

Media Questions & Answers

In 2007, Mr Bain's convictions were overturned by the Privy Council and a retrial was ordered. In 2009, Mr Bain was acquitted of all charges having been found not guilty by the jury at his second trial.

In March 2010, Mr Bain's lawyers wrote to the then Minister of Justice, Hon Simon Power, to make an application for compensation for wrongful conviction and imprisonment in relation to Mr Bain's 1995 convictions for the murder of all five members of his immediate family.

The last significant step in the compensation process was the Minister's appointment, on 19 March 2015, of Hon Ian Callinan AC QC, a former Judge of the High Court of Australia, to provide advice on Mr Bain's application. The Minister received Mr Callinan's advice in January 2016.

What has been decided?

Mr Bain's claim for compensation has been unsuccessful as he has not established his innocence on the balance of probabilities. Cabinet has agreed to an ex gratia payment of \$925,000 to Mr Bain, which Mr Bain has accepted in full and final settlement of all matters. The payment recognises the cost and time of the compensation process and the desirability of avoiding litigation.

This payment is not made under the existing scheme governing compensation for wrongful conviction and imprisonment as Mr Bain has not established his innocence on the balance of probabilities.

What is the basis for making such a payment to Mr Bain?

Hon Ian Callinan AC QC reported to the Minister of Justice that Mr Bain had not proved his innocence on the balance of probabilities, which is a necessary criterion for the payment of compensation for wrongful conviction and imprisonment.

However, it became clear that Mr Bain contested Mr Callinan's findings. Mr Bain also advised he would legally challenge any decision by Cabinet to decline his application in reliance on Mr Callinan's advice, which would inevitably lead to further cost and delay.

Cabinet has agreed to make an ex gratia payment to Mr Bain in recognition of his significant expenses during the compensation process and the length of time that he has spent pursuing compensation since his application was lodged in March 2010 and to avoid the likelihood of further litigation.

Mr Bain, in turn, has agreed to forgo any legal action against the Crown and related parties in relation to his prosecution, convictions, imprisonment, and application for compensation.

Has any other compensation applicant been given an ex gratia payment like this one?

No. Mr Bain's situation is unique – the process for considering his application has run over almost six and a half years. This is an extraordinary case, unique in its complexity, and the process took longer than anyone would have liked.

What is an ex gratia payment?

A payment made without the giver recognising any liability or legal obligation.

Who is eligible for compensation for wrongful conviction and imprisonment?

Under Cabinet guidelines introduced in 1998, eligibility is limited to those who—

- (a) *have served all or part of a sentence of imprisonment; and either*
 - (i) *have had their convictions quashed on appeal, without order of retrial, 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) *have received a free pardon under section 407 of the Crimes Act 1961; and*
- (b) *are alive at the time of the application.*

Was Mr Bain eligible under these guidelines?

Mr Bain is not eligible under the Cabinet guidelines because the Privy Council ordered a retrial when quashing his convictions – the guidelines require that a conviction is quashed on appeal *without* a retrial being ordered. However, when the Cabinet guidelines were adopted in 1998, Cabinet reserved discretion to consider applications that fall outside the Guidelines “in extraordinary circumstances ... on their individual merits, where this is in the interests of justice.”

Applicants outside guidelines such as Mr Bain must show, at a minimum, that they are innocent on the balance of probabilities. They must also show that there are extraordinary circumstances that justify consideration of their application.

How was Mr Bain's application for compensation assessed?

On 19 March 2015, the Minister of Justice instructed Hon Ian Callinan AC QC, a former Judge of the High Court of Australia, to provide advice on Mr Bain's application.

In the first instance, Mr Callinan was asked to advise on whether Mr Bain was innocent on the balance of probabilities and, if so, whether he was also innocent beyond reasonable doubt (this is because innocence beyond reasonable doubt may be an example of an 'extraordinary circumstance' in a case falling outside Cabinet guidelines).

Mr Callinan was provided with documents relevant to Mr Bain's application. He met with and took submissions from the parties, and provided them with an opportunity to comment on his draft report before he finalised his advice to the Minister.

As well as his Final Report on innocence, Mr Callinan provided the Minister of Justice with a Further Report addressing matters raised by Mr Bain about the draft report.

Has Mr Callinan’s report been publicly released?

Yes, with redactions for court suppression and privacy details.

What process did the Minister follow once she received Mr Callinan’s advice?

After receiving Mr Callinan’s final advice, the Minister provided Mr Bain’s representatives and the Crown Law Office with copies of the reports so they would have the opportunity to advise her of any matters that they believe she should take into account before determining her advice to Cabinet. The Minister decided to take this extra step, in the interests of justice, so that the parties would have an opportunity to raise relevant issues with the Minister before any final decision on Mr Bain’s application.

It was clear that Mr Bain and his representatives contested Mr Callinan’s findings. It was during this period that Mr Bain advised he would legally challenge any decision by Cabinet to decline his application in reliance on Mr Callinan’s advice. The matter has been in discussion since this time.

How much did the reports on Mr Bain’s claim cost?

Mr Binnie’s inquiry cost \$373,020.38, and Dr Fisher’s peer review of Mr Binnie’s report cost \$206,748.78. Mr Callinan’s inquiry cost \$298,381.45.

Didn’t a jury find Mr Bain innocent?

At his second trial in June 2009, a jury found Mr Bain not guilty beyond reasonable doubt of having committed the murders.

The criminal courts determine whether or not a person has been proved guilty beyond reasonable doubt. They do not determine whether someone is factually innocent of committing an offence. A person found not guilty is not necessarily innocent of the offence – it just means that the prosecution has not proved that they are guilty to the very high criminal standard of beyond reasonable doubt.

In other words, in Mr Bain’s case, the jury’s verdict determined that he was not guilty beyond reasonable doubt, and left open the question of whether or not he was innocent on the balance of probabilities.

What does “innocent on the balance of probabilities” mean?

To prove innocence on the balance of probabilities, a claimant must show that it is **more likely than not** that they did not commit the offence. The burden of proving this is on the claimant.

Why do the Cabinet guidelines require the accused to prove his or her innocence?

The integrity of the compensation scheme depends on it being **more likely than not** that a claimant is factually innocent. This is because one of the central purposes of the compensation scheme is to vindicate the innocent. This is a central tenet of compensation claims around the world.

Accordingly, a claimant must prove their innocence on the balance of probabilities. It would not be appropriate for the Crown to pay money to every person who has their conviction quashed, as that would include people who are more likely to be guilty as well as people whose convictions were quashed due to procedural irregularities unrelated to their guilt or innocence.

How many claims for compensation does the Minister receive and how many are successful?

About 2-3 applications are received each year. Most are declined as they do not meet the criteria for payment. Usually that is because applicants have not or cannot prove their innocence on the balance of probabilities.

Since the establishment of the Cabinet Guidelines in December 1998, 27 other claims by persons who were wrongfully convicted and imprisoned have been determined, of which 7 applications have been successful. As at August 2016, a further 3 applications are under consideration.