documents, invite written submissions from both the applicant and Crown, and consider any further evidence either side wishes to put forward.

Unlike in criminal trials, the onus of proof is on an applicant to establish their innocence on the balance of probabilities.

### **Who will conduct the fresh inquiry?**

The next step is for officials to develop a shortlist of potential inquirers for the Justice Minister and provide advice on the terms of reference. There will be a further announcement in due course

### **What does the Bain team think about this decision?**

This approach has been raised with Mr Bain’s representatives and they are understood to be comfortable proceeding in this manner. This process allows both parties to move forward in a constructive manner.

### **How much could David Bain get if he succeeds?**

Any amount to be paid would be calculated having regard to a number of factors including time spent in jail and any identifiable loss of livelihood and future earnings. There may also be a public apology or statement of innocence.

It wouldn’t be appropriate to speculate on how much Mr Bain could qualify for.

## **GENERAL BACKGROUND QUESTIONS**

### **How are compensation claims usually decided?**

Under Cabinet guidelines introduced in 1998, people may be eligible for compensation if they have served all or part of a sentence of imprisonment and either:

- have had their convictions quashed on appeal, without order of retrial; or
- have received a free pardon.

### **Is Mr Bain eligible for compensation under Cabinet guidelines?**

No, Mr Bain is not eligible under the Cabinet guidelines because the Privy Council ordered a retrial when quashing his convictions.

**What is the basis for compensating people like Mr Bain who fall outside the Cabinet guidelines?**

When Cabinet adopted the guidelines in 1998, it reserved the Crown's discretion to consider claims falling outside the guidelines in "extraordinary circumstances" where it is in the interests of justice to do so.

The criteria for claims that fall outside the Cabinet guidelines are stricter. The applicant being able to prove their innocence on the balance of probabilities is a minimum requirement, consistent with the Cabinet guidelines, but something more is required that demonstrates that the circumstances are extraordinary.

**Are there previous examples of "extraordinary circumstances"?**

The question of extraordinary circumstances is ultimately an assessment for Cabinet to make, based on all the facts of the case.

Cabinet has paid compensation on two occasions, both in 2011, where a claim was made outside guidelines and Cabinet was satisfied there were extraordinary circumstances.

In one case, Cabinet was satisfied that new DNA evidence, obtained after conviction, established the claimant's innocence beyond reasonable doubt.

In another, the Police and the Crown accepted that the claimants were not responsible for the alleged offence and the Police formally apologised.

Further information about these claims is available on the Ministry of Justice website at <http://www.justice.govt.nz/services/miscarriages-of-justice/compensation-for-wrongful-conviction-and-imprisonment>